No. 04-55689

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEFAN SCHNEIDER, et al.,	)
Plaintiffs-Appellants,	)
v.	)
THOMAS RIDGE, SECRETARY OF HOMELAND SECURITY, et al.,	)
Defendants-Appellees.	)

APPELLEES' ANSWERING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV 02-9228 DSF (JWJx)

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I. ISSUE PRESENTED

Whether the district court properly dismissed the action because the national interest waiver regulations, which plaintiffs-appellants challenge, are reasonable and in accordance with law.

II. STATEMENT OF JURISDICTION

A. The district court found that it had subject matter jurisdiction based upon 28 U.S.C. §1331 (federal question) and 5 U.S.C. §702 (Administrative Procedures Act, "APA").

B. The statutory basis for jurisdiction in this Court is 28 U.S.C. §1291.

C. The district court denied plaintiffs-appellants' motion for summary judgment on March 26, 2004 and entered judgment dismissing plaintiffs-appellants' Amended Complaint ("AC") on April 12, 2004. (CR 50, 51; ER 4-35; SER 682-715.)[1] On April 14, 2004, plaintiffs-appellants filed their notice of appeal. (CR 52; ER 1.) The appeal is timely pursuant to Federal Rule of Appellate Procedure 4(a)(1).

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[1] "CR" refers to the Clerk's Record, and is followed by the document control number. "SER" refers to the appellees' Supplemental Excerpts of Record and the number following SER refers to the bate-stamp number in the lower right hand corner of the Supplemental Excerpts of Record. Other notations are the description of the particular exhibit and the page or paragraph number on the exhibit itself. "ER" refers to appellant's Excerpts of Record and is followed by the applicable page number. "AOB" refers to the appellant's opening brief.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an immigration action wherein eight different plaintiffs, all alleged to be physicians, claimed that their medical practice in under-served areas entitled them to national interest waivers and immediate adjustment of status to lawful permanent resident.[2] Each physician plaintiff presented a unique factual history and each challenged the regulations supporting the national interest waiver in a different manner. Defendants Thomas J. Ridge, Secretary of Homeland Security, Eduardo Aguirre, Jr., Acting Director of the Bureau of Citizenship and Immigration Services ("BCIS"), and the BCIS, (hereinafter collectively referred to as "CIS"), contended and the district court agreed that the regulations at issue are reasonable and do not impermissibly contradict the Immigration and Nationality Act. Accordingly, the action was dismissed and judgment entered in favor of the defendants-appellees.

B. COURSE OF PROCEEDINGS BELOW

The alien doctors filed their complaint on December 4, 2002. (CR 1.) An amended complaint was filed on December 9, 2004. (CR

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[2] The original plaintiffs included Stefan Schneider, Anwar Tandar, Komsu Mamuya, Muhammad Aijaz Sattar, Sandeep Harbans Jain, Mahesh Krishnamoorthy, Saravanan Kasthuri, and Bogdan Nedelescu (collectively referred to as "the alien doctors"). As identified infra, the remaining plaintiffs-appellants include Stefan Schneider, Komsu Mamuya and Anwar Tandar.

3; SER 1-12.)

A motion for leave to file a second amended complaint was filed by the alien doctors, opposed by CIS, and denied by the district court on March 13, 2003. (CR 9, 13, 16.) Thereafter, CIS filed their answer to the amended complaint on April 7, 2003.[3] (CR 17; SER 13-22.)

On December 1, 2003, the alien doctors filed a motion for summary judgment (CR 28, 29) which was opposed by CIS. (CR 37, 46.) In support of CIS' opposition, CIS also filed the administrative records for each alien doctor. (CR 38-45; SER 23-649.) A hearing on the motion was held on March 15, 2004. (CR 49.) The district court filed its Order denying the alien doctors' motion for summary judgment and dismissing the action on March 26, 2004. (CR 50; ER 4-35; SER 682-713.) The court entered judgment in favor of CIS on April 12, 2004. (CR 51; SER 714-715.) The alien doctors filed their notice of appeal on April 14, 2004. (CR 52; ER 1.)

C. THE STATUTORY FRAMEWORK

The Immigration and Nationality Act ("INA"), 8 U.S.C. §1101 et seq., governs the classification, admission, and authorized

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[3] The original defendants were John Ashcroft, Attorney General, Michael Garcia, Acting Commissioner of the Immigration and Naturalization Service ("INS") and the INS. With the creation of the Department of Homeland Security ("DHS") and transfer of functions from INS to DHS, the appropriate defendants were automatically substituted. See Homeland Security Act, Pub. L.107-296, §451(b), 116 Stat. 2135, 2195 (2002).

stay of non-immigrant and immigrant aliens, including employment-based immigrant worker visa petitions ("EB immigrants").

1. Employment-Based Immigrants

Section 203 of the INA provides for the allocation of preference visas for both family and employment-based immigrants. The second preference employment-based category (EB-2) allows for the immigration of aliens, such as physicians, who are members of the professions holding advanced degrees or aliens of exceptional ability. 8 U.S.C. §1153(b)(2). Immigration as an alien who is a member of the professions holding advanced degrees or who has exceptional ability is a multi-step process. The employer must file a petition seeking to classify the prospective immigrant as a qualifying alien. 8 U.S.C. §1154(a)(1)(F); 8 C.F.R. §204.5(k). The petition must include a certification from the Department of Labor that: (1) there are insufficient numbers of equally qualified domestic workers; and (2) the employer's employment of the immigrant will not adversely affect the wages and working conditions of similarly employed persons in the United States. 8 U.S.C. §1182(a)(5)(A) & (D); 8 C.F.R. §204.5(k)(4). Generally, obtaining the requisite certification by the Department of Labor may take more than a year. (SER 651-652.)

2. National Interest Waivers

On November 12, 1999, the President approved enactment of the Nursing Relief for Disadvantaged Areas Act of 1999, Public

Law 106-95 ("Nursing Relief Act"). Section 5 of the Nursing Relief Act amends section 203(b)(2) of the INA by adding a new subparagraph (B)(ii), the national interest waiver ("NIW"). 8 U.S.C. §1153(b)(2)(B)(ii). The amendment establishes special rules for requests for NIWs that are filed by or on behalf of physicians who are willing to work in an area or areas 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 ("VA"). Under the Act as amended, the Attorney General, now the Secretary of Homeland Security, may grant a NIW of the job offer requirement (i.e., certification by the Department of Labor) to any alien physician who agrees to work full-time in a designated clinical practice for the period fixed by statute. After the required period of service, the alien may be eligible for adjustment of status.

The statute, 8 U.S.C. §1153(b)(2), states, in pertinent part:

> (A) Visas shall be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1)[4], to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests or welfare of the United States

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[4] 8 U.S.C. §1153(b)(1) "Priority workers."

and whose services in the sciences, arts, professions or business are sought by an employer in the United States.

(B) Waiver of job offer

(i) National interest waiver

Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of sub-paragraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if -

(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.

The statute, 8 U.S.C. §1153(b)(ii)(II), continues:

No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b), 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 245, 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 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.
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> * * * * * * *
>
> The requirements of this subsection do not affect waivers on behalf of alien physicians approved under subsection (b)(2)(B) of this section before the enactment date of this subsection. In the case of a physician for whom an application for waiver was filed under section 203(b)(2)(B) prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to section 203(b)(2)(B) except that the alien 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 101(a)(15)(J)) 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).

3. The Regulations

The regulations regarding the NIW, also referred to as the interim rule, were published in the Federal Register on September 6, 2000, became effective on October 6, 2000 and remain in effect. 65 Fed. Reg. 53889-53896. Accordingly, Title 8 of the Code of Federal Regulations was amended to add §§204.12 and 245.18. The interim rule was necessary to codify the provisions of Public Law 106-95 (Nursing Relief Act), and to put into place eligibility rules and procedures for applicants and the agency to employ. (SER 653-657.) The interim rule establishes the procedure under which a physician who is willing to practice

full-time in a designated health professional shortage area or in a VA facility may obtain a waiver of the job offer requirement that applies to alien beneficiaries of second preference employment-based immigrant visa petitions. (Id.) It further explains the requirements the alien physician must meet in order to obtain approval of an immigrant visa petition; and thereafter, approval of an application for adjustment to lawful permanent residence status. (SER 653-658.)

The statute and regulations at issue are aimed at specific individuals seeking immigrant status. Physicians may be admitted to the United States prior to seeking immigrant status, in an appropriate non-immigrant classification. See generally 8 U.S.C. §1101(a)(15) and 8 C.F.R. §214.2. If admitted as a nonimmigrant, the physician must abide by all the terms and conditions of his nonimmigrant status. For example, a physician may enter the United States as a nonimmigrant for purposes of training or education and with the explicit understanding that the physician will be required to return to his country of residence after the completion of such education and/or training. 8 U.S.C. §§1101(a)(15)(F), (J). In general, such physicians enter on F-1 or J-1 status, as is true for alien doctors Schneider, Jain, Sattar and Mamuya.

Physicians in J status may seek a waiver of the two-year foreign residence requirement under 8 U.S.C. §1182(e) in exchange

for the alien's agreement to practice medicine full time for three years in a geographic area designated by the Secretary of HHS as having a shortage of health care professionals. 8 U.S.C. §1184(l) (Conrad Amendment)[5].

H-1B status is also a non-immigrant status. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b). H-1B status may be accorded to a physician who may engage in productive employment, but not to an alien physician seeking medical education in the United States. Id. It allows for the physician to reside and work lawfully in the United States for a limited period of time. The number of available H-1B nonimmigrant visas is limited each calendar year. 8 U.S.C. §1184(g)(1)(A). H-1B status, like J-1 status, requires that the physician depart the United States after the expiration of the approved period of H-1B status. H-1B status may not extend beyond six years. 8 U.S.C. §1184(g)(4); 8 C.F.R.

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[5] Conrad Amendment, P.L. 103-416, 8 U.S.C. §1184(l), provides that a nonimmigrant physician may waive the two year foreign residence requirement in exchange for three years service in a designated health care shortage area. By fulfilling this requirement, the physician may obtain a change of status from J-1 to H-1B also. Recommendation for this waiver is performed by State departments of health. (SER 658.) Each State may recommend thirty physicians for purposes of this waiver each year. (Id.) The recommendation is required from the State as opposed to the local departments of health because the State is the best equipped to understand the needs of the State and the best to prevent an individual county or local department from usurping improperly the limited number of recommendations available under this program. (Id.) See 8 C.F.R. §212.7(c)(9)(i)(D); 22 C.F.R. §41.63.

§214.2(13)(iii); (15)(ii)(4)(B).[6]

O status is also a non-immigrant status. 8 U.S.C. §1101(a)(15)(O). O-1 status may be accorded to a physician of "extraordinary ability or achievement" who may perform services related to an event or events if petitioned for by an employer. 8 C.F.R. §214.2(o)(1). A requirement of the O classification is, again, the representation that the alien's stay will be temporary. Id. All physician plaintiffs are alleged to currently hold H-1B status.

D. STATEMENT OF FACTS

Eight alien doctors pursued this action in the district court. Mahesh Krishnamoorthy and Bogdan Nedelescu have voluntarily withdrawn from this appeal because their applications for adjustment of status to lawful permanent resident have been approved. (AOB 6, n. 2.) Additionally, the applications for adjustment of status to lawful permanent resident for Sandeep Jain and Muhammad Sattar were approved during the pendency of this appeal on October 22, 2004 and December 29, 2004,

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[6] There are some exceptions for aliens in H-1B status to remain beyond their sixth year if pursuing lawful permanent resident status. On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). One section of the new law amends §106(a) of the American Competitiveness in the Twenty-First Century Act ("AC21") and removes the six-year limitation on H-1B status for certain aliens on whose behalf an alien labor certification or employment-based immigrant petition has been pending for 365 days or longer.

respectfully. See Appellees' Motion to Supplement the Record, filed concurrently. The I-140 Immigrant Petition for Alien Worker and NIW request of Saravanan Kasthuri was denied on August 9, 2004 due to abandonment; Kasthuri failed to timely respond to a request for additional evidence. (Id.) There is no evidence that Kasthuri ever filed an application for adjustment of status. Accordingly, the claims of Jain, Sattar and Kasthuri are now moot. The only remaining plaintiffs-appellants are Stefan Schneider, Anwar Tandar and Komsu Mamuya.

1. Stefan Schneider

Stefan Schneider is a citizen and native of Germany who entered the United States in 1992 in non-immigrant J-1 status. (ER 84; SER 159-161.) See 8 U.S.C. §§1101(a)(15)(J), 1182(j). By law, Schneider made a commitment to return to the country of his nationality upon completion of his education or training. 8 U.S.C. §1182(j)(C).

A Petition for Nonimmigrant Worker (I-129) was filed on behalf of Schneider by Pro Health Inc., Long Beach, California. (ER 86.) The I-129 was approved and Schneider was granted a change of status to O-1 on June 29, 1998. (ER 86; SER 177.) An I-129 was again approved on July 26, 2000, July 23, 2001, and July 29, 2002, each extending Schneider's O-1 status. (ER 87, 88; SER 179-180, 207-209.)

On March 26, 2003, the CIS received Schneider's Application

to Waive the Foreign Residence Requirements (I-612), which was subsequently approved, thereby relieving Schneider of the requirement to return to his country in accordance with his prior J-1 status. (ER 89; SER 135, 188, 193.) Another I-129 Petition for Nonimmigrant Worker was filed on Schneider's behalf by Pro Health Inc., and both the Petition and the change of status to H-1B was approved on May 22, 2003. (ER 90; SER 128, 181.) The approval notice identifies Schneider's H-1B status as valid from June 28, 2003 through June 27, 2006. (ER 90; SER 663-664.)

On March 6, 2003 the CIS received an I-140 Immigrant Petition for Alien Worker and request for NIW on behalf of Schneider. (ER 91; SER 155, 159-161.) The Petition and the NIW were approved on June 26, 2003. (Id.) Thereafter, on August 25, 2003, Schneider submitted an I-485 Application to Adjust to Permanent Resident Status. The I-485 is currently pending. (ER 92; SER 122-127.)

2. Anwar Tandar

Anwar Tandar is a citizen and native of Indonesia. (SER 319.) An I-140 and NIW request was filed on behalf of Tandar on June 1, 1998. (SER 454, 556-558.) An agency request for additional evidence was made on November 5, 1998. (SER 485, 494, 582.) The I-140 and NIW request were denied on June 21, 1999, based upon Tandar's failure to file adequate evidence. (SER 534-535.) No administrative appeal was filed. A motion to reopen

was filed on August 13, 2000 and denied on November 17, 2000. (SER 447, 448.)

Tandar alleges that he is a physician who practiced medicine at Fallon Clinic in Worchester, Massachusetts from July 17, 2000 through June 20, 2003. Tandar was accorded H-1B status on June 6, 2000. (SER 326, 546, 639.) A second I-140 and NIW request was filed on behalf of Tandar on January 12, 2001. (SER 361, 408, 637.) The I-140 and NIW request were approved on September 11, 2001. (SER 362, 408-410, 637.) Tandar filed an I-485 on November 13, 2001, which remains pending. (SER 319-322, 363, 364, 638.)

3. Komsu Mamuya

Komsu Mamuya is a citizen and native of Tanzania. (SER 30.) Mamuya entered the United States as a student holding a non-immigrant visa, and was accorded H-1B status on March 3, 1997. SER 49.) An I-129 Petition for Nonimmigrant Worker, filed on his behalf by the Fallon Clinic, Worchester, Massachusetts, was approved and his H-1B status was extended on July 13, 1999. (SER 64.) His H-1B status was again extended on April 27, 2000 and October 27, 2001. (SER 39, 40.) An I-140 and NIW request were filed on behalf of Mamuya on March 19, 2001 and approved on September 8, 2001. (SER 63, 84-86.) Mamuya filed an I-485 application for adjustment of status on February 7, 2003. (SER 30-33.) The I-485 is currently pending.

IV. STANDARD OF REVIEW

This court may affirm the district court's judgment on any ground finding support in the record, "even if it relied on the wrong ground or reasoning." Moreland v. Las Vegas Metropolitan Police Department, 159 F.3d 365, 369 (9th Cir. 1998).

V. ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED THE ACTION BECAUSE THE NATIONAL INTEREST WAIVER REGULATIONS, WHICH PLAINTIFFS-APPELLANTS CHALLENGE, ARE REASONABLE AND IN ACCORDANCE WITH LAW.

Assuming arguendo that jurisdiction is exists, the regulations at issue are reasonable and in accordance with law.[7] The Attorney General is specifically charged with the administration and enforcement of the immigration laws. 8 U.S.C. § 1103(a)(1). Included within this broad grant of authority is the power to establish regulations and perform such other acts as the Attorney General deems necessary for administering and

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[7] The APA, 5 U.S.C. § 701, et seq., provides a limited waiver of sovereign immunity pursuant to which courts may review final agency action. It authorizes a reviewing court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The scope of judicial review under the APA standard is narrow, highly deferential, and presumes the agency action to be valid. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 419 (1971). Accordingly, the alien doctors must establish finality by exhausting administrative remedies through administrative appeal prior to judicial review, should the agency's decision on the application be adverse to the doctor, which they have not done. See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305, 1308 (9th Cir. 1984).

enforcing such laws. 8 U.S.C. § 1103(a)(3). The regulations provide the framework for enforcement of the immigration laws.

Judicial deference to the political branches of the government over immigration matters is well settled. See, e.g., INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"); Reno v. Flores, 507 U.S. 292, 305 (1993) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.") (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)). Indeed, the Supreme Court has declared that "over no conceivable subject is the legislative power of Congress more complete." Fiallo v. Bell, 430 U.S. 787, 792 (1977), quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).[8]

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[8] Schneider, Tandar and Mamuya seek to compel the approval of their applications for adjustment of status to that of lawful permanent resident. The status of an alien who has been inspected or paroled into the United States may be adjusted to that of lawful permanent resident by the Attorney General, "in his discretion," if the alien satisfies certain eligibility criteria. See 8 U.S.C. § 1255(a). "[A]djustment of status is a matter of grace, not right." Elkins v. Moreno, 435 U.S. 647, 667 (1978); Wing Ding Chan v. INS, 631 F.2d 978, 980 (D.C. Cir. 1978). Adjustment of status is a discretionary act entrusted to the Attorney General and the CIS by Congress. See 8 U.S.C. §1255(a); 8 C.F.R. §§2.1 (delegation of authority), 245.1 (eligibility for adjustment of status)(2001).

As the Supreme Court held in Chevron U.S.A. v. Natural Resources Defense Council, Inc. ("Chevron"), 467 U.S. 837 (1984):

> 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. 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. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843. In Chevron, the Supreme Court confirmed the obligation of the court to defer to agency construction regardless of whether the "agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the [reviewing] court would have reached if the question initially had arisen in a judicial proceeding." Id. at 843, n. 11. If the statute does not directly address the precise question at issue or "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." Id. at 843. If so, the court is obligated to defer to the agency construction.

Such deference should be given here. Each of alien practitioners' challenges to the regulation lacks merit. In each

instance, the regulation properly fills a gap left by Congress or illuminates an ambiguity in the statute itself. As demonstrated below, the agency's construction of the statute is reasonable and should be upheld.

1. The Definition Of A Physician Working In A Designated Shortage Area Is Proper.

The alien doctors challenge the agency's regulatory definition of those physicians eligible for a national interest waiver. Yet, all of the alien doctors have had their I-140s and NIW requests approved by the CIS, except for Kasthuri whose petition and NIW request were denied due to abandonment. Accordingly, all alien doctors lack standing to challenge the agency's regulation.

Nonetheless, the agency's definition is reasonable. The statute clearly references "physician[s] in an area or areas designated by the Secretary of Health and Human Services ("HHS") as having a shortage of health care professionals." The INA does not specifically define these words. Accordingly, as part of its legislative rulemaking, CIS consulted with and deferred to HHS' determinations that limit physicians in "designated shortage areas" to the practice of family or general medicine, pediatrics, general internal medicine, obstetrics and gynecology, and psychiatry. (SER 655.) It is imminently reasonable that CIS incorporated the HHS definitions in the Public Health Service Act

and the regulations thereto in the interim rule.[9] See 42 U.S.C. §254e; 42 C.F.R. Pt.5, App. A, C.[10] The regulation, 8 C.F.R. §204.12, pays proper deference to those medical specialties that HHS has designated are in short supply. Accordingly, the regulation is proper and should be upheld.[11]

2. Calculation Of Required Service Time Is Reasonable.

The alien doctors also challenge the manner in which the agency determines the qualifying service time. The alien doctors challenge the start date accepted by the agency, claiming that any time spent in the under-served area should count toward the service requirement. Indeed, plaintiffs appear to contend that Tandar, Schneider and Mamuya should all be immediately eligible for adjustment of status based upon prior employment. Plaintiffs are wrong. The agency construction is reasonable and should be

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[9] It is unreasonable to expect Congress or CIS to ignore the existing HHS definitions. When Congress legislates, Congress is presumed to know the existing law. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-5 (1988).

[10] A "health care shortage area" is defined as an area, urban or rural, in which the Secretary of HHS determines that there is a health manpower shortage. 42 U.S.C. §254e(a)(1); 42 C.F.R. Pt.5, App. A. In determining whether an area meets the criteria for designation, HHS looks to the delivery of medical care and counts the practitioners who provide direct patient care in four primary care specialities and mental health. 42 C.F.R. Pt.5, App. A, C. Those primary care specialties include general or family practice, general internal medicince, pediatrics and obstetrics and gynecology. 42 C.F.R. Pt.5, App. A, 3.

[11] Physicians serving at facilities operated by the VA are not limited by medical specialty. The VA may petition on behalf of alien physicians who practice in all fields of medicine.

upheld.

The statute states that the "Attorney General may not adjust the status of 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 a J-1." 8 U.S.C. §1153(b)(2)(B)(ii)(II). Congress did not identify start dates or the manner in which qualifying service time was to be counted. Nor did Congress define the word "aggregate." Accordingly, it is proper for the agency to fill in the gap by regulation, and it has properly done so here.

The statute is prospective in nature and states so explicitly. 8 U.S.C. §1153(b)(2)(A). The statute uses the present tense, looking to the physician's present agreement to work full time as a physician and not the physician's past employment. Specifically, the statute directs the granting of the NIW "if the alien physician agrees to work full time as a physician ..." 8 U.S.C. §1153(2)(B)(ii)(I).

In keeping with statutory intent, CIS regulations are designed to make available a NIW to those who actually serve in the national interest by providing, on a long-term basis, much-needed medical services to communities that have a current crisis in medical care, as determined by HHS' designations. (SER 653-

657.) The "start date" of the requisite period of service will depend on the alien's status and/or possession of an Employment Authorization Document ("EAD"). Contrary to plaintiffs' allegations, the alien's status and whether he is employment authorized are not irrelevant factors under immigration law. It is unlawful for any employer to employ an alien in the United States unless the alien is authorized to accept employment. 8 U.S.C. § 1324A(a)(1)(A). Most nonimmigrants are authorized pursuant to their status to be employed by a specific employer. If an alien who is in the United States as a nonimmigrant accepts unauthorized employment (i.e., employment other than the employment he or she is specifically authorized to hold), the unauthorized employment makes the alien subject to removal as a deportable alien. Id.; 8 U.S.C. §1227(a)(1)(C)(i); 8 C.F.R. §214.1(e). Such unauthorized employment may also render the alien ineligible for adjustment of status. 8 U.S.C. §1255(k). It would, therefore, clearly be contrary to law and public policy to permit the period of service to begin before the alien is authorized to accept the qualifying employment.

8 U.S.C. §1153(b)(2)(B)(ii)(II) specifically prohibits any time served in J-1 nonimmigrant status as counting towards the 5-year service requirement. Therefore, a physician in J-1 status who has an approved Form I-140 petition must file a Form I-485 Application to Register Permanent Residence or to Adjust Status

and a Form I-765 Employment Authorization Application, and await CIS approval of the I-765 - which leads to issuance of an EAD. Once the physician has received an EAD, he may use that document as evidence of his eligibility for employment. An alien who works pursuant to an EAD is not considered to be working pursuant to J-1 status. Of course, the requisite period of service does not commence until the alien with an EAD (formerly in J-1 status) actually begins working in the qualifying employment.

If the physician, other than one in J-1 status, already has authorization (in connection with their nonimmigrant status) to accept employment at the facility, the regulations contemplate that the six-year or four-year period during which the physician must provide the service begins on the date that CIS approves the I-140 petition and NIW request.

Of significance, with respect to alien physicians who have already obtained a waiver of the two-year foreign residence requirement under section 214(l) of the INA,[12] 8 U.S.C. §1184(l), CIS calculates the five-year or three-year period of service for the NIW beginning on the date the alien changed from J-1 to H-1B status. That is, an alien who is subject to the foreign

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[12] Section 214(l) of the INA, 8 U.S.C. §1184(l), provides a special waiver of the foreign residence requirement for alien physicians who are willing to work at VA facilities or HHS-designated under-served areas. Under section 214(l) three years service as an H-1B nonimmigrant is sufficient to obtain a waiver of the J-1 foreign residence requirement.

residence requirement will not be required to first serve for three years to obtain that waiver and then serve an additional five years to obtain adjustment of status based on the NIW. The date on which the five-year clock begins to run for this alien physician (including the plaintiffs) is the date on which the physician changed from J-1 to H-1B status.

Moreover, there is nothing to prevent a physician, even one that is not subject to the above exception, from filing the I-140 petition and NIW request immediately upon commencing services in a shortage area. Therefore, plaintiffs' claims that this requirement somehow extends the mandatory period of required service beyond reasonable expectations is inaccurate.

Within the realm of petitions and applications that may be filed with CIS in order to obtain a benefit under the INA, the majority of benefits are tied to the date on which the petition or application is approved, not the date on which the petition or application is filed. See, e.g., I-131 advanced parole, I-485 adjustment of status, I-765 employment authorization, and N-400 naturalization (SER 660-661.) Approval acknowledges that both parties linked to the petition (namely the petitioner and the beneficiary) are fully eligible for the benefit being sought. While the filing date of an employment-based immigrant petition and its associated labor certification establishes the priority date of eventual immigrant visa issuance, such priority dates are

meaningless unless petition is approved. Id. Similarly, an application to adjust an alien's status from that of nonimmigrant to immigrant, and interim benefit applications such as employment authorization and permission to travel filed therewith, are considered approved on the date of approved adjudications, not on the date the applications were filed. Id.

Lastly, plaintiffs fail to establish the time it takes for an I-140 petition to be approved is beyond reasonable, in light of the volume of filings received by CIS and the mandatory security checks that must be performed in connection with every application.

At the time the interim rule at issue went into effect, an alien became immediately eligible to file an I-485 application to adjust his or her status and an I-765 application for employment authorization upon approval of the I-140 petition. Current regulations provide for an even faster process towards obtaining an EAD, and CIS counts the requisite period of service performed by the alien granted an EAD on the day the alien begins working for the qualifying petitioner under the terms of that EAD.

On July 31, 2002, interim regulations amending 8 C.F.R. §245.2 went into effect. 67 Fed. Reg. 49561. Under the interim rule, an I-140 petition can be filed concurrently with an I-485 adjustment application. The filing of an adjustment application allows an alien to file an I-765 application for employment

authorization. An EAD card can be obtained, by law, within 90 days of filing an I-485 Application to Adjust Status together with an I-765 Application for Employment Authorization. 8 C.F.R. §274a.12(c)(9), (10); 8 C.F.R. § 274a.13(d). The result is that, with the advent of the "concurrent filing" interim rule, there is minimal delay between filing an I-140 /I-485/I-765 concurrent package and receipt of an EAD, which allows CIS to start counting time served towards the five or three-year service requirements.

The regulation, by placing time limitations on the period of years in which a physician may complete his medical service, defines the term "aggregate." By regulation, the agency requires that the required five years of full time medical service in a designated area be met within a six year period following approval of the petition and NIW. If the three-year service requirement applies, then the regulation requires that the medical service in a designated area be completed within four years of approval of the petition and NIW. Contrary to plaintiffs' claims, the regulation specifically recognizes that unforeseen events may arise which interrupt medical service, such as loss of employment, illness or pregnancy. Accordingly, the regulation provides the physician with an additional year within which to complete the required service. It is reasonable to assume that within one year, the physician can recover from any temporary interruption of their professional services. (SER 658-

659.)

To allow the physician to remain in the United States indefinitely without satisfying the service requirement is clearly contrary to the intent of the statute. It 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. Also, for public policy and national security concerns, CIS is not inclined to hold open immigrant visa petitions for years where the alien may be inadmissible and has no possibility of qualifying for adjustment of status to lawful permanent resident. Id. Therefore, as demonstrated above, the regulation at issue is a reasonable interpretation of the statute and should be upheld.

3. The Established Effective Dates Are Reasonable.

The statute states that the medical service requirements do not apply to applications for petitions and NIW approved prior to its enactment date, i.e., November 1, 1999. The statute also states that the service requirement for a petition and NIW filed prior to November 1, 1998, shall be an aggregate of three years service. The statute as written is silent on the petitions and NIWs filed prior to the enactment date and denied prior to the enactment date. The statute is similarly silent with regard to petitions pending as of the enactment date. Accordingly, it is

proper for the agency to fill these gaps by regulation and it has done so.

The agency regulation established an administrative method to implement the noted effective dates by providing guidance for each group of possible petitioners and beneficiaries. 8 CFR §204.12(d). A special rule applies if the alien physician is the beneficiary of an immigrant visa petition filed before November 1, 1998, but only if the visa petition remained pending before the INS (now CIS) or the courts on November 12, 1999, the date of enactment. In that case, all the other requirements apply but the alien physician may obtain permanent residence after only 3 years of qualifying service. This benefit is not available if a decision denying the visa petition became administratively final before that date, as was the case with Tandar.[13] The regulation also provides that the CIS will not entertain motions to reopen or reconsider a case that was filed before November 1, 1998 but finally denied prior to November 12, 1999 because the provisions of section 1153(b)(2)(B)(ii) were not in effect when those particular cases were denied. In this way, the agency promotes judicial efficiency and finality balanced against the availability of agency resources. (SER 659-660.)

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[13] Tandar's I-140 petition was denied on June 21, 1999 as a result of his failure to respond to a request for additional evidence. Tandar failed to file a new petition until January 12, 2001. Tandar had no petition pending on November 12, 1999.

Under established precedent, changes in laws apply to cases pending when the change occurs but not to cases that have already become final. See Ziffrin v. United States, 318 U.S. 73 (1943) (when a law is changed before a decision is handed down by an administrative agency, the agency must apply the new law). Furthermore, in order for an alien to receive a priority date, his or her petition must be fully approvable under the law that is in effect at the time of filing. See also 8 C.F.R. 103.2(b)(12)(a petitioner must establish eligibility for the benefit sought at the time the application or petition was filed). Accordingly, the regulation is reasonable and in accordance with law.

4. Tracking Compliance Is Reasonable.

The alien doctors complain that the requiring a physician to resubmit his I-140 and NIW in the event of relocation is in conflict with the statute. The statute requires that alien physician files a petition for preference classification. 8 U.S.C. §1153(2)(B)(ii)(I). The statute is silent as to how often such petition must be filed. It was not unreasonable for the agency to devise a method by which it tracks compliance. (SER 658-659.) If a physician relocates, the immediate questions are whether the physician is continuing to practice full time in a designated area. The answers to these questions are mandatory for maintenance of the benefit of the statute, i.e., the required

service in exchange for a waiver of the job offer/labor certification requirements. By refiling one's petition on relocation, these questions are answered for the agency. Moreover, the information provided allows the agency to confirm that the alien physician has the requisite approvals to continue to lawfully reside and work in the United States. In any event, there is no loss of service computation time upon the filing of subsequent petitions.[14] Thus, this requirement is reasonable.[15]

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[14] Further, this requirement appears to apply to only plaintiff Jain. As the administrative record makes clear, his medical service start date continues to be the date of the first approval and not the date of the subsequent petition approvals, thus, there is no loss of service computation time. Moreover, Jain's application for adjustment of status has been approved. Accordingly, there is no plaintiff to properly present this issue; it is moot.

[15] Plaintiffs argue that the rule is at odds with Section 106 of the American Competitiveness in the Twenty-First Century Act ("AC21"), Pub. L. No. 106-313, 8 U.S.C. § 1154(j). AC21 was passed in October 2000, subsequent to the issuance and effective dates of the rule at issue. Plaintiffs' argument that there is no need to file additional immigrant visa petitions when a petitioned employee changes employers or locations conveniently implies that such was permissible at the time of the interim rule. Instead, the INA and CIS regulations at the time the NIW physicians rule became effective specifically required a new I-140 to be filed in the event that the alien was no longer a proper beneficiary of an I-140 petition forming the basis for a pending adjustment of status application (such as in cases where the alien's prospective employer upon adjustment had changed). 8 U.S.C. §1255(a)(3), 8 C.F.R.§245.1(c)(4). If the regulation conflicts with a later enacted law, that law, in this case, AC21 controls. In any event, plaintiffs' claims are moot.

5. The Requirement Of An Attestation From A State Department Of Health Of Qualification As A Physician And National Interest Is Lawful.

Lastly, in the district court, the alien doctors claimed that the requirement that a State Department of Health attest to the individual physician's employment as within the public interest to be contrary to the statute.[16] Plaintiffs-appellants fail to address this issue in their opening brief. Accordingly, the alien doctors have waived this issue on appeal. Zukle v. Regents of Univ. of California, 166 F.3d 1042, 1045, n.10 (9th Cir. 1999).

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[16] Nonetheless, even if it had been properly raised, the requirement that the State Department of Health (and not State-created localized entities) provide an attestation for the alien physician is reasonable. The attestation provides an objective check on the physician's declaration of national interest by a central authority within each State that has oversight on physician licensure, physician/patient practice and the medical needs and resources of the State. (SER 657-658.)

VI. CONCLUSION

For the reasons stated herein, the judgment of the district court should be affirmed. The regulation at issue determined to be reasonable and in compliance with law.

Dated: January 18, 2005

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