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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

H4

FILE: [redacted] Office: NEW DELHI, INDIA Date: AUG 30 2007

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[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.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [redacted], is a native and citizen of India who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The applicant is married to a naturalized citizen, [redacted] He 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). The OIC denied the waiver application, finding that the applicant failed to establish hardship to a qualifying relative. *Decision of the OIC, dated September 23, 2005.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I).

Section 212(a)(9)(B)(i)(I) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for a period of more than 180 days but less than 1 year, and seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible. Furthermore, under section 212(a)(9)(B)(i)(II) of the Act, 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). With regard to an adjustment applicant who had 180 days of unauthorized stay in the United States before filing an adjustment of status application, his or her return on an advance parole will trigger the three- and ten-year bar. Memo, Virtue, Acting Exec. Comm., INS, HQ IRT 50/5.12, 96 Act. 068 (Nov. 26, 1997).

---

[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) [hereinafter *Virtue Memo Unlawful Presence*].

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

Aliens with properly filed applications for adjustment of status under sections 245(a) and 245(i) of the Act will be considered present in the United States under a period of authorized stay, and such period will also cover renewal of a denied application in proceedings.[3]

The record reflects that the applicant entered the United States without inspection on September 9, 1996. He married [redacted], a naturalized citizen of the United States, on January 1997. On February 3, 1997, the Petition for Alien Relative (Form I-130), Application to Register Permanent Residence or Adjust Status (Form I-485), and Supplement A to Form I-485 were filed on the applicant's behalf by [redacted] Because the applicant's prior marriage had not been legally terminated, Citizenship and Immigration Services (CIS) found his marriage to [redacted] was legally invalid. On August 24, 2001, CIS denied the Form I-130 petition due to abandonment; and on November 9, 2001, it denied the Form I-485 application. On April 26, 2002, the applicant's marriage to the first spouse terminated. *Divorce Decree in the Wolverhampton County Court.* The applicant and [redacted] married on April 28, 2002. *State of Nevada Marriage Certificate (No. MA02-6157).* On June 3, 2002, [redacted] filed a Form I-130 petition on behalf of the applicant. Based on the submitted evidence, CIS denied this petition on May 2, 2003, finding that the applicant was not legally married to [redacted] "when the marriage upon which this petition is based occurred." On July 2, 2003, a Form I-130, Form I-485, and Supplement A to Form I-485 were filed by [redacted] on the applicant's behalf. On January 23, 2004, the District Director, Sacramento, California, denied the Form I-485 and Supplement A. The Form I-130 was approved by the District Director on May 3, 2004. The applicant voluntarily departed from the United States in December 2004.

For purposes of calculating the period of unlawful presence under section 212(a)(9)(B) of the Act, since the applicant was still married to his first wife when the Form I-485 was filed, and thus was not "a proper filing," the applicant began to accrue time in unlawful presence from April 1, 1997 until the filing of the second Form I-485 on July 2, 2003. Consequently, he accrued more than one year of unlawful presence. Even if the first Form I-485 were to be accepted as properly filed, the applicant accrued unlawful presence from the denial on November 9, 2001[4] until the next I-485 was filed on July 2, 2003, which is more than one year of unlawful presence. Consequently, the OIC was incorrect in finding the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year. The record reflects that the applicant accrued more than one year of unlawful presence; he is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), and is subject to the ten-year bar.

The AAO will now address the finding that a waiver of inadmissibility is not warranted.

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

[3] *Virtue Memo Unlawful Presence, supra* n. 1, at 3-4.

[4] November 9, 2001 is the date the Form I-485 application was denied.

> 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 the applicant is not a consideration under the statute, and unlike section 212(h) of the Act where a child is included as a qualifying relative, they are not included under section 212(a)(9)(B) of the Act. Thus, hardship to the applicant and his stepchildren will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relative in this case is the applicant's wife. 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 record contains information about India, marriage certificates, divorce decrees, a list of household expenses, an affidavit from the applicant's wife, a letter from the applicant's stepdaughters, and other documents.

In an affidavit [redacted] indicated that she has been employed by Liqui-Box Corporation as a packer since 1997. She stated that she has two U.S. citizen daughters and cannot imagine a secure home for her children without having her husband's financial and emotional support. [redacted] stated that she cannot bear the family's expenses without her husband, who is the main breadwinner. [redacted] indicated that she cannot relocate to India as she would not find a job like the one she now holds, her children would not receive a quality education in India, and she would not find a home comparable to the one she owns.

The July 24, 2005 letter described [redacted] "fixed survival costs," which total $2,052 each month. It stated that [redacted] earns $12.61 per hour and that this is not enough to pay grocery and family expenses.

The letter from the applicant's stepdaughters indicated that they cannot live without their stepfather.

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

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (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 the applicant's wife must be established in the event that she joins the applicant; and in the alternative, that she remains 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.

The record fails to establish that the applicant's wife would endure extreme hardship if she remained in the United States without her husband.

[redacted] states that her husband's income is needed to meet the family's household expenses. The record contains a letter describing the family's household expenses; but there is no supporting evidence of [redacted] earnings or the household expenses. 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)).

Furthermore, courts in the United States have universally held that economic detriment alone is insufficient to establish extreme hardship. *See, e.g., INS v. Jong Ha Wang,* 450 U.S. 139, 144 (1981) (upholding BIA finding that economic loss alone does not establish extreme hardship) and *Mejia-Carrillo v. United States INS,* 656 F.2d 520, 522 (9th Cir. 1981) (economic loss alone does not establish extreme hardship, but it is still a fact to consider).

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, the fact that an applicant has U.S. citizen stepchildren is not sufficient, in itself, to establish extreme hardship. The general proposition is that the mere birth of a deportee's child who is a U.S. citizen is not sufficient to prove extreme hardship. The BIA has held that birth of a U.S. citizen child is not per se extreme hardship. *Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). In *Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985), the Seventh Circuit has stated that an illegal alien cannot gain a favored status merely by the birth of a citizen child. The Ninth Circuit has found that an alien illegally present in the United States cannot gain a favored status merely by the birth of his citizen child. *Lee v. INS*, 550 F.2d 554 (9th Cir. 1977). In a per curiam decision, *Banks v. INS*, 594 F.2d 760 (9th Cir. 1979), the Ninth Circuit found that an alien, illegally within this country, cannot gain a favored status on the coattails of his (or her) child who happens to have been born in this country.

Moreover, 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. As stated in *Perez v. INS,* 96 F.3d 390 (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; and that courts have upheld orders of the BIA that resulted in the separation of aliens from members of their families in *Amezquita-Soto v. INS,* 708 F.2d 898, 902 (3d Cir.1983) (finding that neither petitioner nor his daughter would suffer extreme hardship if the petitioner were deported because the grandmother had raised and could care for the child); *Guadarrama-Rogel v. INS,* 638 F.2d 1228, 1230 (9th Cir.1981) (separation of parents from alien son is not extreme hardship where other sons are available to provide assistance); *Banks, supra* at *763* (separation of a mother from a grown son who elects to live in another country is not extreme hardship); and *Noel v. Chapman,* 508 F.2d 1023, 1027-28 (2d Cir.), *cert. denied,* 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). In *Dill v. INS*, 773 F.2d 25 (3rd Cir. 1985), the Third Circuit affirmed the BIA's decision in finding no extreme hardship to the petitioner or to the couple that raised her on account of separation, as the BIA stated the petitioner "is an adult who can establish her own life and need not depend primarily on her parents for emotional support in the same way as a young child."

The record reflects that [redacted] is very concerned about separation from her husband. 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 she remains in the United States, is typical to individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship as defined by the Act. The record before the AAO is insufficient to show that the emotional hardship, which certainly will be endured by the applicant's wife, is unusual or beyond that which is normally to be expected upon removal. *See* [redacted] *and* [redacted]

The record is insufficient to establish that [redacted] would endure extreme hardship if she joined her husband in India.

The conditions in India, the country where [redacted] and would live if she joins her husband, are a relevant hardship consideration. While 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).

The record contains a country report on human rights practices in India during 2003 and information about India from *The World Factbook* the U.S. Department of State. This evidence, which provides general information about conditions in India, is not persuasive as *Kuciemba v. INS,* 92 F.3d 496, 500 (7th Cir. 1996) states that "[g]eneral 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." (citation omitted).

[redacted] makes a claim of economic hardship stemming from an inability to find comparable work to the position she presently holds. Court decisions have shown that the difficulties [redacted] may experience in obtaining employment in India, and the general economic conditions in that country, are insufficient to establish extreme hardship. *E.g., Ramirez-Gonzales v. Immigration and Naturalization Service,* 695 F.2d 1208, 1211-13 (9th Cir.1983) (upholding finding that [redacted] testimony and unsupported allegations are insufficient to establish inability to find employment in Guatemala); *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980) (upholding finding that hardship in finding employment in Mexico does not reach extreme hardship); *Bueno-Carrillo v. Landon,* 682 F.2d 143, 146 (7th Cir.1982) (claim by respondent that he had neither skills nor education and would be "virtually unemployable in Mexico" found insufficient to establish extreme hardship); and *Pelaez v. INS*, 513 F.2d 303 (5th Cir. 1975) (difficulty in obtaining employment is not extreme hardship).

Although hardship to the applicant's stepchildren is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by the applicant's wife, as a result of her concern about the well-being of her children, is a relevant consideration. The applicant's wife indicates that her daughters would not receive a quality education in India. The AAO notes that the Judgment of Dissolution from the Superior Court of California, County of Sutter, reflects that [redacted]s two daughters are 18 and 15 years old. In *Matter of Andazola*, 23 I&N Dec. 319, 333 (BIA 2002), the BIA stated that the Ninth Circuit in *Casem v. INS*, 8 F.3d 700 (9th Cir. 1993), and cases cited therein, observed the difference between the adjustments required of very young children accompanying their parents to a foreign country and those faced by children already in school. In the case *In Re Kao & Lin,* 23 I&N Dec. 45 (BIA 2001), the BIA found there was extreme hardship to a 15-year-old United States citizen who spent her entire life in the United States, was completely integrated into the American lifestyle, and was not sufficiently fluent in the Chinese language to make an adequate transition to daily life in her parents' native country of Taiwan. Both of [redacted] daughters are of school age. The applicant submitted no independent evidence, however, to establish that schools in India, where instruction is normally in the English language, are academically inferior to those in the United States. The AAO therefore finds that the record is insufficient to establish that the applicant's wife would endure extreme hardship on account of the adjustments her children would be required to make to attend school and transition to life in India.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

In the final analysis, the AAO finds that the requirement of significant hardships over and above the normal economic and social disruptions involved in removal has not been met so as to warrant a finding of extreme hardship. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he 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.

ORDER: The appeal is dismissed.