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CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEFAN SCHNEIDER, et al.,

Plaintiffs,

v.

THOMAS J. RIDGE, Secretary of Homeland Security, EDUARDO AGUIRRE, JR., Acting Director of the Bureau of Citizenship and Immigration Services; and BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

No. CV 02-9228 DSF (JWJx)

ORDER **DENYING** PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING THE ACTION

Eight alien physicians ask this Court to strike down portions of a rule promulgated by the Immigration and Naturalization Service (now called the U.S. Citizenship and Immigration Services) that are allegedly inconsistent with the Immigration and Nationality Act. Plaintiffs claim that certain portions of the rule affect their ability to obtain immediate adjustment of non-immigrant status or to obtain permanent resident status.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

50

Plaintiffs' Notice of Motion and Motion for Summary Judgment (the "Motion") and Memorandum of Points and Authorities in Support of the Motion and accompanying Exhibits ("Memorandum") were filed December 1, 2003. Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law ("Uncontroverted Facts") was lodged December 1, 2003. Defendants' Statement of Genuine Issues ("Genuine Issues") was filed February 2, 2004. Defendants' Notices of Filing the Administrative Record of Sandeep Harbans Jain ("Jain"), Saravanan Kasthurli ("Kasthurli"), Mahesh Krisnamoorthy ("Krisnamoorthy"), Komsu Mamuya ("Mamuya"), Bogdan Nedelescu ("Nedelescu"), Muhammad A. Sattar ("Sattar"), Stefan Schneider ("Schneider"), and Anwar Tandar ("Tandar") in Support of the Opposition were filed February 2, 2004. Defendants' Opposition to the Motion ("Opposition") was filed February 5, 2004. Plaintiffs' Reply to the Opposition ("Reply") was filed February 23, 2004. The Court heard oral argument on March 15, 2004.

I. BACKGROUND

A. The Immigration and Nationality Act

The Immigration and Nationality Act ("INA") provides for the allocation of preference visas. 8 U.S.C. § 1153. The second preference employment based category ("EB-2") allows for the allotment of visas to aliens who are members of the professions holding advanced degrees or who are aliens of exceptional ability in the sciences, arts, or business. Id. § 1153(b)(2). Any United States employer may file a petition ("I-140 petition") for classification of an alien under this section. Id. § 1154(a)(1)(F); 8 CFR § 204.5(k). Under this classification, the I-140 petition must be accompanied by an individual labor certification from the Department of Labor determining the following:

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of

> application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(i).

B. National Interest Waivers

The Nursing Relief for Disadvantaged Areas Act of 1999 ("Nursing Relief Act"), Pub. L. 106-95, amended the INA by establishing special rules for requests for a national interest waiver ("NIW") filed by or on behalf of practicing licensed physicians who are willing to work in an area of the United States designated by the Secretary of Health and Human Services ("HHS") as having a shortage of health care professionals or at facilities operated by the Department of Veterans Affairs. Pub. L. 106-95. Specifically, the Nursing Relief Act amended the INA to permit the Attorney General to waive the job offer requirement (the certification by the Department of Labor) according to the following conditions:

> (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
>
> (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

8 U.S.C. § 1153(b)(2)(B)(ii)(I). The Nursing Relief Act further provides that a

permanent resident visa may be issued after the alien has worked full time "as a physician for an aggregate of five years (not including the time served in the status of an alien described in section 101(a)(15)(J)), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs." Id. § 1153(b)(2)(B)(ii)(I)(aa). However, any physician who had an NIW petition filed on his or her behalf before November 1, 1998 is required to work full time for an aggregate of only three years (not including time served in the status of an alien described under section 1101(a)(15)(J)). Id. § 2253(b)(2)(B)(ii)(IV).

C. Non-Immigrant Classifications

Physicians may be admitted to the United States through an appropriate non-immigrant classification. For example, a physician may enter the United States as a non-immigrant for purposes of training or education. 8 U.S.C. § 1101(a)(15)(F). A physician may also enter the United States as a non-immigrant "as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training." Id. § 1101(a)(15)(J). The physician is then required to return to his country of residence after the completion of such education or training. Id. § 1101(a)(15)(F) and (J). Physicians in this status (known as F-1 or J-1 status) may seek a waiver of the two year foreign residency requirement under 8 U.S.C. § 1182(e) provided the physician agrees to practice medicine full time for at least three years in a geographical area that has been determined by the Attorney General to be in the public interest. Id. § 1184(l).

Another non-immigrant status is known as H-1-B status. Id. § 1101 (a)(15)(H)(i)(b). A physician may apply for this status if he engages in temporary employment. Id. However, this clause does not apply to graduates of medical

schools who come to the United States to perform such services. Id. H-1-B status allows the physician to reside and work lawfully in the United States for a limited period of time, but requires that the physician leave the United States after expiration of the approved period. Id. Although there are some exceptions, in general the period of authorized admission as a non-immigrant under H-1-B status may not exceed six years. Id. § 1184(g)(4). Additionally, the total number of aliens who may be issued visas or otherwise provided non-immigrant H-1-B status varies according to the calendar year. Id. § 1184(g)(1)(A).

O status is another non-immigrant status. Id. § 1101(a)(15)(O). This status is accorded to a physician of "extraordinary ability or achievement" who comes temporarily to the United States to continue work in the area of extraordinary ability relating to an event or events petitioned for by an employer. Id.; see also 8 C.F.R. § 214.2(O)(1).

D. The Rule

The Immigration and Naturalization Service (now known as the U.S. Citizenship and Immigration Services ("CIS") has published a rule ("the Rule") to implement the INA. 65 Fed. Reg. 53889. The Rule establishes a procedure by which "a physician who is willing to practice full-time in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or in a facility operated by the Department of Veterans Affairs may obtain a waiver of the job offer requirement." Id. The Rule further explains the requirements the alien physician must meet in order to obtain approval of an immigrant visa petition and to obtain adjustment to lawful permanent resident status. Id. The Rule was promulgated to "help reduce the shortage of physicians in designated underserved areas of the United States." Id. The Rule also provides guidelines for physicians to obtain approval of an immigrant visa petition and for physicians who seek to obtain adjustment to lawful permanent residence status. Id.

The Rule provides that second-preference immigrant physicians may be granted a NIW based on service in a medically underserved area or VA facility, provided:

> (1) The physician agrees to work full-time (40 hours per week) in a clinical practice for an aggregate of 5 years (not including time served in J-1 non-immigrant status); and
>
> (2) The service is;
>
> (i) In a geographical area or areas designated by the Secretary of Health and Human Services (HHS) as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area, and in a medical speciality that is within the scope of the Secretary's designation for the geographical area or areas; or
>
> (ii) At a health care facility under the jurisdiction of the Secretary of Veterans Affairs (VA); and
>
> (3) A Federal agency or the department of public health of a State, territory of the United States, or the District of Columbia, has previously determined that the physician's work in that area or facility is in the public interest.

8 C.F.R. § 204.12(a). The Rule also provides that if the physician already has authorization to accept employment, other than as a J-1 exchange alien, "the beneficiary physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of approval of the Form I-140." Id. § 204.12(b)(1). On the other hand, "[i]f the physician must obtain authorization to accept employment before the physician may lawfully begin working, the physician must complete the aggregate 5 years of qualifying

full-time clinical practice during the 6-year period beginning on the date of [sic] the Service issues the necessary employment authorization document." Id. § 204.12(b)(2). The medical service period begins when: 1) the NIW request is approved; 2) the necessary employment authorization document is issued, or 3) the physician's status is changed from J-1 to H-1-B status. Id. §§ 204.12(b) and 245.18(e)(2).

Plaintiffs assert that the Rule and the Nursing Relief Act (designed to implement Section 5 of the INA) are inconsistent. Plaintiffs seek an order from this Court striking those sections of the Rule allegedly inconsistent with the Nursing Relief Act and INA. Plaintiffs also seek an order from the Court that the plaintiffs are entitled to have their NIW requests and applications for adjustment of status to permanent residence adjudicated without regard to those portions of the Rule that allegedly contradict the Nursing Relief Act and INA.

E. Plaintiffs

1. Schneider

Schneider is a citizen and native of Germany. Administrative Record for Schneider ("SAR") at 74. Schneider came to the United States in April 1992 in non-immigrant J-1 status. Memorandum at 72.[1] Schneider's employer, Pro Health Inc. ("Pro Health"), filed the Petition for Non-Immigrant Worker ("I-129 petition") on behalf of Schneider. SAR at 63. On June 29, 1998, CIS notified petitioner Pro Health that the petition had been approved, and that Schneider was granted O-1 status. Id. at 63. CIS notified petitioner again on July 26, 2000, July 23, 2001 and July 29, 2002 that it had approved the subsequent I-129 petitions and extended Schneider's O-1 status. Id. at 65-66, 93-95.

CIS received Schneider's Application to Waive the Foreign Residency Requirements ("I-612 application") on March 26, 2003. Memorandum at 77. In

[1] References to the Memorandum in Section E refer to the exhibit pages attached to the Memorandum.

May 2003, CIS granted this application. SAR at 21. On May 9, 2003, CIS received another I-129 petition from petitioner Pro Health on behalf of Schneider. Memorandum at 78. On May 22, 2003, CIS approved this petition and notified petitioner of Schneider's change in status to H-1-B. Schneider's H-1-B status is valid from June 28, 2003 to June 27, 2006. Id.

On March 6, 2003, CIS received an I-140 petition and NIW request on behalf of Schneider. SAR at 41, 45-47. CIS notified petitioner of the approval of the I-140 petition and NIW request on June 26, 2003. Id. On August 25, 2003, CIS received an I-485 Application to Adjust to Permanent Residence Status ("I-485 application"). SAR at 8-13. This application is pending. Id.

The Rule will make Schneider's five-year service requirement commence on June 26, 2003, the date the NIW request was approved. However, Schneider asserts that he has already completed his five-year medical service requirement. He claims that the four and a half years he practiced medicine in an underserved area in O-1 status should be considered toward fulfillment of the service requirement.

2. Tandar

Tandar is a citizen and native of Indonesia. Administrative Record of Tandar ("TAR") at 6. On June 1, 1998, an I-140 petition was filed on his behalf. Id. at 141. The petition was denied on June 21, 1999. Id. at 221-222. On November 17, 2000, Tandar's request to reopen or reconsider the denial of the petition was also denied. Id. at 134.

On June 6, 2000, CIS notified petitioner that Tandar was afforded H-1-B status. Id. at 13. Another I-I40 petition and NIW request were filed on behalf of Tandar on January 12, 2001. Id. at 48, 95, 324. On September 8, 2001, CIS notified petitioner that the I-140 petition and NIW request had been approved. Id. at 49, 95-97, 324; Memorandum at 33. CIS received Tandar's I-485 application on November 13, 2001, which is pending. TAR at 6-9, 50-51, 325.

On May 21, 2002, CIS notified Tandar that his five-year medical service requirement began on September 8, 2001, the date CIS approved the NIW request. Memorandum at 33. Tandar asserts that his five-year medical service requirement began on August 27, 1997, the date he began practicing in a medically underserved area, and that he was employed as a physician through June 20, 2003. Tandar therefore contends he is immediately eligible for adjustment of status to permanent resident. Tandar also claims he falls within the three-year medical service requirement because his first NIW petition was filed before November 1, 1998.

3. Mamuya

Mamuya, a native and citizen of Tanzania, was issued a visa on March 3, 1997. Administrative Record of Mamuya ("MAR") at 6 and 25. At that time, Mamuya was granted H-1-B status. Id. On July 13, 1999, CIS issued a notice to petitioner Fallon Clinic, plaintiff's employer, indicating that Mamuya's H-1-B status was extended until May 3, 2002. Id. at 40. On March 26, 2001, CIS received an I-140 petition and NIW request. Id. at 39, 60-62. On September 8, 2001, CIS approved the NIW request. Id. at 60-62. On September 11, 2001, CIS issued a notice approving the I-140 petition. Id. at 39. Mamuya filed an I-485 application for adjustment of status on February 7, 2003. Id. at 6-9. This application is pending.

On May 21, 2002, CIS notified Mamuya that his five-year medical service requirement began on September 8, 2001, the date CIS approved the NIW request. Memorandum at 87. Mamuya contends that his five-year medical service requirement began on July 29, 1999, the date he began practicing in a medically underserved area.

4. Sattar

Sattar is a citizen and native of Pakistan. Administrative Record of Sattar ("SAAR") at 2. Sattar came to the United States in July 1992 as a J-1 immigrant

visa holder to do his residency with Illinois Masonic Medical Center in Chicago, Illinois. Memorandum at 36-37.

In March 1996, Sattar's I-612 application was approved. Id. at 42. On July 23, 1996, CIS notified petitioner Cherokee Nation that the I-129 petition filed on behalf of Sattar had been approved, and that Sattar was afforded a change in status to H-1-B. Id. at 39. On May 28, 1997, CIS notified petitioner, Choctaw National Health Services Authority, that the I-129 petition filed on behalf of Sattar had been approved and Sattar's H-1-B status was extended. Id. at 40.

On January 11, 1999, the I-140 petition and NIW request were denied for failure to provide additional information. Id. at 45-48. In November 2002, Sattar filed an I-485 application, which is pending. Id. at 50. On October 15, 2003, Sattar's second I-140 petition and NIW request were approved. SAAR at 2-4.

Sattar alleges that he has practiced in a medically underserved area from July 23, 1996 to the present, and therefore contends he is immediately eligible to adjust his status to permanent resident.

5. Jain

Jain is a citizen and native of India. Administrative Record of Jain ("JAR") at 5. From 1994 to 1998, Jain was employed at the Long Island Jewish Medical Center, located in New Hyde Park, New York, a medically underserved area. Memorandum at 58-61. On November 25, 1991, Jain was accorded F-1 non-immigrant status. JAR at 26. CIS notified petitioner Long Island Jewish Medical Center, Jain's employer, that the I-129 petition filed on Jain's behalf had been approved and that Jain was accorded H-1-B status. Id. at 83. Jain's H-1-B non-immigrant status was extended on May 18, 1995, February 26, 1996, and May 15, 1997. Id. at 82, 81, 80 respectively.

On July 22, 1998, the I-129 petition filed by Metropolitan Hospital, located in the medically underserved area of East Harlem, on behalf of Sattar was approved based on a change in condition of employment. Id. at 79. On August

10, 1998, Jain began his employment with Metropolitan Hospital. Memorandum at 54.

On July 13, 2001, CIS issued a notice that the I-140 petitions and NIW requests received on January 16, 1998 and February 2, 2001 had been approved. Memorandum at 66-67.[2] On August 3, 2001, CIS received Jain's I-485 application, which is pending. Id. at 68. On July 15, 2002, CIS notified Jain that his three-year medical service requirement began on July 12, 2001, the date CIS approved the NIW request. Id. at 69.

Jain contends that: 1) he is subject to the three-year medical service requirement because he had an NIW petition filed prior to November 1, 1998; 2) he has practiced in a medically underserved area since 1994, and therefore has already completed his three-year medical service requirement; and 3) he is immediately eligible for adjustment of status to permanent residence.

6. Krishnamoorthy

Krishnamoorthy is a citizen and native of India. Administrative Record of Krishnamoorthy ("KAR") at 3-6. On March 25, 1994, CIS notified Krishnamoorthy that he had been approved for F-1 status. Id. at 20. On March 29, 1995, CIS notified petitioner, Coney Island Hospital, that the I-129 petition had been approved, and that Krishnamoorthy was afforded H-1-B status. Id. at 19. On June 22, 2001, a second I-129 petition was approved, and Krishnamoorthy's H-1-B status was extended to June 22, 2001. Id. at 18, 95, 98. On April 3, 2001, an I-140 petition and NIW request were approved. Id. at 34, 40-41. On July 26, 2001, Krishnamoorthy filed an I-485 application for adjustment of status to permanent resident. Id. at 3-6. This application is pending.

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[2] The I-140 petition and NIW request were filed on behalf of Jain on June 18, 1998, and were denied because Jain was not licensed as a physician by the State of New York. Id. at 153. An appeal was filed and the matter was remanded on April 6, 1999 for NIW eligibility. Id. at 152, 143-46. On October 11, 2000, the case was remanded again for consideration under the Nursing Relief Act. Id. at 135-140.

The Rule establishes that Krishnamoorthy's required service begins on April 3, 2001, the date the NIW was approved. Krishnamoorthy contends that his five-year medical service requirement began on September 29, 1998, the date he began practicing in an underserved area. Therefore, he claims that he is immediately eligible to adjust his status to permanent resident.

7. Kasthuri

Kasthuri is a citizen and native of India. Administrative Record of Kasthuri ("KAAR") at 3. He came to the United States in June 1995 in J-1 status. Memorandum at 91. On December 4, 2000, CIS notified petitioner Pacific Medical Imaging Consultants that the I-129 petition filed on behalf of Kasthuri had been approved and that Kasthuri was afforded H-1-B status. KAAR at 67. Kasthuri's H-1-B status was then extended through April 1, 2006. Id. at 66.

On June 23, 2001, Kasthuri began working as a radiologist with Pacific Medical Imaging located in Wenatchee, Washington, a medically underserved area. Memorandum at 107-08. Kasthuri filed an I-140 petition and NIW request in March 2003, which are pending. Id. at 3-5.

Kasthuri contends that contrary to the Rule the INA conveys benefits to "any physician," including specialists. Kasthuri asserts that his NIW request should therefore be approved.

8. Nedelescu

Nedelescu is a citizen and native of Romania. Administrative Record of Nedelescu ("NAR") at 4, 11. From October 1, 1998 to June 2001, Nedelescu was employed by Saint Vincent Hospital in Worcester, Massachusetts, a medically underserved area, in H-1-B status. Memorandum at 101-02. On September 24, 1998, CIS notified petitioner Saint Vincent Hospital that the I-129 petition filed on Nedelescu's behalf had been approved. NAR at 50, 85. An I-129 petition filed by Worchester Internal Medicine on behalf of Nedelescu was subsequently approved, and his H-1-B status was extended to June 30, 2004. Id. at 49, 51, 84. On July 1,

2001, Nedelscu began his current employment in H-1-B status with Worcester Internal Medicine located in Worcester. Id. at 103-04. On October 21, 2003, Nedelscu's I-140 petition and NIW request were approved. Id. at 56-58. On November 12, 2002, Nedelscu filed an I-485 application, which is pending. Id. at 4-7.

Nedelescu contends that his five-year medical service requirement began on October 6, 1998, the date he began practicing in an underserved area, and that he is immediately eligible for adjustment of status.

II. LEGAL STANDARD

A motion for summary judgment provides a procedure for terminating trial actions "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Although summary judgment deprives a party of the right to a jury trial, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Additionally, a motion for summary judgment can be used by any party to dispose of any part of the opposing party's claims or defenses. See FED. R. CIV. P. 56(a) and (b). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Where the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. Id.

In deciding whether to grant summary judgment, the district court need only consider evidence set forth in the moving or opposing papers and the parts of the

record specifically referred to therein. Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1029 (9th Cir. 2001) (summary judgment proper though genuine issue of fact raised in affidavit that was on file but not mentioned in opposing papers filed with the court). The court must view the evidence presented in the light most favorable to the opposing party. Anderson v. Liberty Lobby, 477 U.S. 242, 249-55 (1986). At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Id. at 249. If the non-moving party presents evidence that is "merely colorable" or is not "significantly probative," summary judgment may be granted. Id.

A district court may not grant summary judgment, however, where any material fact is in genuine dispute. FED. R. CIV. P. 56(c). Accordingly, to survive a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." FED. R. CIV. P. 56(e); see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). If the record taken as a whole could lead a rational trier of fact to find for the non-moving party, there is a "genuine issue for trial" and summary judgment should be denied. Matsushita, 475 U.S. at 587.

III. ANALYSIS

A. Jurisdiction[3]

Federal district courts have original jurisdiction in actions "arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. For jurisdiction under § 1331, there must be a question of federal law involved and

[3] In response to plaintiffs' Motion, defendants assert that the Court does not have jurisdiction over the action. The Court must resolve this threshold question.

reference must be made to other federal laws. See Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983); see also, e.g., Dillon v. Combs, 895 F.2d 1175, 1177 (7th Cir. 1990). "[T]he party seeking to invoke jurisdiction of the federal court has the burden of establishing that jurisdiction exists." Data Disc, Inv. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977).

In general, the United States is immune from suit except as it consents to be sued. U.S. v. Sherwood, 312 U.S. 584, 586 (1941). In order to maintain a lawsuit against the United States, the plaintiff must point to an unequivocal waiver of sovereign immunity. Blue v. Widnall, 162 F.3d 541, 545 (9th Cir. 1998). The Administrative Procedure Act ("APA") waives sovereign immunity for actions against the United States and its agencies 'arising under' federal law to the extent that a plaintiff seeks nonmonetary relief. Id.; see also 5 U.S.C. § 702. This section permits a challenge to be brought in the district courts if a private party is adversely affected by final agency action claimed to be contrary to law. Id. Indeed, the Supreme Court has stated that the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" Reno v. Catholic Social Services, Inc., 509 U.S. 43, 47 (1993), citing Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702). "Even if no statute specifically provides an agency's decisions are subject to judicial review, the Supreme Court customarily refuse[s] to treat such silence 'as a denial of authority to [an] aggrieved person to seek appropriate relief in the federal courts.'" Spencer Enterprises, Inc. v. U.S., 345 F.3d 683, 687 (9th Cir. 2003). The question for this Court is therefore whether any statute deprives the federal court of jurisdiction to review the particular agency action here. See id. at 688.

The APA withdraws jurisdiction to review agency actions that are "committed to agency discretion by law." Id.; see also 5 U.S.C. § 701(a)(2). The Supreme Court has held that this provision applies only where "the statute is

drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion, and has emphasized that such a situation only occurs in 'rare instances.'" Spencer Enterprises, 345 F.3d at 688, citing Heckler v. Chaney, 470 U.S. 821, 830 (1985) (internal citation and quotation marks omitted). "Even where an agency is granted 'unfettered discretion' pursuant to a statute, its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard' by which this court may review its exercise of discretion." Spencer Enterprises, 345 F.3d at 688 (citation omitted).

Defendants do not cite any specific section of the INA which would deprive the Court of jurisdiction.[4] However, defendants assert that the decision to approve adjustment of status to lawful permanent resident is made pursuant to 8 U.S.C. § 1255, which defendant asserts is a discretionary act. The Court therefore sua sponte considers whether 8 U.S.C. § 1252 divests district courts of jurisdiction to review decisions committed to the discretion of the Attorney General. 8 U.S.C. § 1252(a)(2)(B)(ii) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review--
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or *1255* of this title, or
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of

[4] Although defendant claims that the Court lacks jurisdiction to compel the approval of plaintiffs' applications for adjustment of statute to that of lawful permanent resident, plaintiffs clearly indicate that they are not seeking to compel such action. Accordingly, the Court does not decide whether the Court lacks jurisdiction to compel this action based on 8 U.S.C. § 1255.

relief under section 1158(a) of this title.

(emphasis added); see also Paunescu v. INS, 76 F. Supp. 2d 896, 900 (N.D. Ill. 1999) (because plaintiffs had neither been denied nor granted relief under 8 U.S.C. § 1255 this section did not bar jurisdiction.), Galvez v. Howerton, 503 F. Supp. 35 (C.D. Cal. 1980) (district court had jurisdiction to review denial by the INS of an adjustment of status to that of permanent resident alien), Calexico Warehouse, Inc. v. Neufeld, 259 F. Supp. 2d 1067, 1073 (S.D. Cal. 2002) (noting split of authority among circuits regarding whether or not Section 1252 divests district courts of subject matter jurisdiction to review INS decisions, *aside from those decisions dealing with orders of removal* and lack of direction from the Ninth Circuit Court of Appeals). The Court also declines to finds that this section divides this Court of subject matter jurisdiction because plaintiffs have neither been denied nor granted relief under § 1255 and this action does not involve removal proceedings.[5] Moreover, the Court does not find any other section of the INA which would specifically deprive this Court of jurisdiction to determine whether the Rule impermissibly conflicts with the INA.

The INA provides:

> The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of

[5] The Court further declines to find that 8 U.S.C. § 1252(g) deprives this court of jurisdiction. See e.g. Shanti, Inc. v. Reno, 36 F. Supp. 2d 1151, 1158-59 (Minn. 1999) (disposition of a visa petition is "a collateral issue not within the scope of deportation, removal, or exclusion proceedings"). 8 U.S.C. § 1252(g) provides: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

> section 1154(a)(1) of this title or [FN1] may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a). The INA further provides that "*subject to clause (ii)* [8 U.S.C. § 1153(b)(2)(B)((i)], the Attorney General *may*, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) [8 U.S.C. § 1153(b)(2)(A)] that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States." 8 U.S.C. § 1153(b)(2)(B)(i) (emphasis added). Although 8 U.S.C. § 1153 (b)(2)(B)(ii)(i) instructs that the Attorney General "shall grant a national interest waiver," this authority is guided by statutory requirements. See id. § 1153(b)(2)(B)(ii). The statute here is not "drawn in such broad terms . . . there is no law to apply." Spencer Enterprises, 345 F.3d at 688 (noting that reviewing denials of visa petitions according to the standards of the APA is permissible). This language is also distinct from discretionary language that would allow the Attorney General to deny NIWs even to those who meet the statutory eligibility requirements. Spencer Enterprises, 345 F.3d at 690.

The Court therefore finds jurisdiction to review whether the Rule conflicts with the INA pursuant to 28 U.S.C. § 1331 and the APA (5 U.S.C. § 702).

B. Ripeness and the APA

The presumption of available judicial review is subject to the limitation that "injunctive and declaratory judgment remedies" (what plaintiffs seek here) "are

discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution, that is to say, unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties." Reno, 509 U.S. at 47 (internal citations and quotations omitted). The basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Assoc. of American Medical Colleges v. U.S., 217 F.3d 770, 779 (9th Cir. 2000) (citation omitted). In evaluating ripeness, the court assesses: 1) "the fitness of the issues for judicial decision," and 2) "the hardship to the parties of withholding court consideration." Id. (citation omitted). An agency action is fit for judicial review only if: 1) the issues presented are purely legal; 2) the regulation is a final agency action; and 3) the rule has been concretely applied to the plaintiff. Id., citing Anchorage v. U.S., 980 F.2d 1320, 1323 (9th Cir. 1992) and Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990). The court may find that a justiciable controversy should be resolved if the court can make a firm prediction that the plaintiff will apply for a benefit and that the agency will deny the application by virtue of the applicable rule. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1435-36 (9th Cir. 1996) (adopting the "firm prediction" rule).

The Court finds that whether the Rule conflicts with the statute is a purely legal question. See, e.g., Chang v. U.S., 327 F.3d at 922. Moreover, based on the evidence before the Court concerning plaintiffs' applications for adjustment of status, the Court finds that application of the firm prediction rule is appropriate in

this case (with the single exception discussed below).[6] The Court further finds that the impact of the regulations on plaintiffs is sufficiently direct and immediate to render the issue appropriate for judicial review at this stage. Id. at 153-54. Plaintiffs claim they are presently entitled to permanent resident status or that they are much nearer to achieving the goal than the CIS asserts. It is hardly subject to dispute that permanent resident status is a significant benefit to plaintiffs. Indeed, it is the carrot by which Congress intended to entice alien physicians to work in areas underserved by American physicians. Therefore, the Court finds that the ripeness doctrine does not bar this Court from judicial review concerning whether the Rule conflicts with the Nursing Relief Act and the INA.[7]

The Court also does not agree with defendant that the APA precludes administrative review. Plaintiffs' appeal to a "superior agency authority" is not a prerequisite to judicial review because the INA does not foreclose immediate judicial review for the specific question at issue here as to whether the Rule impermissibly conflicts with the statute. See Chang v. U.S., 327 F.3d 911, 922 (9th Cir. 2003) (citations omitted). Moreover, the agency cannot hear the type of claim at issue here, including questions of APA compliance, and therefore administrative review would be inadequate. Id. at 924.

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[6] The Court also finds that the Rule is final because it was promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties. See Abbott, 387 U.S. at 151. Moreover, there is no indication that this regulation is informal. Id. Application of the Rule as promulgated will likely mean that the plaintiffs will not obtain the desired status within the time frame they believe they are entitled to under the INA.

[7] The Court does not address the issue of jurisdiction to award the requested relief because the Court finds that the Rule does not impermissibly contradict the statute. Because the Court finds that it has jurisdiction on these grounds, the Court does not decide whether 28 U.S.C. § 1361 provides a basis for this Court's jurisdiction on the facts of this case. Moreover, plaintiffs admit that they do not challenge the granting or denial of plaintiffs' individual applications. Reply at 2.

C. Joinder

Federal Rule of Civil Procedure 20(a) provides:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

FED. R. CIV. P. 20(a). Therefore, Rule 20(a) imposes two requirements for the joinder of parties: "(1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and (2) some question of law or fact common to all the parties will arise in the action." League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977). The Ninth Circuit has stated that permissive

joinder is to be construed liberally in order to promote trial convenience, expedite the final determination of disputes, and prevent multiple lawsuits. Id. (citation omitted). The Supreme Court has explained that "[u]nder the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966). The Supreme Court has also explained that "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much on the immediateness of their connection as on their logical relationship." Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926).

The Court agrees with plaintiffs that the facts and issues presented in defendants' cited case, Coughlin v. Rogers, 130 F.3d 1348 (9th Cir. 1997), are distinguishable. In Coughlin, plaintiffs brought an action for writ of mandamus to compel CIS to adjudicate 49 pending petitions or applications. Plaintiffs' applications or petitions fell into six distinct categories: 1) twenty plaintiffs (United States citizens) alleged the defendants failed to adjudicate their petitions and applications on behalf of an alien spouse or child; 2) eleven alien plaintiffs alleged the defendants failed to adjudicate their applications for adjustment of status based on an approved petition as an alien worker; 3) two alien plaintiffs alleged the defendants failed to adjudicate their applications for adjustment of status based on their allegations that they followed their spouses to the United States; 4) five alien plaintiffs alleged the defendants failed to timely adjudicate their applications to remove a conditional status; 5) one alien plaintiff alleged he was orally advised that his petition to remove the conditions on residence was denied and he would be issued an Order to Show Cause ("OSC") as to why he should not be deported, but never received an OSC; and 6) ten plaintiffs (lawful permanent residents) applied for and were awaiting a decision on their applications for naturalization at the time the action was filed. Id. at 1349-50. In

contrast, all plaintiffs in this case are contending that their medical service requirement should be met under the statute.[8] The Court also agrees that defendants fail to cite authority for the proposition that plaintiffs' immigration histories must be identical in all respects in order for permissive joinder to be permitted.

The Court further finds that there is "some question of law or fact" common to all plaintiffs because each claim by the plaintiffs centers on whether the Rule is inconsistent with the statute, and each plaintiff is allegedly adversely affected by these inconsistencies. Each plaintiff is also a foreign-born physician pursuing adjustment of status to a lawful permanent resident of the United States. As part of the relief requested, each plaintiff requests that the Court declare that certain portions of the Rule are null and void. This relief also arises out of the same question of law. The Court therefore finds that the plaintiffs are properly joined.

D. The Rule

1. Standard of Review

The Supreme Court has explained the district court's role in reviewing an agency's construction of a statute:

> [The Court] is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as

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[8] Admittedly, the CIS has only advised of specific commencement dates for Tandar, Mamuya, and Jain.

> would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). To determine whether "Congress has directly spoken to the precise question in issue," a court begins with traditional methods of statutory interpretation. Yang v. INS, 79 F. 3d 932, 935 (9th Cir. 1996), citing Chevron, 467 U.S. at 842-43. If Congress has been silent with respect to the specific issue, the court must then ask whether "the agency's answer is based on a permissible construction of the statute." Yang, 79 F.3d at 835, citing Chevron, 467 U.S. at 843. The Supreme Court further explained:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. (Citation omitted.) If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron, 467 U.S. at 843-44. A court may "not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. at 844. Therefore, in the face of ambiguity or Congressional silence, a court should defer to the agency's considered judgment. Yang, 79 F.3d

at 935.

2. Calculation of Required Service

The INA provides:

> No permanent resident visa may be issued to an alien physician described in subclause (i) by the Secretary of State under section 1154(b) of this title, and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 1255 of this title, until such time as the alien has worked full time as a physician for an *aggregate of 5 years* (not including the time served in the status of an alien described in section 1101(a)(15)(J) of this title), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

8 U.S.C. § 1153(b)(2)(B)(ii) (emphasis added). Physicians who had an NIW petition filed on their behalf prior to November 1, 1998 must work full time for an aggregate of only three years. Id. at 1153(b)(2)(b)(ii)(IV).

Plaintiffs Tandar, Jain, Schneider, Mamuya, Krishnamoorthy and Nedelescu claim that they should be immediately eligible for adjustment of status based on prior employment. Plaintiffs claim that the Rule unlawfully restricts the application of 8 U.S.C. § 1153 in the following ways: 1) the physician's medical service requirement will begin on the date the CIS approves the NIW petition on his behalf. 8 C.F.R. § 245.18(e); 2) if the physician does not already have an employment authorization, his period of medical service begins on the date the CIS issues an employment authorization document. Id. § 245.18(e)(1); and 3) if a

physician formerly held J-1 status and obtained a waiver of the home residence requirement and a change to H-1-B status, his period of service begins on the date he changes status to H-1-B. Id. § 245.18(e)(2). The Rule also establishes that physicians petitioning for EB-2 immigrant status with a request for NIW must fulfill the aggregate five years of full-time service within a six-year period following approval of the petition and waiver, or within four years of approval of the I-140 petition and waiver for cases filed before November 1, 1998. Id. §§ 204.12(b)(1) and (2) and 204.12(d)(4). Plaintiffs assert that the Rule therefore impermissibly sets forth a system for calculating the five or three-year medical service requirement.

The Court finds these "restrictions" are permissible. There is no ambiguity. Congress simply did not specifically identify the date or manner in which the qualifying service begins. The Court therefore agrees with defendants that it is proper for the agency to fill in this gap by regulation. See Chevron, 467 U.S. at 842-43. The Rule establishes clearly identifiable dates when the qualifying service period begins and ends. The Rule also establishes appropriate guidelines to ensure that the alien is lawfully permitted to stay in the United States pending a determination of permanent residence status.

The Court also finds the six and four year limitations on completion of five and three years of service to be permissible. Congress clearly has not specified the time frame within which the "aggregate" service must be competed. At most, plaintiffs might argue that the statute is ambiguous (as to whether Congress intended that there be no limit). The Court finds persuasive the CIS's position that "[i]t would defeat the purpose of the statute to find that a physician who sporadically accumulates five years of service in a designated area or areas, spread over a period of 25 years, has fulfilled the purpose of the statute." Opposition at 26. The Court finds that the Rule reasonably recognizes that unforeseen events may arise that interrupt medical service by providing physicians with an additional

year to complete the required service, but it would not be appropriate to allow physicians to remain in the United States indefinitely. While an argument could be made for a longer period of time to complete the required service, it is not the function of the Court to re-write the Rule.

On July 31, 2002, interim regulations amending 8 C.F.R. § 245.2 went into effect. 67 Fed. Reg. 49561. This interim rule now allows the I-485 application to be filed concurrently when a visa is immediately available (as opposed to first filing and obtaining approval of the underlying I-140 petition before applying for permanent residence), and therefore improves the "efficiency of the process as well as customer service." Id. The interim rule also provides that "if an employment-based visa petition is pending on July 31, 2002, the alien beneficiary may obtain the benefits of concurrent filing, but only if the alien beneficiary files the Form I-485 together with the applicable fee and a copy of Form I-797, Notice of Action, establishing previous receipt and acceptance by the Service of the underlying Form I-140 visa petition." Id. Plaintiffs' argument that "[l]engthy delays in CIS adjudication times impose a significantly longer period of employment obligation" are therefore moot. Memorandum at 15.

Accordingly, the Court finds that the Rule, in implementing guidelines on how to calculate the required medical service, does not contradict the statute.

3. "Double Compliance" System

Plaintiffs Mamuya and Tandar contend that they should not be required to submit evidence concerning their completion of the medical service requirement. The Rule provides that physicians who have obtained NIWs must submit "Form I-485 during the 6-year period following Service approval of a second preference employment-based immigrant visa petition." 8 C.F.R. § 245.18(a). The Rule also requires that "[f]or physicians with a 5-year service requirement, no later than 120 days after the second anniversary of the approval of Petition for Immigrant Worker, Form I-140, the alien physician must submit to the Service Center having

jurisdiction over his or her place of employment documentary evidence that proves the physician has in fact fulfilled at least 12 months of qualifying employment." Id. at § 245.18(g). Plaintiffs contend that the Rule imposes a "double compliance system" to ensure fulfillment of the required medical service period.

The INA generally provides that a physician's status may not be adjusted to permanent resident alien and a physician may not obtain a permanent resident visa unless he meets the medical service requirement, but does not provide for the submission of additional evidence ensuring compliance with the medical service requirement. 8 U.S.C. § 1153(b)(2)(B(ii)(II). The Court finds Congress was silent on this issue. The Rule establishes two points where the physician must submit evidence noting his practice of medical service in an underserved area. The Rule establishes appropriate procedures to ensure Compliance with the medical service requirement. The Court cannot say that the Rule represents an unreasonable exercise of discretion. The Court also appropriately defers to the agency's judgment. See Yang, 79 F.3d at 935.

4. Effective Dates of Service

The INA provides that "a physician for whom an application for a waiver was filed under subsection (b)(2)(B) of this section prior to November 1, 1998, . . . is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 1101(a)(15)(J) of this title) before a visa can be issued to the alien under section 1154(b) of this title or the status of the alien is adjusted to permanent resident under section 1255 of this title." 8 U.S.C. § 1153(b)(2)(B)(ii)(IV).

The Rule provides that if the beneficiary of an immigrant visa petition was filed before November 1, 1998 and the visa petition remained *pending* before the INS or the courts on November 12, 1999 (the date of the enactment), the alien physician may obtain permanent residence after only three years of qualifying service. 8 C.F.R. § 204.12(d)(4). However, the three-year requirement is not

available if a decision *denying* the visa petition became administratively final before that date. Id. at 8 C.F.R. § 204.12(d)(6). The regulation further provides that the agency must "deny any motion to reopen or reconsider a decision denying an immigrant visa petition if the decision became final before November 12, 1999, without prejudice . . .." Id. An alien physician who obtained approval of a second preference employment-based visa petition and NIW before November 12, 1999 is not subject to the service requirements. Id. at § 204.12(d)(5).

Plaintiffs argue that the requirement that the NIW petition be pending on November 12, 1999 is contrary to the statute because Congress does not explicitly indicate that the three-year medical requirement applies only to those NIW petitions pending on November 12, 1999. The Court does not agree.

The Court finds Congress did not address I-140 petitions and NIWs filed and *denied* before the enactment date of the statute. Furthermore, the Court agrees with the agency's interpretation of the statute that "[i]n making provision for cases filed before November 1, 1998, however, section 203(b)(2)(B)(ii)(IV) of the Act makes it clear that Congress intended to apply this new provision to all petitions that were actually pending on November 12, 1999." 65 Fed. Reg. 53889. The Rule also promotes efficiency and finality. The Court finds that the Rule is based on a permissible construction of the statute and therefore will not substitute its own construction. See Chevron, 467 U.S. at 842-43.

5. Medically Underserved Area

The statute provides that "any alien physician" who agrees to work full time "in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals . . ." shall be granted an NIW. 8 U.S.C. § 1153(b)(2)(B)(i)(I). The Rule requires that service may be in an area "designated by the Secretary of Health and Human Services (HSS) as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area, and in a medical speciality that is

within the scope of the Secretary's designation for the geographical area or areas." 8 C.F. R. § 204.12(a)(2)(i). In determining whether an area meets the criteria for designation, HHS takes into account "[a]ll non-Federal doctors of medicine (M.D.) and doctors of osteopathy (D.O.) providing direct patient care who practice principally in one of the four primary care specialties - - general or family practice, general internal medicine, pediatrics, and obstetrics and gynecology." 42 C.F.R. Pt. 5, App. A.

Kasthuri is the only plaintiff who contends that his NIW request should be immediately approved in part because the time he spent working as a radiologist (a specialty he claims would not be credited under the rule) should count toward the medical service requirement. Based on the language of the INA and the Rule, the Court cannot make a firm prediction that the agency will deny the NIW request solely based on the fact that Kasthuri served as a radiologist in a medically underserved area. The agency's determination will depend on the particular designation for the geographical area, and may depend on whether the area has a shortage in the field of radiology. Accordingly, the Court finds Kasthuri's claim is not ripe for review.

6. Attestation

The parties agreed at the hearing that seven plaintiffs lack standing to pursue the claim that the Rule impermissibly requires that the public interest attestation be issued by a "department of public health of a state" because their determinations do not involve attestation to the physician's employment. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 556 (1992). The parties also agreed at the hearing that Sattar is the only plaintiff who is alleged to have failed to comply with the requirement that a State Department of Health attest to the individual physician's employment as within the public interest. Sattar's I-140 petition and NIW request were approved after he submitted a letter from the Choctaw Nation Health Services Authority, an agency of the United States Public

Health Service, attesting to his medical service. SAAR at 6; see also 8 U.S.C. § 1153 (B)(2)(B)(ii)(bb). The Court therefore finds that Sattar's claims regarding this issue are moot.

7. Petition for Preference Classification When an Alien Physician Relocates

The statute requires that an alien physician file a petition for preference classification. 8 U.S.C. § 1153(2)(B)(i)(I). The Rule also requires when a physician relocates and finds a new position within a medically underserved area, the new employer must submit a new I-140. 8 C.F.R. § 204.12(f)(1). Jain asserts that the Rule unlawfully imposes an obligation to seek an additional waiver because he relocated.[9] However, subsequent to the issuance and effective dates of the Rule, Congress passed the American Competitiveness in the Twenty-First Century Act, Pub. L. No. 106-313, 8 U.S.C. § 1154(j). This Act provides for the addition of a new section of the INA called "Job flexibility for long delayed applicants for adjustment of status to permanent residence," which provides: "A petition under subsection (a)(1)(D) of this section for an individual whose application for adjustment of status pursuant to section 1255 of this title has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." 8 U.S.C. § 1154(j). Jain's claim with respect to the Rule's requirement when a physician relocates is therefore moot.

IV. CONCLUSION

For the reasons set forth above, the Court finds that plaintiffs fail to show they are entitled to summary judgment as a matter of law. Therefore, the Court DENIES Plaintiffs' Motion for Summary Judgment. Because the Court finds the

[9] The parties agreed at the hearing that the requirement that a physician must resubmit a I-140 petition and NIW request in the event he relocates applies only to Jain.

portions of the Rule objected to by plaintiffs do not impermissibly contradict the INA or the Nursing Relief Act, plaintiffs' claims are dismissed.

DATED: March 26, 2004

Dale S. Fischer

DALE S. FISCHER
United States District Judge