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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 STEFAN SCHNEIDER, ET AL.,) No. CV 02-9228 DSF (JWJx)
12 Plaintiffs,)
13)
14 v.) Date: March 1, 2004
15 THOMAS J. RIDGE, Secretary of) Time: 1:30 p.m.
16 Homeland Security, EDUARDO) Courtroom: D, 8th Floor
AGUIRRE, JR., Acting Director of) 312 North Spring Street
17 the Bureau of Citizenship and) Los Angeles, CA 90012
18 BUREAU OF CITIZENSHIP AND) Honorable Dale S. Fischer
IMMIGRATION SERVICES,¹
19 Defendants.

20 DEFENDANTS' OPPOSITION TO PLAINTIFFS'

21 MOTION FOR SUMMARY JUDGMENT

22 [A Statement of Genuine Issues, Proposed Judgment and Certified
23 Administrative Records have been filed under separate cover]
24

25 ¹ On March 1, 2003, certain functions of the Immigration and Naturalization
26 Service ("INS") were transferred from the jurisdiction of the Attorney General to the
27 Secretary of Homeland Security and assigned to the Bureau of Immigration and Customs
28 Enforcement and the Bureau of Citizenship and Immigration Services. Homeland
Security Act, Pub. L.107-296, §451(b), 116 Stat. 2135, 2195 (2002) Pursuant to Rule
25(d) of the Federal Rules of Civil Procedure, the proper defendants are automatically
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1 Defendants Thomas J. Ridge, Secretary of Homeland Security, Eduardo
2 Aguirre, Jr., Acting Director of the Bureau of Citizenship and Immigration
3 Services (BCIS), and the BCIS, (hereinafter collectively referred to as "CIS"),
4 hereby oppose plaintiffs' motion for summary judgment.

5 INTRODUCTION

6 This is an immigration action wherein eight different plaintiffs, all alleged
7 to be physicians, claim, under varying theories, that their medical practice in
8 under-served areas entitles them to national interest waivers and adjustment of
9 status. Each physician plaintiff presents a unique factual history and accordingly,
10 each challenges the regulations supporting the national interest waiver in a
11 different manner. The plaintiffs are mis-joined. Moreover, the plaintiffs have
12 failed to demonstrate jurisdiction. Lastly, even if jurisdiction is established, the
13 regulations at issue are reasonable and should be upheld by this court.

14 THE STATUTORY FRAMEWORK

15 The Immigration and Nationality Act (INA), 8 U.S.C. §1101 et seq.,
16 governs the classification, admission, and authorized stay of non-immigrant and
17 immigrant aliens, including employment-based immigrant worker visa petitions
18 (EB immigrants).

19 1. Employment Based Immigrants

20 Section 203 of the INA provides for the allocation of preference visas for
21 both family and employment-based immigrants. The second preference
22 employment-based category (EB-2) allows for the immigration of aliens, such as
23 physicians, who are members of the professions holding advanced degrees or
24 aliens of exceptional ability. 8 U.S.C. §1153(b)(2). Immigration as an alien who is
25 a member of the professions holding advanced degrees or who has exceptional
26 ability is a multi-step process. The employer must file a petition seeking to
27 classify the prospective immigrant as a qualifying alien. 8 U.S.C. §1154(a)(1)(F);
28

1 8 C.F.R. §204.5(k). The petition must include a certification from the Department
2 of Labor that: (1) there are insufficient numbers of equally qualified domestic
3 workers; and (2) the employer's employment of the immigrant will not adversely
4 affect the wages and working conditions of similarly employed persons in the
5 United States. 8 U.S.C. § 1182(a)(5)(A) & (D); 8 C.F.R. § 204.5(k)(4).

6 Generally, obtaining the requisite certification by the Department of Labor may
7 take more than a year. See Declaration of Craig Howie ("CHD"), ¶¶ 4, 5, attached
8 hereto as Exhibit A.

9 2. National Interest Waivers

10 On November 12, 1999, the President approved enactment of the Nursing
11 Relief for Disadvantaged Areas Act of 1999, Public Law 106-95 (Nursing Relief
12 Act). Section 5 of the Nursing Relief Act amends section 203(b)(2) of the Act by
13 adding a new subparagraph (B)(ii). 8 U.S.C. §1153(b)(2)(B)(ii). The amendment
14 establishes special rules for requests for a national interest waiver that are filed by
15 or on behalf of physicians who are willing to work in an area or areas of the
16 United States designated by the Secretary of Health and Human Services (HHS) as
17 having a shortage of health care professionals or at facilities operated by the
18 Department of Veterans Affairs (VA). Under the Act as amended, the Attorney
19 General, now the Secretary of Homeland Security, may grant a national interest
20 waiver of the job offer requirement (i.e., certification by the Department of Labor)
21 to any alien physician who agrees to work full-time in a designated clinical
22 practice for the period fixed by statute. After the required period of service, the
23 physician alien may be eligible for adjustment of status.

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

25 (A) Visas shall be made available in a number not to exceed 28.6
26 percent of such worldwide level, plus any visas not required for the
27
28

1 classes specified in paragraph (1)², to qualified immigrants who are
2 members of the professions holding advanced degrees or their
3 equivalent or who because of their exceptional ability in the sciences,
4 arts, or business, will substantially benefit prospectively the national
5 economy, cultural or educational interests or welfare of the United
6 States and whose services in the sciences, arts, professions or
7 business are sought by an employer in the United States.

8 (B) Waiver of job offer

9 (i) National interest waiver

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

15 (ii) Physicians working in shortage areas or veterans facilities

16 (I) In general

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

21 (aa) the alien physician agrees to work full time as a physician
22 in an area or areas designated by the Secretary of Health and
23 Human Services as having a shortage of health care profession-
24 als or at a health care facility under the jurisdiction of the Secre-
25 tary of Veterans Affairs; and

26
27 ² 8 U.S.C. §1153(b)(1) "Priority workers."
28

1 (bb) a Federal agency or a department of public health in any
2 State has previously determined that the alien physician's work
3 in such an area or at such facility was in the public interest.

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

5 No permanent resident visa may be issued to an alien physician
6 described in subclause (I) by the Secretary of State under section
7 204(b), and the Attorney General may not adjust the status of such an
8 alien physician from that of a nonimmigrant alien to that of a
9 permanent resident alien under section 245, until such time as the
10 alien has worked full time as a physician for an aggregate of 5 years
11 (not including the time served in the status of an alien described in
12 section 101(a)(15)(J)), in an area or areas designated by the Secretary
13 of Health and Human Services as having a shortage of health care
14 professionals or at a health care facility under the jurisdiction of the
15 Secretary of Veterans Affairs.

16 * * * * *

17 The requirements of this subsection do not affect waivers on behalf of
18 alien physicians approved under subsection (b)(2)(B) of this section
19 before the enactment date of this subsection. In the case of a
20 physician for whom an application for waiver was filed under section
21 203(b)(2)(B) prior to November 1, 1998, the Attorney General shall
22 grant a national interest waiver pursuant to section 203(b)(2)(B)
23 except that the alien is required to have worked full time as a
24 physician for an aggregate of 3 years (not including time served in the
25 status of an alien described in section 101(a)(15)(J)) before a visa can
26 be issued to the alien under section 1154(b) of this title or the status
27 of the alien is adjusted to permanent resident under section 1255 of
28

1 this title. 8 U.S.C. §1153(b)(2)(B)(ii)(IV).

2 3. The Regulations

3 The interim rule was published in the Federal Register on September 6,
4 2000, became effective on October 6, 2000 and remains in effect. 65 Fed. Reg.
5 53889-53896. Accordingly, Title 8 of the Code of Federal Regulations was
6 amended to add §§204.12 and 245.18. The interim rule was necessary to codify
7 the provisions of Public Law 106-95 (Nursing Relief Act), and to put into place
8 eligibility rules and procedures for applicants and the agency to employ. CHD
9 ¶¶7-9. This interim rule establishes the procedure under which a physician who is
10 willing to practice full-time in a designated health professional shortage area or in
11 a Department of Veterans Affairs ("VA") facility may obtain a waiver of the job
12 offer requirement that applies to alien beneficiaries of second preference
13 employment-based immigrant visa petitions. Id. It further explains the
14 requirements the alien physician must meet in order to obtain approval of an
15 immigrant visa petition; and thereafter, approval of an application for adjustment
16 to lawful permanent residence status. CHD, ¶¶7-10.

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

1 Physicians in J status may seek a waiver of the 2-year foreign residence
2 requirement under 8 U.S.C. §1182(e) in exchange for the alien's agreement to
3 practice medicine full time for three years in a geographic area designated by the
4 Secretary of HHS as having a shortage of health care professionals. 8 U.S.C.
5 §1184(l)(Conrad Amendment).

6 H-1-B status is also a non-immigrant status. 8 U.S.C. §§
7 1101(a)(15)(H)(i)(b). H-1-B status may be accorded to a physician who may
8 engage in productive employment, but not to an alien physician seeking medical
9 education in the United States. Id. It allows for the physician to reside and work
10 lawfully in the United States for a limited period of time. The number of available
11 H-1-B non-immigrant visas is limited each calendar year. 8 U.S.C.

12 §1184(g)(1)(A). H-1-B status like the J-1 requires that the physician depart the
13 United States after the expiration of the approved period of H-1-B status. H-1B
14 status may not extend beyond six years. 8 U.S.C. §1184(g)(4); 8 C.F.R.
15 §214.2(13)(iii); (15)(ii)(4)(B).³

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

22
23
24 ³ There are some exceptions for alien in H-1B status to remain beyond their sixth
25 year if pursuing lawful permanent resident status. On November 2, 2002, President Bush
26 signed into law the Twenty-First Century Department of Justice Appropriations
27 Authorization Act (21st Century DOJ Appropriations Act). One section of the new law
28 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 (EB) immigrant petition has been
pending for 365 days or longer.

STATEMENT OF FACTS

1 1. Plaintiff Stefan Schneider

2 Plaintiff Stefan Schneider, the only plaintiff residing in California, is a
3 citizen and native of Germany. See I-129, Petition for Nonimmigrant Worker,
4 plaintiffs' motion (hereinafter "Mtn."), 74. Schneider entered the United States in
5 1992 in non-immigrant J-1 status. Mtn. 72. See 8 U.S.C. §§1101(a)(15)(J),
6 1182(j). By law, Schneider made a commitment to return to the country of his
7 nationality upon completion of his education or training. 8 U.S.C. §1182(j)(C).

8 A Petition for Nonimmigrant Worker (I-129) was filed on behalf of
9 Schneider by Pro Health Inc., Long Beach, California. Mtn. 74. The I-129 was
10 approved and Schneider was granted a change of status to O-1 on June 29, 1998.
11 Mtn. 72,74; SAR 63.⁴ An I-129 was again approved on July 26, 2000, July 23,
12 2001, and July 29, 2002, each extending Schneider's O-1 status. SAR 65-66, 93-
13 95.

14 On March 26, 2003, the CIS received Schneider's Application to Waive the
15 Foreign Residence Requirements (I-612). Mtn. 77. The I-612 was subsequently
16 approved, thereby relieving Schneider of the requirement to return to his country
17 in accordance with his prior J-1 status. SAR 21, 74, 79. Thereafter, another I-129
18 Petition for Nonimmigrant Worker was filed on Schneider's behalf by Pro Health
19 Inc. Mtn. 78. The Petition as well as a change of status to H-1B was approved on
20 May 22, 2003. SAR 14, 67. The approval notice identifies Schneider's H-1B
21 status as valid from June 28, 2003 through June 27, 2006. Id.; See Declaration of
22 Terry Demagde, attached hereto as Exhibit B.

23
24
25 ⁴ A certified copy of the administrative record for Schneider has been filed under
26 separate cover. Reference to the record will be designated "SAR" followed by the page
27 as follows: Anwar Tandar shall be "TAR," Komsu Mamuya "MAR," Muhammad Aijaz
28 Sattar "SAAR," Sandeep Harbans Jain "JAR," Mahesh Krishnamoorthy "KAR,"
Saravanan Kasthuri "KAAR," and Bogdan Nedelescu "NAR."

1 On March 6, 2003 the CIS received an I-140 Immigrant Petition for Alien
2 Worker and request for National Interest Waiver ("NIW") on behalf of Schneider.
3 SAR 41, 45-47. The Petition and the NIW were approved on June 26, 2003. Id.
4 Thereafter, on August 25, 2003, Schneider submitted an I-485 Application to
5 Adjust to Permanent Resident Status. The I-485 is currently pending. SAR 8-13.

6 2. Plaintiff Anwar Tandar

7 Plaintiff Anwar Tandar is a citizen and native of Indonesia. TAR 6. An I-
8 140 and NIW request was filed on behalf of Tandar on June 1, 1998. TAR 141,
9 243-245. An agency request for additional evidence was made on November 5,
10 1998. TAR 172, 181, 269. The I-140 and NIW request were denied on June 21,
11 1999, based upon Tandar's failure to file adequate evidence. TAR 221-222. No
12 administrative appeal was filed. A motion to reopen was filed on August 13, 2000
13 and denied on November 17, 2000. TAR 134, 135.

14 Tandar alleges that he is a physician who practiced medicine at Fallon
15 Clinic in Worcester, Massachusetts from July 17, 2000 through June 20, 2003.
16 Tandar was accorded H-1B status on June 6, 2000. TAR 13, 233, 326. A second
17 I-140 and NIW request was filed on behalf of Tandar on January 12, 2001. TAR
18 48, 95, 324. The I-140 and NIW request were approved on September 11, 2001.
19 TAR 49, 95-97, 324. Tandar filed an I-485 on November 13, 2001, which remains
20 pending. TAR 6-9, 50, 51, 325.

21 3. Plaintiff Komsu Mamuya

22 Plaintiff Komsu Mamuya is a citizen and native of Tanzania. MAR 6.
23 Mamuya entered the United States as a student holding a nonimmigrant visa. Mtn.
24 81. Mamuya was accorded H-1B status on March 3, 1997. MAR 25. An I-129
25 Petition for Nonimmigrant Worker, filed on his behalf by the Fallon Clinic,
26 Worcester, Massachusetts, was approved and his H-1B status was extended on
27 July 13, 1999. MAR 40. His H-1B status was again extended on April 27, 2000
28

1 and October 27, 2001. MAR 15, 16. An I-140 and NIW request were filed on
2 behalf of Mamuya on March 19, 2001 and approved on September 8, 2001. MAR
3 39, 60-62. Mamuya filed an I-485 application for adjustment of status on
4 February 7, 2003. MAR 6-9. The I-485 is currently pending.

5 4. Plaintiff Muhammad Sattar

6 Plaintiff Muhammad Sattar is a citizen and native of Pakistan. SAAR 2.
7 Sattar entered the United States in J-1 nonimmigrant status. Mtn. 36-7. He
8 alleges that he is employed as a primary care physician by the Choctaw Nation
9 Indian Hospital in Talihina, Oklahoma. Mtn.37. Sattar's medical service to the
10 Choctaw Nation is identified in a letter from the Indian Health Service, a
11 component of the United States Public Health Service. Mtn. 52.

12 Sattar's I-612 Application to Waive the Foreign Residence Requirements
13 appears to have been approved on March 6, 1996. Mtn. 42. An I-129 Petition for
14 Nonimmigrant Worker, filed by the Cherokee Nation on behalf of Sattar appears
15 to have been approved and H-1B status accorded on July 23, 1996. Mtn. 39.
16 Sattar alleges that the Cherokee Nation breached their employment contract. Mtn.
17 37. An I-129 Petition, filed by the Choctaw Nation on behalf of Sattar, appears to
18 have been approved and H-1B status extended on May 28, 1997. Mtn. 40.

19 Sattar filed an I-140 Immigrant Petition for Alien Worker and NIW request
20 on January 14, 1998, which was denied on January 11, 1999, after Sattar and his
21 lawyer at that time both failed to respond to an agency request for additional
22 information. Mtn. 45-48. There is no evidence that an administrative appeal of
23 the denial was ever filed.

24 Sattar filed a second I-140 and NIW request on November 20, 2002, which
25 was approved on October 15, 2003. SAAR 2-4; Mtn. 49; See Declaration of
26 Ernestine Leslie attached hereto as Exhibit C. Sattar appears to have filed an I-
27 485 application to adjust status on November 22, 2002, which remains pending.
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Mtn. 50.

1 5. Plaintiff Sandeep Harbans Jain

2 Plaintiff Sandeep Harbans Jain is a citizen and native of India. JAR 5, 23.
3 Jain alleges that he is a physician practicing medicine at the Metropolitan Hospital
4 in East Harlem, New York. He was accorded F-1 non-immigrant status on
5 November 25, 1991. JAR 26. An I-129 Petition for Nonimmigrant Worker, filed
6 on his behalf, was approved and he was accorded H-1B nonimmigrant status on
7 June 27, 1994. JAR 83, 239. His H-1B nonimmigrant status was extended on
8 May 18, 1995 (JAR 82, 238), again on February 26, 1996 (JAR 81, 237), and
9 again on May 15, 1997 (JAR 80, 236). An I-129 Petition was approved based
10 upon a change in conditions of employment on July 22, 1998. JAR 79, 294.

11 On January 16, 1998, an I-140 Immigrant Petition for Alien Worker and
12 NIW request were filed on behalf of Jain. JAR 94-96. A request for evidence was
13 issued by the agency on March 19, 1998. JAR 170. The Petition was denied on
14 June 18, 1998 because Jain was a medical resident and not licensed as a physician
15 by the State of New York. JAR 153. An appeal was filed on July 17, 1998 and
16 the matter was remanded on April 6, 1999 for NIW eligibility. JAR 152, 143-146.
17 Another request for evidence ("RFE") was issued by the agency on May 12, 1999,
18 and the Petition was again denied for failure to respond to the RFE on August 20,
19 1999. JAR 141-142. The agency certified the case to the Office of Administrative
20 Appeals and it was remanded again on October 11, 2000 for consideration under
21 the Nursing Relief Act. JAR 135, 136, 137-140. Another RFE was issued on
22 December 12, 2000 (JAR 101-102), and the Petition and NIW request were
23 approved on July 12, 2001. JAR 94.

24 During this time, another I-140 and NIW request was filed on behalf of Jain
25 on August 24, 1998. JAR 194-195. The agency issued an RFE on January 15,
26 1999, to which Jain failed to respond and the second Petition was denied. JAR
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1 190, 189. A third I-140 and NIW request were filed on behalf of Jain on February
2, 2001, and approved on July 12, 2001. JAR 257.

2 Jain filed an I-485 application for adjustment of status on September 25,
3 2001. JAR 5-9. The I-485 is currently pending.

4 6. Plaintiff Mahesh Krishnamoorthy

5 Plaintiff Mahesh Krishnamoorthy is a citizen and native of India. KAR 3-6.
6 He was accorded F-1 status on March 17, 1994. KAR 20. He alleges that he was
7 accorded H-1B status on June 23, 1995. Mtn. 91. An I-129 Petition for
8 Nonimmigrant Worker, filed on his behalf, was approved and H-1B status was
9 extended on November 24, 1998. KAR 18, 95, 98.

10 Krishnamoorthy alleges that he is a physician currently practicing medicine
11 at Tri-County Medical Center in Franklin County, Georgia. Mtn. 91.

12 Krishnamoorthy filed an I-140 Immigrant Petition for Alien Worker and NIW
13 request on March 14, 2000. KAR 34, 40-41. A request for additional evidence in
14 support of the petition was issued by the agency on November 11, 2000. KAR 44,
15 51. The I-140 and the NIW request were approved on April 3, 2001. KAR 34, 40-
16 41. Krishnamoorthy filed an I-485 application for adjustment of status on July 26,
17 2001. KAR 3-6. The I-485 is currently pending.

18 7. Plaintiff Saravanan Kasthuri

19 Plaintiff Saravanan Kasthuri is a citizen and native of India. KAAR 3. He
20 alleges that he was admitted to the United States on June 30, 1995 in J-1
21 nonimmigrant status. Mtn. 107. An I-129 Petition for Nonimmigrant Worker
22 filed on his behalf by Pacific Medical Imaging on October 16, 2000, was approved
23 and H-1B status accorded on December 4, 2000. KAAR 67. Kasthuri alleges that
24 he did not begin employment with his sponsoring employer until June 23, 2001.
25 Mtn. 107. An I-129 filed on his behalf by Columbia Basin Imaging was approved
26 and his H-1B status extended on February 19, 2003. KAAR 66. Kasthuri alleges
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1 that he is a radiologist working at Richland, Washington. An I-140 Immigrant
2 Petition for Alien Worker and NIW request was filed by Kasthuri on March 31,
3 2003 and remains pending. KAAR 3-5. The agency has no record of Kasthuri
4 ever having filed an I-485 application for adjustment of status.

5 8. Plaintiff Bogdan Nedelescu

6 Plaintiff Bogdan Nedelescu is a citizen and native of Romania. NAR 4, 11.
7 He was accorded B-1 nonimmigrant status on February 5, 1996. NAR 14. His B-1
8 nonimmigrant status was extended in March 1997. NAR 15. An I-129 Petition
9 for Nonimmigrant Worker, filed on his behalf by Saint Vincent Hospital on April
10 30, 1998, was approved on September 24, 1998. NAR 50, 85. An I-129 filed by
11 Worcester Internal Medicine on May 9, 2001 on behalf of Nedelescu, was
12 approved and his H-1B status was extended on June 26, 2001. NAR 49, 51, 84.

13 Nedelescu alleges that he is a physician currently employed by Worcester
14 Internal Medicine in Worcester, Massachusetts. Mtn. 99. An I-140 Immigrant
15 Petition for Alien Worker and NIW request was filed on behalf of Nedelescu on
16 June 25, 2002. NAR 52. A request for additional evidence in support of the
17 petition was issued by the agency on June 25, 2003. NAR 110. The I-140 and the
18 NIW request were approved on October 21, 2003. NAR 56-58; Declaration of
19 Paul M. Tierney, attached hereto as Exhibit D. Nedelescu filed an I-485
20 application for adjustment of status on November 12, 2002. NAR 4-7. The I-485
21 is currently pending.

22 III. ARGUMENT

23 A. PLAINTIFFS HAVE FAILED TO ESTABLISH JURISDICTION

24 It is axiomatic that "the United States, as sovereign, is immune from suit
25 save as it consents to be sued, . . . and terms of its consent to be sued in any court
26 define that court's jurisdiction to entertain the suit." Lehman v. Nakshian, 453
27 U.S. 156, 160, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981), quoting United States v.
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1 Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). The party
2 seeking to invoke the jurisdiction of the federal court bears the burden of
3 establishing that jurisdiction exists. See Data Disc., Inc. v. Systems Tech. Assoc.,
4 Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). Rano v. Sipa Press, Inc., 987 F.2d 580,
5 587 (9th Cir. 1993).

6 Because there is no presumption in favor of federal court jurisdiction and
7 that jurisdiction is limited, the basis for such jurisdiction must be affirmatively
8 shown. Kirkland Masonry Inc. v. Commissioner of Internal Revenue Service, 614
9 F.2d 532, 533 (5th Cir. 1990); Fed.R.Civ.P. 8(a). The burden of establishing
10 jurisdiction lies with the plaintiffs and must appear on the face of the complaint.
11 See Tavoulaareas v. Comnas, 720 F.2d 192, 195 (D.C. Cir. 1983).

12 In the instant case, plaintiffs cannot establish that this Court has jurisdiction
13 to issue the requested relief. Plaintiffs do not identify any waiver of sovereign
14 immunity which explicitly grants the district court jurisdiction to order the CIS to
15 grant the plaintiffs' visa petitions or to compel the CIS to adjudicate and to
16 approve plaintiffs' applications to adjust status, the ultimate relief sought by all
17 plaintiffs. Instead, plaintiff attempts to rely upon statutes such as 28 U.S.C. §1331
18 which generally authorize actions or forms of relief in the district court. 28 U.S.C.
19 §1331 is a grant of federal question jurisdiction to the district courts in private
20 actions and not a waiver of the sovereign immunity of the United States and its
21 agencies. See A.L. Rowan & Son, General Contractors Inc. v. Dep't of Housing
22 and Urban Development et al., ~~611 F.2d 997~~, 1000 (5th Cir. 1980); Anderson v.
23 United States, 229 F.2d 675 (5th Cir. 1956). Accordingly, plaintiffs' motion and
24 this action must fail.

25 B. THE COURT LACKS JURISDICTION IN THE NATURE
26 OF MANDAMUS.

27 28 U.S.C. §1361, cited by plaintiffs, provides that "the district courts shall
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1 have original jurisdiction of any action in the nature of mandamus to compel an
2 officer or employee of the United States or any agency thereof to perform a duty
3 owed to the plaintiff.” Section 1361 does not provide an independent
4 jurisdictional basis to compel an agency to adjudicate an application. See
5 Starbuck v. City and County of San Francisco, 556 F.2d 450, 459 n.18 (9th Cir.
6 1977)(28 U.S.C. 1361 “does not provide an independent ground for jurisdiction”).
7 Rather, section 1361 “supplies a permissible remedy in actions otherwise properly
8 brought on independent jurisdictional grounds.” Craig v. Colburn, 414 F. Supp.
9 185, 193, aff’d 570 F.2d 916 (10th Cir. 1978) (emphasis added). Section 1361
10 does not constitute a waiver of sovereign immunity. White v. Administrator of
11 General Services Administration, 343 F.2d 444 (9th Cir. 1965). Section 1361
12 does not create new liabilities or new causes of action against the United States
13 Government nor does it give access to federal courts for actions which could not
14 have been brought against a federal official prior to its enactment. See Seebach v.
15 Cullen, 224 F.Supp. 15, 17 (N.D.Calif. 1963), aff’d, 338 F.2d 633 (9th Cir.), cert.
16 denied, 380 U.S. 972 (1965).

17 Moreover, courts have consistently recognized that "the remedy of
18 mandamus is a drastic one, to be invoked only in extraordinary situations." Allied
19 Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 66 L.Ed.2d 193
20 (1980). To obtain an order of mandamus, a petitioner must establish: (1) a clear
21 right to the relief, (2) a clear duty by the respondent to do the act requested, and
22 (3) the lack of any other adequate remedy. See Guerrero v. Clinton, 157 F.3d
23 1190, 1197 (9th Cir. 1998). Mandamus relief against officers and employees of
24 the United States is available only when the defendant official or agency owes a
25 specific duty to the plaintiff, which is plainly defined, non-discretionary, free from
26 doubt, and “purely ministerial.” See Pittston Coal Group v. Sebben, 488 U.S. 105,
27 121, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988); Tucson Airport Authority v. General
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1 Dynamics Corporation, 136 F.3d 641, 646 (9th Cir. 1998). Mandamus cannot be
2 used to compel or control an act which, by law, is discretionary. See Nova
3 Stylings Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983). Nor does mandamus
4 lie to review the discretionary acts of government officials. Id. at 1180.
5 “[M]andamus is an inappropriate remedy with regard’ to non-consular officials,
6 whose duties were discretionary.” Luo v. Coultice, 178 F.Supp.2d 1135, 1139-40
7 (C.D.Cal. 2001), quoting Patel v. Reno, 134 F.3d 929, 933 (9th Cir. 1997)(as
8 amended).

9 Plaintiffs seek to compel the approval of their applications for adjustment of
10 status to that of lawful permanent resident. The status of an alien who has been
11 inspected or paroled into the United States may be adjusted to that of lawful
12 permanent resident by the Attorney General, "in his discretion," if the alien
13 satisfies certain eligibility criteria. See 8 U.S.C. § 1255(a). "[A]djustment of
14 status is a matter of grace, not right." Elkins v. Moreno, 435 U.S. 647, 667, 98
15 S.Ct. 1338, 55 L.Ed.2d 614 (1978); Wing Ding Chan v. INS, 631 F.2d 978, 980
16 (D.C. Cir. 1978). Adjustment of status is a discretionary act entrusted to the
17 Attorney General and the CIS by Congress. See 8 U.S.C. §1255(a); 8 C.F.R.
18 §§2.1 (delegation of authority), 245.1 (eligibility for adjustment of status)(2001).
19 Adjustment of status is not a purely ministerial act. It involves the exercise of
20 Executive discretion. The Court lacks jurisdiction to compel such action.

21 C. PLAINTIFFS FAIL TO ESTABLISH JURISDICTION
22 UNDER THE DECLARATORY JUDGMENT ACT
23 OR THE ALL WRITS ACT

24 Plaintiffs also attempt to base jurisdiction on the Declaratory Judgment Act,
25 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. §1651. Neither statute confers
26 jurisdiction on the federal courts. See Syngenta Crop Protection Inc. v. Henson,
27 537 U.S. 28, 29, 123 S.Ct. 366, 368, 154 L.Ed.2d 368 (2002)(All Writs Act does
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1 not confer jurisdiction on the federal courts); Skelly Oil Co. v. Phillips Petroleum
2 Co., 339 U.S. 667, 671-72, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)(Declaratory
3 Judgment Act does not confer subject matter jurisdiction). Plaintiffs must first
4 establish jurisdiction under an independent basis to avail themselves of declaratory
5 relief. Id.; see also Seibert v. Baptist, 594 F.2d 423, 428 (5th Cir. 1979)
6 (Declaratory judgment statute does not establish an independent basis for federal
7 jurisdiction, but only establishes a separate remedy available in cases where
8 jurisdiction otherwise exists). Accordingly, plaintiffs have failed to plead and
9 establish a basis for the Court's jurisdiction.

10 **D. THE PLAINTIFFS ARE NOT PROPERLY JOINED**

11 The plaintiffs are not properly joined and their claims should be severed.
12 Rule 20(a) of the Federal Rules of Civil Procedure permits the joinder of plaintiffs
13 in one action if: (1) the plaintiffs assert any right to relief arising out of the same
14 transaction, occurrence, or series of transactions or occurrences; and (2) there are
15 common questions of law or fact. In the instant action, each plaintiff presents
16 different questions regarding length of service, type of service, qualifications and
17 prior administrative filings and rulings. The plaintiffs were admitted to the United
18 States at different times in different non-immigrant statuses. Each practices
19 medicine in different medical specialties at different institutions in different cities.
20 Each plaintiff presents a different factual situation, and each has an independent
21 immigration procedural history. Each has filed various applications and petitions
22 at different times with different agency Service Centers, and each plaintiff has
23 waited different lengths of time for administrative processing of said applications
24 and petitions. Agency decisions regarding each plaintiff's applications and
25 petitions will be personalized, dependant upon the unique set of facts presented by
26 that plaintiff alone. Plaintiffs' claims do not arise out of the same transaction or
27 occurrence and should not be joined. Moreover, while Rule 20 is designed to
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1 promote judicial economy, and reduce inconvenience, delay, and added expense,
2 here trial efficiency will not be promoted by allowing all Plaintiffs to bring a
3 single case. Each claim raises potentially different issues, and must be viewed in a
4 separate and individual light by the Court. See Coughlin v. Rogers, 130 F.3d
5 1348, 1351 (9th Cir. 1997). Moreover, severing plaintiffs will not prejudice any
6 substantial right. Accordingly, this Court should deny plaintiffs' motion and sever
7 the action.

8 F. PLAINTIFFS CLAIMS ARE NOT SUBJECT TO JUDICIAL
9 REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

10 The Administrative Procedures Act ("APA"), 5 U.S.C. § 701, et seq.,
11 authorizes a reviewing court to set aside final agency action that is "arbitrary,
12 capricious, an abuse of discretion, or otherwise not in accordance with law." 5
13 U.S.C. §706(2)(A).⁵ The scope of judicial review under the APA standard is
14 narrow, highly deferential, and presumes the agency action to be valid. Citizens to
15 Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 419, 28 L.Ed.2d 814, 91 S.Ct.
16 814 (1971). See Western Radio Services Co., Inc. v. Espy, 79 F.3d 896, 900 (9th
17 Cir. 1996). A district court reviewing an administrative decision under the APA
18 shall hold unlawful and set aside agency action, findings, and conclusions found to
19 be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
20 with law." 5 U.S.C. § 706(2)(A). This is a deferential standard, under which a
21 district court will reverse the agency's decision only if it violated the law or
22 committed a clear error in judgment. See Bowman Transportation, Inc. v.
23 Arkansas-Best Freight System, Inc., 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d
24 447 (1974); see also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d
25 1305, 1308 (9th Cir. 1984). The court cannot substitute its own judgment for that

26 _____
27 *⁵ The APA is not a grant of subject matter jurisdiction in the federal courts.
28 Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977).

1 of the agency. Bowman Transportation, 419 U.S. at 442, quoting Citizens to
2 Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136
3 (1971).

4 The APA provides a limited waiver of sovereign immunity pursuant to
5 which courts may review final agency action.⁶ However, there is no final agency
6 action here. Seven of the eight plaintiff physicians have approved I-140s and
7 NIWs and are awaiting decisions on their application for adjustment of status.
8 Only one physician plaintiff, Kasthuri, is waiting on a decision on his I-140 and
9 his NIW. The responsible Service Center is processing Kasthuri's petition and
10 sent a request for additional evidence in January, 2004. See Exhibit E attached
11 hereto. His Petition like any other is processed in chronological order, a
12 reasonable and fair method.⁷ Once the decision is made on Kasthuri's I-140, he
13 may seek appeal to the Office of Administrative Appeals, and thereafter, review in
14 the courts may be appropriate under the deferential standard provided by the
15 APA.⁸ See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305, 1308
16 (9th Cir. 1984). Accordingly there is no final agency action. The court lacks
17 jurisdiction in the instant case and plaintiff's motion should be denied.

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19 ⁶ The APA also authorizes a reviewing court to "compel agency action
20 unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "Courts have
21 permitted jurisdiction under [§ 706(1)'s] limited exception to the finality doctrine
22 only when there has been a genuine failure to act." Ecology Center, Inc. v. United
23 States Forest Service, 192 F.3d 922, 926 (9th Cir. 1999). However, a claim of
24 unreasonable delay requires that the agency have a duty to act. See
25 Madison-Hughes v. Shalala, 80 F.3d 1121, 1124-25 (6th Cir. 1996); see also
26 Brower v. Evans, 257 F.3d 1058, 1067-68 (9th Cir. 2001) (considering claim of
27 unreasonable delay only after concluding that Secretary of Commerce had duty to
28 act).

24 ⁷ Petitions and Applications are processed in chronological order. See
25 Declarations of Ernestine Leslie, Nancy Janson, Marvin Estes and Ruth Sterns attached
26 hereto as Exhibits F, G, H, and I, respectively.

26 ⁸ Similarly, the other plaintiffs awaiting decisions on their I-485 applications must
27 exhaust administrative remedies by seeking administrative appeal prior to judicial review,
28 should the agency decision on the application be adverse to the plaintiff.

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G. THE REGULATION AT ISSUE IS REASONABLE AND
IN ACCORDANCE WITH LAW.

Assuming arguendo that jurisdiction is established, the regulation at issue is reasonable and in accordance with law. 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 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, 119 S.Ct. 1439, 143 L.Ed.2d 590 (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, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (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, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (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, 97 S.Ct. 1473, 1487, 52 L.Ed.2d 50 (1977), quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339, 29 S.Ct. 671, 676, 53 L.Ed. 1013 (1909).

As the Supreme Court held in Chevron U.S.A. v. Natural Resources Defense Council, Inc. (“Chevron”), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984):

The power of an administrative agency to administer a

1 congressionally created ... program necessarily requires the
2 formulation of policy and the making of rules to fill any gap left,
3 implicitly or explicitly, by Congress. If Congress has explicitly left a
4 gap for the agency to fill, there is an express delegation of authority
5 to the agency to elucidate a specific provision of the statute by
6 regulation. Such legislative regulations are given controlling weight
7 unless they are arbitrary, capricious, or manifestly contrary to the
8 statute. Sometimes the legislative delegation to an agency on a
9 particular question is implicit rather than explicit. In such a case, a
10 court may not substitute its own construction of a statutory provision
11 for a reasonable interpretation made by the administrator of an
12 agency.

13 Chevron, 467 U.S. at 843. In Chevron, the Supreme Court confirmed the
14 obligation of the court to defer to agency construction regardless of whether the
15 “agency construction was the only one it permissibly could have adopted to
16 uphold the construction, or even the reading the [reviewing] court would have
17 reached if the question initially had arisen in a judicial proceeding.” Id. at 843, n.
18 11. If the statute does not directly address the precise question at issue or “if the
19 statute is silent or ambiguous with respect to the specific issue, the question for the
20 court is whether the agency's answer is based on a permissible construction of the
21 statute.” Id. at 843. If so, the court is obligated to defer to the agency
22 construction. Such is the case here.

23 Each of plaintiffs’ challenges to the regulation lacks merit. In each instance,
24 the regulation properly fills a gap left by Congress or illuminates an ambiguity in
25 the statute itself. As demonstrated below, the agency’s construction of the statute
26 is reasonable and should be upheld.
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1. A Physician Working In A Designated Shortage Area

Plaintiffs challenge the agency's construction of those physicians eligible for a national interest waiver. Yet all plaintiffs, except Kasthuri, have had their NIW approved by the CIS. Accordingly, all other plaintiffs lack standing to challenge the definition assigned to the phrase "physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals."

Plaintiffs' reading of the statute ignores the very words of the statute. 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. CHD ¶8. CIS acted reasonably by incorporating 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

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⁹ When congress legislates, congress is presumed to know the law. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-5, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988).

¹⁰ A "health care shortage area" is defined as an area, urban or rural, in which the Secretary of Health and Human Services ("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 medicine, pediatrics and obstetrics and gynecology. 42 C.F.R. Pt.5, App. A, 3.

1 regulation is proper and should be upheld.¹¹

2 2. Calculation of Required Service

3 Plaintiffs also challenge the manner in which the agency determines the
4 qualifying service time. Plaintiffs challenge the start date accepted by the agency,
5 claiming that any time spent in the underserved area should count toward the
6 service requirement. Indeed, plaintiffs appear to contend that Tandar, Jain,
7 Schneider, Mamuya, Krishnamoorthy and Nedelescu should all be immediately
8 eligible for adjustment of status based upon prior employment. Plaintiffs are
9 wrong. The agency construction is reasonable and should be upheld.

10 The statute states that the "Attorney General may not adjust the status of an
11 alien physician from that of a nonimmigrant alien to that of a permanent resident
12 alien under section 1255 of this title until such time as the alien has worked full
13 time as a physician for an aggregate of 5 years not including the time served in the
14 status of a J-1." 8 U.S.C. §1153(b)(2)(B)(ii)(II). Congress did not identify start
15 dates or the manner in which qualifying service time was to be counted. Nor did
16 Congress define the word "aggregate" Accordingly, it is proper for the agency to
17 fill in the gap by regulation, and it has properly done so here.

18 The statute is prospective in nature and states so explicitly. 8 U.S.C.
19 §1153(b)(2)(A). The statute uses the present tense, looking to the physician's
20 present agreement to work full time as a physician and not the physician's past
21 employment. Specifically, the statute directs the granting of the NIW "if the alien
22 physician agrees to work full time as a physician ..." 8 U.S.C. §1153(2)(B)(ii)(I).
23 In keeping with statutory intent, CIS regulations are designed to make available a
24 national interest waiver to those who actually serve in the national interest by
25 providing, on a long-term basis, much-needed medical services to communities

26 ¹¹ In contrast, physicians serving at facilities operated by the United States
27 Department of Veterans Affairs ("VA") are not limited by medical specialty. The VA
28 may petition on behalf of alien physicians who practice in all fields of medicine.

1 that have a current crisis in medical care, as determined by HHS' designations.
2 CHD ¶¶ 6-9. The "start date" of the requisite period of service will depend on the
3 alien's status and/or possession of an Employment Authorization Document
4 (EAD). Contrary to plaintiffs' allegations, the alien's status and whether he is
5 employment authorized are not irrelevant factors under immigration law. It is
6 unlawful for any employer to employ an alien in the United States unless the alien
7 is authorized to accept employment. 8 U.S.C. § 1324A(a)(1)(A). Most non-
8 immigrants are authorized pursuant to their status to be employed by a specific
9 employer. If an alien who is in the United States as a nonimmigrant accepts
10 unauthorized employment (i.e., employment other than the employment he or she
11 is specifically authorized to hold), the unauthorized employment makes the alien
12 subject to removal as a deportable alien. *Id.*, 8 U.S.C. §1227(a)(1)(C)(i); 8 C.F.R.
13 § 214.1(e). Such unauthorized employment may also render the alien ineligible
14 for adjustment of status. 8 U.S.C. §1255(k); INA 245(k). It would, therefore,
15 clearly be contrary to law and public policy to permit the period of service to begin
16 before the alien is authorized to accept the qualifying employment.

17 8 U.S.C. §1153(b)(2)(B)(ii)(II) specifically prohibits any time served in J-1
18 nonimmigrant status as counting towards the 5-year service requirement.
19 Therefore, a physician in J-1 status who has an approved Form I-140 petition must
20 file a Form I-485 Application to Register Permanent Residence or to Adjust Status
21 and a Form I-765 Employment Authorization Application, and await CIS approval
22 of the I-765 - which leads to issuance of an EAD. Once the physician has received
23 an EAD, he may use that document as evidence of his eligibility for employment.
24 An alien who works pursuant to an EAD is not considered to be working pursuant
25 to J-1 status. Of course, the requisite period of service does not commence until
26 the alien with an EAD (formerly in J-1 status) actually begins working in the
27 qualifying employment.
28

1 If the physician, other than one in J-1 status, already has authorization (in
2 connection with their non-immigrant status) to accept employment at the facility,
3 the regulations contemplate that the six-year or four-year period during which the
4 physician must provide the service begins on the date that CIS approves the I-140
5 petition and NIW request. There is nothing to prevent a physician from filing the
6 I-140 petition and NIW request immediately upon commencing services in a
7 shortage area. Therefore, plaintiffs' claims that this requirement somehow extends
8 the mandatory period of required service beyond reasonable expectations is
9 inaccurate. Within the realm of petitions and applications that may be filed with
10 CIS in order to obtain a benefit under the INA, the majority of benefits are tied to
11 the date on which the petition or application is approved, not the date on which the
12 petition or application is filed. See, e.g., I-131 advanced parole, I-485 adjustment
13 of status, I-765 employment authorization, and N-400 naturalization; CHD ¶14.
14 Approval acknowledges that both parties tied to the petition (namely the petitioner
15 and the beneficiary) are fully eligible for the benefit being sought. While the
16 filing date of an employment-based immigrant petition and its associated labor
17 certification establishes the priority date of eventual immigrant visa issuance, such
18 priority dates are meaningless unless petition is approved. Id. Similarly, an
19 application to adjust an alien's status from that of nonimmigrant to immigrant, and
20 interim benefit applications such as employment authorization and permission to
21 travel filed therewith, are considered approved on the date of approved
22 adjudications, not on the date the applications were filed. Id.

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

27 At the time the interim rule at issue went into effect, an alien became
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1 immediately eligible to file an I-485 application to adjust his or her status and an I-
2 765 application for employment authorization upon approval of the I-140 petition.
3 Current regulations provide for an even faster process towards obtaining an EAD,
4 and CIS counts the requisite period of service performed by the alien granted an
5 EAD on the day the alien begins working for the qualifying petitioner under the
6 terms of that EAD. On July 31, 2002, interim regulations amending 8 C.F.R. §
7 245.2 went into effect. 67 Fed. Reg. 49561. Under the interim rule, an I-140
8 petition can be filed concurrently with an I-485 adjustment application. The filing
9 of an adjustment application allows an alien to file an I-765 application for
10 employment authorization. An EAD card can be obtained, by law, within 90 days
11 of filing an I-485 Application to Adjust Status together with an I-765 Application
12 for Employment Authorization. 8 C.F.R. §274a.12(c)(9), (10); 8 C.F.R. §
13 274a.13(d). The result is that, with the advent of the "concurrent filing" interim
14 rule, there is minimal delay between filing an I-140 /I-485/I-765 concurrent
15 package and receipt of an EAD, which allows CIS to start counting time served
16 towards the five or three-year service requirements.

17 The regulation, by placing time limitations on the period of years in which a
18 physician may complete his medical service, defines the term "aggregate." By
19 regulation, the agency requires that the required five years of full time medical
20 service in a designated area be met within a six year period following approval of
21 the petition and NIW. If the three-year service requirement applies, then the
22 regulation requires that the medical service in a designated area be completed
23 within four years of approval of the petition and NIW. Contrary to plaintiffs'
24 claims, the regulation specifically recognizes that unforeseen events may arise
25 which interrupt medical service, such as loss of employment, illness or pregnancy.
26 Accordingly, the regulation provides the physician with an additional year within
27 which to complete the required service. It is reasonable to assume that within one
28

1 year, the physician can recover from any temporary interruption of their
2 professional services. CHD ¶12. To allow the physician to remain in the United
3 States indefinitely without satisfying the service requirement is clearly contrary to
4 the intent of the statute. It would defeat the purpose of the statute to find that a
5 physician who sporadically accumulates five years of service in a designated area
6 or areas, spread over a period of 25 years, has fulfilled the purpose of the statute.
7 Also, for public policy and national security concerns, CIS is not inclined to hold
8 open immigrant visa petitions for years where the alien may be inadmissible and
9 has no possibility of qualifying for adjustment of status to lawful permanent
10 resident. Id. Therefore, as demonstrated above, the regulation at issue is in
11 accordance with law and should be upheld.

12 3. Effective Dates

13 The statute states that the medical service requirements do not apply to
14 applications for petitions and NIW approved prior to its enactment date, i.e.
15 November 1, 1999. The statute also states that the service requirement for a
16 petition and NIW filed prior to November 1, 1998, shall be an aggregate of three
17 years service. The statute as written is silent on the petitions and NIWs filed prior
18 to the enactment date and denied prior to the enactment date. The statute is
19 similarly silent with regard to petitions pending as of the enactment date.
20 Accordingly, it is proper for the agency to fill these gaps by regulation and it has
21 done so.

22 The agency regulation established an administrative method to implement
23 the noted effective dates by providing guidance for each group of possible
24 petitioners and beneficiaries. 8 CFR §204.12(d). A special rule applies if the
25 alien physician is the beneficiary of an immigrant visa petition filed before
26 November 1, 1998, but only if the visa petition remained pending before the INS
27 (now CIS) or the courts on November 12, 1999, the date of enactment. In that
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1 case, all the other requirements apply but the alien physician may obtain
2 permanent residence after only 3 years of qualifying service. This benefit is not
3 available if a decision denying the visa petition became administratively final
4 before that date. The regulation also provides that the BCIS will not entertain
5 motions to reopen or reconsider a case that was filed before November 1, 1998 but
6 finally denied prior to November 12, 1999 because the provisions of section
7 1153(b)(2)(B)(ii) were not in effect when those particular cases were denied. In
8 this way, the agency promotes judicial efficiency and finality balanced against the
9 availability of agency resources. CHD ¶13.

10 Under established precedent, changes in laws apply to cases pending when
11 the change occurs but not to cases that had already become final. See Ziffrin v.
12 United States, 318 U.S. 73, 63 S. Ct. 465, 87 L.Ed. 621 (1943) (when a law is
13 changed before a decision is handed down by an administrative agency, the agency
14 must apply the new law). Furthermore, in order for an alien to receive a priority
15 date, his or her petition must be fully approvable under the law that is in effect at
16 the time of filing. See also 8 C.F.R. 103.2(b)(12)(a petitioner must establish
17 eligibility for the benefit sought at the time the application or petition was filed).
18 Accordingly, the regulation is reasonable and in accordance with law.

19 4. Attestation from a State Department of Health of Qualification
20 As a Physician and National Interest

21 Plaintiffs claim that the requirement that a State Department of Health attest
22 to the individual physician's employment as within the public interest to be
23 contrary to the statute. Sattar is the only plaintiff alleged to have failed to comply
24 with such requirement. Sattar, however, has produced a letter from the Indian
25 Health Service, an agency of the United States Public Health Service, attesting to
26 his medical service, a manner of attestation specifically recognized by the statute
27 and regulation, and Sattar's 1-140 and NIW have been approved. 8 U.S.C.
28

1 §1153(b)(2)(B)(ii)(bb). Accordingly, Sattar's claims are moot. There is no case
2 or controversy regarding the submission of a State attestation as no plaintiff can
3 properly raise this issue. Therefore, plaintiffs' claims must fail.

4 Assuming arguendo that a controversy appropriate for resolution in this
5 Court exists, which it does not, the regulation's requirement of an attestation by a
6 State department of health is reasonable and in accordance with law. The statute
7 requires that the work at issue be in the "national interest." Yet the words "in the
8 national interest are undefined by the statute. Additionally, the statute references
9 without definition "a department of public health in any State." Accordingly, it is
10 proper for the agency to fill in this gap. The requirement that the State
11 Department of Health for the state in which the physician is employed provide the
12 attestation is reasonable. The letter provides an objective check on the physician's
13 declaration of national interest. CHD ¶¶10-11. Moreover, the individual States
14 grant medical licenses and maintain records of physician licensure. A physician
15 without a current license cannot lawfully practice medicine in any given state.
16 Therefore, the State Department of Health to attest to the physician's
17 qualifications, i.e., licensure, as well as to the fact that the service is in the public
18 interest. It is the State Department of Health that would know the needs of the
19 State and how the State allocates its resources to medical needs.

20 For example, plaintiff Jain's first I-140 and NIW was initially denied
21 because he was not a licensed physician at the time. Without a medical license,
22 Jain was unable to comply with the service requirement of the statute. The ability
23 to provide full time medical care is the integral component to this legislation.

24 The requirement of an attestation from the State as opposed to a local health
25 department is identical to that required to purposes of the Conrad Amendment,
26 P.L. 103-416, 8 U.S.C. §1184(l); CHD ¶11. Here, a nonimmigrant physician may
27 waive the return requirements in exchange for three years service in a designated
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1 health care shortage area. By fulfilling this requirement, the physician may obtain
2 a change of status from J-1 to H-1B also. Recommendation for this waiver is
3 performed by State departments of health. Each State may recommend thirty
4 physicians for purposes of this waiver each year. The recommendation is required
5 from the State as opposed to the local departments of health because the State is
6 the best equipped to understand the needs of the State and the best to prevent an
7 individual county or local department from usurping improperly the limited
8 number of recommendations available under this program. See 8 CFR
9 212.7(c)(9)(i)(D); 22 C.F.R. §41.63. Inasmuch as the Conrad conversion is
10 specifically recognized in the statute, it is reasonable that the agency would look
11 to the requirements of that program for guidance in adopting its regulation.

12 The agency construction respects the principles of federalism and the
13 authority of the States by placing the decision on how best to meet physician needs
14 at the State level (and not with State-created localized entities). The agency
15 interpretation is also favors attestation by a central authority within each State that
16 has oversight on physician/patient practice. CHD ¶11. The requirements of the
17 regulation are reasonable and should be upheld by the court.¹²

18 5. Tracking Compliance Is Reasonable

19 Lastly, plaintiffs complain that the requiring a physician to resubmit his I-
20 140 and NIW in the event of relocation is in conflict with the statute. The statute
21 requires that alien physician files a petition for preference classification. 8 U.S.C.
22 §1153(2)(B)(ii)(I). The statute is silent as to how often such petition must be
23 filed. It is not unreasonable for the agency to devise a method by which it tracks
24 compliance. CHD ¶12. If a physician relocates, the immediate questions are

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26 ¹² Nothing in this interim rule prevents local departments of public health from
27 urging the central State health department to issue attestations concerning the merits of a
28 particular alien physician and that physician's desire to practice medicine in an HHS-
designated underserved area.

1 whether the physician is continuing to practice full time in a designated area. The
2 answers to these questions are mandatory for maintenance of the benefit of the
3 statute, i.e., the required service in exchange for a waiver of the job offer/labor
4 certification requirements. Refiling answers these questions for the agency.
5 Moreover, the information provided allows the agency to confirm that the alien
6 physician has the requisite approvals to continue to lawfully reside and work in the
7 United States. Further, this requirement appears to apply to only plaintiff Jain. As
8 the administrative record makes clear, his medical service start date continues to
9 be the date of the first approval and not the date of the subsequent petition
10 approvals. Accordingly there is no loss of service computation time. The
11 regulation is reasonable and should be upheld.¹³

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22 ¹³ Plaintiffs argue the the rule is at odds with Section 106 of the American
23 Competitiveness in the Twenty-First Century Act ("AC21"), Pub. L. No. 106-313, 8
24 U.S.C. § 1154(j). AC21 was passed in October 2000, subsequent to the issuance and
25 effective dates of the rule at issue. Plaintiffs' argument that there is no need to file
26 additional immigrant visa petitions when a petitioned employee changes employers or
27 locations conveniently implies that such was permissible at the time. Instead, the INA
28 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). To date, Department of
Homeland Security has not issued regulations implementing AC21.

VI. CONCLUSION

1 As demonstrated above, plaintiffs have not set forth any basis upon which
2 this Court may exercise its jurisdiction. Nor can plaintiffs establish that he is
3 entitled to the relief which they demand. Therefore, for the reasons stated herein,
4 plaintiffs' motion for summary judgment should be denied and the regulation at
5 issue determined to be reasonable and in compliance with law.

6 Dated: February 2, 2004

7 Respectfully submitted,
8 DEBRA W. YANG
9 United States Attorney
10 LEON W. WEIDMAN
11 Assistant United States Attorney
12 Chief, Civil Division

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14 JOANNE S. OSINOFF
15 Assistant United States Attorney
16 Attorneys for Defendants
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DECLARATION OF CRAIG HOWIE

I, Craig Howie, hereby declare and state:

1. I am employed as a Senior Adjudications Officer, Office of Policy and Regulations Development, Citizenship and Immigration Services, Department of Homeland Security ("DHS"), Washington, D.C. I have held this position since 1995. At that time, the agency was known as Immigration and Naturalization Service ("INS"). On March 1, 2003, certain functions of the INS were transferred from the jurisdiction of the Attorney General to the Secretary of Homeland Security and assigned to the Bureau of Immigration and Customs Enforcement, the Bureau of Customs and Border Protection, and the Bureau of Citizenship and Immigration Services (CIS). My job duties and responsibilities did not change with the transition from INS to DHS.

2. The duties and responsibilities of my position include providing subject matter expertise on issues dealing with the B, I and TN non-immigrant visas. In 1999, at the time of the enactment of the national interest waiver legislation contained in 8 U.S.C. 1153, my duties included providing subject matter expertise on issues dealing with employment based immigrant categories. In addition, my duties included the preparation of regulation 204.12 in support of the national interest waiver legislation.

3. This declaration is submitted in support of the government's opposition to plaintiffs' motion for summary judgment.

4. The Immigration and Nationality Act specifies the worldwide level of immigration as well as the allocation of immigrant visas for aliens desiring to immigrate using either family-based or employment-based petitions. Employment-based visas ("green cards") are available in limited numbers. Immigrants who are members of professions holding advanced degrees or their equivalent are eligible for visas if they will substantially benefit prospectively the national economy.

5. The immigration of an alien who is a member of a profession holding advanced degrees requires that a visa petition seeking to classify the prospective immigrant as a qualifying alien be filed by an employer and that the petition include the required certification from the Department of Labor. In other words, the alien must have a job offer and the employer must show that there are no citizens willing and qualified to perform the work for purposes of the labor certification. Absent the availability of a National Interest Waiver, the petitioner is required to obtain the requisite certification by the Department of Labor ("DOL") prior to filing the I-140 petition. Obtaining such certification may on average take several months to more than a year. This is confirmed by the labor certification processing dates that the DOL posts on its website.

6. As stated above, the national interest waiver contained in 8 U.S.C. 1153(b) removes the requirement that some employer must be seeking the alien's services and 8 C.F.R. 204.5(k)(4)(ii) also waives the requirement of labor certification as administered by the Department of Labor. The number of national interest waivers available to qualifying professionals in a given year is unlimited, although the numbers of aliens whose professional contributions rise to the level of serving the "national interest", and therefore qualify for waiver of the labor certification requirement, are relatively few.

The Nursing Relief for Disadvantaged Areas Act of 1999 ("Nursing Relief Act"), Pub. L. 106-95, 113 Stat. 1312. Section 5 of P.L. 106-95 establishes special rules for requests for a national interest waiver that are filed by physicians who are willing to work in areas of the United States designated by the Secretary of Health and Human Services (HHS) as having a shortage of physicians, or at facilities operated by the Department of Veterans' Affairs (VA). The statute provides an incentive to foreign doctors to work, in medically underserved areas that have a difficult time attracting physicians, at the time when the populations in those areas, designated by HHS, are lacking adequate medical care.

7. Section 5 of the Nursing Relief Act of 1999 (Public Law 106-95) provided an NIW to employment-based immigrant medical doctors who agree to

practice medicine in an area of the United States determined to be medically underserved by the Department of Health and Human Services or at a Department of Veterans Affairs facility. In fulfilling its obligation to formulate policy and regulations necessitated by this legislation the INS prepared an interim rule which was intended to provide the public with clear and reasonable standards, that could be applied. The interim rule also established reasonable standards for INS adjudicators to use when adjudicating requests for immigrant classification pursuant to the statute. The interim rule was published in the Federal Register on September 6, 2000, became effective on October 6, 2000 and remains in effect. 65 Fed. Reg. 53889-96. Accordingly, Chapter I of Title 8 of the Code of Federal Regulations (C.F.R.) was amended to add 204.12 and 245.18.

The Nursing Relief Act created a new class of persons eligible for a National Interest Waiver. The interim rule was necessary to implement the provisions of Public Law 106-95. The agency utilized its expertise in immigration matters to fulfill its role and responsibility of putting into place reasonable and carefully construed eligibility rules and processes that would carry out the intention of the statute; allow qualified aliens under the statute to benefit from the grant of a waiver of the normal labor certification requirement, thereby facilitating the granting to qualified applicants of an immigrant visa or adjustment of status; ; and allow INS to

properly track and adjudicate applications. This 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. 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.

8. INS' implementation of the rule was designed to provide a national benefit by addressing this country's need for full time primary and mental health care in areas designated by HHS as underserved areas. The regulation supports this statutory purpose. The regulation also acknowledges that within the Executive Branch, HHS is the lead agency in determining and establishing national healthcare policy. As such, the interim rule defers to certain determinations made by the HHS. In particular, the INS 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/gynecology, and psychiatry. Since HHS had not established shortage areas for other fields of medicine, only these fields of medicine are covered by this rule.

9. 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 career.

The statute and the implementing rule are designed to encourage physicians to practice medicine full time in designated health care professional shortage areas now. Stated another way, INS reasonably read the statute as making available a national interest waiver 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. 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, INS (now CIS) is not inclined to hold open immigrant visa petitions for years where there is no possibility of the alien qualifying for adjustment. By way of brief explanation, the eligibility considerations for adjustment or obtaining an immigrant visa petition allowing someone to enter the

United States as a legal permanent resident differ significantly from those involved in adjudicating an I-140 national interest waiver immigrant visa petition. For example, at the adjustment stage, admissibility factors under 8 U.S.C. 1182 are considered and discretionary determinations such as whether the alien is of good moral character may be considered as well (e.g., a physician may have qualified for approval of an immigrant visa petition and yet may be unable to adjust status to lawful permanent resident because he or she molested a patient; forged documents; committed crimes).

10. The requirement that the State Department of Health for the State in which the physician is employed provides an attestation that the physician's work in a shortage area is in the "public interest" is reasonable. The letter provides an objective check and ensures consistency throughout the State as to which physicians are serving the "public interest". CIS sees problems in carrying out the statute's purpose with an attestation procedure operating without a central authority in each State having oversight of the process and oversight of where the physicians are actually practicing. It was our conclusion, after consultation with HHS, that State Departments of Health are in the best position to know the medical needs of the State. Moreover, the individual States maintain records of physician licensure. A physician without a current license cannot lawfully practice medicine in any given

state. Thus, CIS believes that its requirement of State attestation best serves the interest of protecting the public from the practices of unlicensed or unqualified and/or unscrupulous individuals.

11. The requirement of an attestation from the State as opposed to a local health department is identical to that required to purposes of the Conrad Amendments, P.L. 103-416, 8 U.S.C. 1184(l). State departments of health perform recommendation for the waiver. Each State may recommend thirty physicians for purposes of this waiver each year. 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.

12. The statute is silent as to whether a new petition must be filed every time a physician relocates. The agency was interested in devising processes that would ensure that only those physicians who follow through on their commitment to serve in shortage areas are able to receive the benefit of qualifying for a national interest waiver and an immigrant visa under the statute. The agency recognized that a certain percentage of physicians may apply for an immigrant visa under the statute, be granted a national interest waiver, and yet intentionally or unintentionally never

complete the years of required service. In order to implement the statutory prescribed requirement of five years of service, and in fairness to all applicants for the waiver who comply with these requirements, INS sought to track compliance while allowing a physician sufficient flexibility to change employers if he or she wanted and was able to do so. If a physician leaves the position on the basis of which he or she has sought a national interest waiver, CIS has no way of knowing whether they are continuing to practice full time in a designated area, and thereby still eligible for the national interest waiver. Although administratively burdensome for the agency, requiring the physician or new employer to file a new immigrant visa petition if the physician has relocated allows the agency to monitor compliance with the statute. 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. The medical service start date continues to be the date of the first petition's approval date and not the date of the subsequent petition approvals (assuming the physician maintains the requisite work authorization). Accordingly there is no loss of service computation time (with the subtraction of any time during which the physician was not actually working in a shortage area).

13. 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. The regulation also provides that CIS will not entertain motions to reopen or reconsider a case that was filed before November 1, 1998, but that was 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 interim regulation promotes judicial efficiency and finality balanced against the availability of agency resources. Since Public Law 106-95 established special provisions for prospective beneficiaries on whose behalf employment-based immigrant petitions had been filed prior to a specific date, CIS was obligated to establish an administrative method to implement the various effective dates for every group of potential petitioners and beneficiaries.

14. Within the realm of petitions and applications that may be filed with CIS in order to obtain a benefit under the Immigration and Nationality Act, the majority

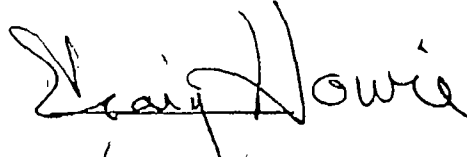
of benefits are tied to the date on which the petition or application is *approved*, not the date on which the petition or application is filed. Approval acknowledges that both parties tied to the petition (namely the petitioner and the beneficiary) are fully eligible for the benefit being sought. While 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. Similarly, an application to adjust an alien's status from that of nonimmigrant to immigrant is considered approved on the date of approved adjudication, not on the date the application was filed. This is important in that the date of an alien's adjustment is the date the alien's time as a permanent resident begins to count toward the needed residency for purposes of naturalization.

15. Lastly, INA 203(b)(2)(B)(ii)(I) is but one of various ways in which a physician may seek to adjust status to lawful permanent resident in the United States. A physician, even one serving in a shortage area, is not obligated to apply under this provision. Nor is a physician restricted from concurrently or subsequently applying for an immigrant visa petition through some other employment-based (family-based, etc) means if he or she so qualifies. Those physicians who are found ineligible for benefits under INA 203(b)(2)(B)(ii)(I), either initially or subsequently through some inconsistent action of their own

volition, may nonetheless obtain permanent resident status through other means.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of February, 2004.


CRAIG HOWIE

DECLARATION OF TERRY DEMAEGD

I, Terry Demaegd declare as follows:

1. I am employed by the Immigration and Naturalization Service (hereinafter "INS") as a Supervisory Center Adjudications Officer (hereinafter "SCAO") at the California Service Center (hereinafter "CSC"), in Laguna Niguel, California. I make this declaration based on my personal knowledge and my review of official documents and records maintained by the INS. If called to testify, I could and would do so competently.
2. In my capacity as an SCAO, I am thoroughly familiar with the policies and procedures of the CSC. I have reviewed the file for Plaintiff Stefan Schneider A73 833 245 who has applied for a National Interest Waiver.
3. In adjudicating this waiver, the CSC will count the H-1B time already worked only if the individual has a J-1 waiver of the two year return to foreign residence requirement under Public Law 103-416 or 104-208 to practice medicine in a health professional shortage area ("HPSA") or medically underserved area ("MUA"). The CSC counts the H-1B time beginning on and subsequent to the date the individual received the J-1 waiver and began their H-1B employment in the designated area. H-1B time completed in a HSPA or MUA location does not count if it occurred before the CIS approved waiver.
4. In the case of Mr. Schneider, a review of the file reveals that he did enter as a J-1 non-immigrant and later received the requisite J-1 waiver on March 6, 2003. However, he did not begin working in H-1B status until June 28, 2003. 8 CFR section 245.18(e)(2) states that if the physician formerly held status as a J-1 nonimmigrant, but obtained a waiver of the foreign residence requirement and a change of status to that of an H-1B nonimmigrant, pursuant to section 214(l) of the Act...the period begins on the date of the alien's change from J-1 to H-1B status.

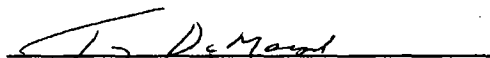
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EXHIBIT B

5. Mr. Schneider's I-140 National Interest Waiver was approved on June 25, 2003. 8 CFR 245.18(e) states that service begins on the date of the notice of approving the Form I-140 and the national interest waiver. Thus, because Mr. Schneider's waiver was approved before he started working in H-1B status, the CSC will credit him with the earliest date of service qualifying under the regulations which is June 25, 2003. Accordingly, Mr. Schneider's required 5 years of service commence on that date.
6. In my capacity as SCAO I am also aware that previously the CSC has not had a reliable method of tracking I-485 applications for adjustment of status related to I-140s petitions with National Interest Waivers. For this reason, the CSC has not normally sent letters notifying applicants of the service requirement at receipt of the I-485- it was done later in the process. However, the CSC has recently developed a tracking method and has begun issuing such notices in National Interest waiver cases. Attached is a copy of the letter issued in Mr. Schneider's case.

I declare under penalty of perjury that the foregoing is true and correct. Executed this

23rd day of JANUARY, 2004 at Laguna Niguel, California.



Terry Demaegd
Supervisory Center Adjudications Officer
California Service Center

NATIONAL INTEREST PHYSICIAN SUBJECT TO FIVE-YEAR REQUIREMENT

On **March 6, 2003**, an Immigrant Petition for Alien Worker (Form I-140) was filed by or for you. The petition was seeking a waiver of the job offer and labor certification requirements in the national interest. This waiver was based on your willingness to practice full-time as a physician 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.

On **June 25, 2003**, the Service approved this petition. On the date of approval you were in a valid O-1 nonimmigrant status (H1B approved 6/28/03) employed as a physician by the I-140 petitioner. Service records indicate that the National Interest Waiver I-140 filed by you or for you was approved on **June 25, 2003**.

Based on the information above, you are subject to the five-year medical practice requirement, with a beginning date of **June 25, 2003**.

You will need to file the following evidence upon completion of at least 12 months of qualifying employment. This evidence must be submitted no later than 120 days beyond **June 25, 2005**.

Submit your Federal Income Tax return(s), including all schedules and Forms W-2 and/or Forms 1099, for any and all years worked since **June 25, 2003**.

Submit an original letter from your employer that attests to your full-time medical practice, the date on which you began this service, and your current employment status. This letter shall address any instances of breaks in employment, other than routine breaks such as paid vacations.

Submit a copy of your license to practice medicine in the United States.
Submit a copy of the Articles of Incorporation, or comparable governing document for your practice. This should include a copy of all amendments to the original document.

Submit a copy of your business license.

Submit the United States Federal income tax return(s), with all schedules and attachments for your business for any and all years worked since **June 25, 2003**.

NOTE: 8 C.F.R.204.12(f) states that a physician may move from one under-served area to another and continue to practice clinical medicine. The new petitioner must submit a new Form I-140 (with fee) with all supporting evidence required in 8 C.F.R. 204.12(c), including a copy of the approval notice from the initial Form I-140. The Service will calculate the amount of time the physician was between practices so as to adjust the count of the aggregate time served in an under-

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Page 3

served area. A change of employers or a move to a new under-served area does not constitute a new 6-year period in which the physician must complete the aggregate five (5) years of service.

NOTE: PLEASE ENCLOSE PAGE 1 OF THIS ORIGINAL NOTICE WITH YOUR RESPONSE NO LATER THAN 120 DAYS BEYOND JUNE 25, 2005.

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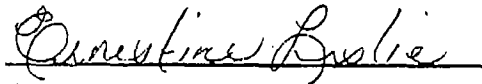
DECLARATION OF ERNESTINE LESLIE

I, Ernestine Leslie declare as follows:

1. I am employed by the United States Department of Homeland Security ("DHS") U.S. Citizenship and Immigration Services ("USCIS") as Assistant Center Director for Division I of the California Service Center ("CSC"), in Laguna Niguel, California. In this capacity I have access to the National Records System for USCIS. The following facts are based on my personal knowledge. If called to testify, I could and would do so competently.
2. The attached electronic record is a true and correct print out of the USCIS National System reflecting that the I-140 petition for Muhammad Sattar (SRC 03 039 54204) was approved on October 16, 2003.

I declare under penalty of perjury that the foregoing is true and correct. Executed this

30th day of January, 2004 at Laguna Niguel, California.



Ernestine Leslie
Assistant Center Director
California Service Center

RECEIPT DATE: 11/22/2002

RECEIPT NUMBER: SRC-03-039-54204

ACTION CODE	ACTION DATE	USER ID
AA RECEIVED	11222002	SRCAXC04
IAA RECEIPT NOTICE SENT	11222002	SRCBATCH
BA RELOCATED FOR PROCESSING	03032003	SRCPAL01
IP TRANSFER NOTICE SENT	03032003	SRCBATCH
CA FROM OTHER INS CENTER OR OFFICE	08052003	SRCAGB02
IK REQUEST FOR ADDITIONAL EVIDENCE	08052003	SRCAGB02
HA RESPONSE TO REQUEST NOTICE	08282003	SRCGJB01
DA APPROVED	10162003	SRCAGB02
KE DATA CHANGE	10162003	SRCAGB02
KE DATA CHANGE	01222004	SRCTMR01
IG DUPLICATE NOTICE SENT	01222004	SRCTMR01

PRESS PF4 OR "ENTER" TO RETURN TO PREVIOUS SCREEN

PF1	PF2	PF4	PF6	PF7	PF8
PG FWD	PG BACK	RETURN	MAIN MENU	CODES	LOGOFF

Notice of Action



RECEIPT NUMBER SRC-03-039-54204		CASE TYPE I140 IMMIGRANT PETITION FOR ALIEN WORKER
RECEIPT DATE November 22, 2002	PRIORITY DATE November 20, 2002	PETITIONER A SATTAR, MUHAMMAD A.
NOTICE DATE January 22, 2004	PAGE 1 of 1	BENEFICIARY A72 681 029 A SATTAR, MUHAMMAD A.
C SHUSTERMAN LAW OFFICES OF CARL SHUSTERMAN 624 S GRAND AVE STE 1608 LOS ANGELES CA 90017		Notice Type: Duplicate Approval Notice Section: Indiv w/Adv Deg or Exceptional Ability in the National Interest

The above petition has been approved. The petition indicates that the person for whom you are petitioning is in the United States and will apply for adjustment of status. He or she should contact the local INS office to obtain Form I-485, Application for Permanent Residence. A copy of this notice should be submitted with the application, with appropriate fee, to this Service Center. Additional information about eligibility for adjustment of status may be obtained from the local INS office serving the area where he or she lives, or by calling 1-800-375-5283.

If the person for whom you are petitioning decides to apply for a visa outside the United States based on this petition, the petitioner should file Form I-824, Application for Action on an Approved Application or Petition, with this office to request that we send the petition to the Department of State National Visa Center (NVC).

The NVC processes all approved immigrant visa petitions that require consular action. The NVC also determines which consular post is the appropriate consulate to complete visa processing. It will then forward the approved petition to that consulate.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.
IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
P O BOX 851488 - DEPT A
MESQUITE TX 75185-1488
Customer Service Telephone: (800) 375-5283

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DECLARATION OF PAUL M.TIERNEY

I, Paul Tierney, declare as follows:

1. I am employed by the United States Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS") as Supervisory Center Adjudications Officer (SCAO) for the Vermont Service Center ("VSC"), in St. Albans, Vermont. I have held this position since August 23, 2002. I have been employed by DHS and its predecessor (the Immigration and Naturalization Service or "INS") since September 29, 1995 in various capacities.

2. In my capacity as SCAO, I am responsible for overseeing the adjudication of various employment based immigrant petitions and applications, including the I-140 Immigrant Petition for Alien Worker.

3. I have reviewed the Computer Linked Application Information Management System (CLAIMS) database and the application file for plaintiff Bogdan Nedelescu. My review of the records reveals that the instant I-140, was filed on June 25, 2002, and was approved and notice was sent on October 21, 2003.

4. I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of January 2004 at St. Albans, Vermont.

Paul M Tierney SCAO
Paul M. Tierney, SCAO
Vermont Service Center
DHS/CIS

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EXHIBIT D



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

Nebraska Service Center
P.O. Box 82521
Lincoln, NE 68501-2521

January 23, 2004
Refer To File No
LIN0314350154

SARAVANAN KASTHURI
C/O DESIREE GOLDFINGER ESQ
STEPHEN JEFFRIES & ASSOCIATES
1560 BROADWAY STE 914
NEW YORK NY 10036

Dear Sir or Madam:

Case Type: I-140
Beneficiary: SARAVANAN KASTHURI

REQUEST FOR EVIDENCE

PLACE THIS LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL.

The documentation submitted is not sufficient to warrant favorable consideration of your petition/application. The following information is also required:

The petitioner is seeking classification as a member of a profession holding an advanced degree who is also requesting a waiver of a job offer under section 203(b)(2) of the Immigration and Nationality Act to facilitate his practice of medicine in a medically underserved area.

Service records indicate the petitioner received a J-1 waiver (SRC 01-100-60459) effective May 7, 2001 to practice in a Health Professional Shortage Area for a three-year term. Therefore, any contract or combination of contracts that are submitted on the petitioner's behalf must demonstrate, at a minimum, an obligation for the petitioner to practice medicine through May 7, 2006. The submitted contracts only imply intent for the petitioner to practice within a Health Professional Shortage Area (HPSA) through March 31, 2006.

Submit a full-time employment contract that covers the required five-year period of clinical medical practice. Please highlight the applicable sections of the contract that relate to the contract's term. The contract you submit should:

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EXHIBIT E

Be dated within six months prior to the date the petition was filed and signed by the alien and an individual who possesses authority to sign a binding contract on behalf of the clinic or hospital.

Indicate the site(s) of employment in certain terms including hours per week at each site, (if applicable), the duties to be performed, and the wage to be paid (including yearly wage increases).

Indicate the employment contract's commencement and termination dates, as appropriate.

If applicable, submit evidence to establish the date the alien changed from J-1 status and commenced his/her employment as an H-1B nonimmigrant worker while serving in a medically under-served area.

AGAIN, PLEASE NOTE: Aliens who already have a waiver under section 214(l) of the Act will NOT be required to first serve the 3-year period of that waiver and then serve an additional 5 years to adjust status under National Interest Waiver provisions.

Describe the alien physician's medical specialty. Additional evidence must establish that the specialty is within the scope of the Secretary's designation for the geographical area(s).

PLEASE NOTE: While statute language says "any physician," HHS currently limits physicians in designated shortage areas to the practice of family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, osteopathy and psychiatry.

The submitted contracts and Part 6 of the petition indicate the petitioner has been and will be employed as a radiologist. As indicated above, radiologists are specifically excluded from the group of authorized professionals. Given this, please provide a regulatory explanation as to how the petitioner qualifies for a national interest waiver under Public Law 106-95.

Provide documentation to establish when the beneficiary physically began his employment with Pacific Medical Imaging Consultants.

PLEASE NOTE: The Service will count all H-1B time from the point where the petitioner obtained the requisite waiver (5/7/01) from CIS (INS) "and" began his H-1B employment in a HPSA or MUA location. The related contracts, at a minimum, must extend until 5/7/06. If the petitioner didn't start his H-1B employment until, or example, until 6/23/01, then the contracts must extend until 6/23/06.

Your response must be received in this office by April 16, 2004. Your case is being held in this office pending your response. Within this period you may:

1. Submit all of the evidence requested;
2. Submit some or none of the evidence requested and ask for a decision based upon the record; or
3. Withdraw the application or petition. (It is noted that if you request that the application or petition be withdrawn, the filing fee cannot be refunded).

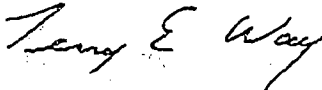
You must submit all of the evidence at one time. Submission of only part of the evidence requested will be considered a request for a decision based upon the record. No extension of the period allowed to submit evidence will be granted. If the evidence submitted does not establish that your case was approvable at the time it was filed, it can be denied.

If you do not respond to this request within the time allowed, your case will be considered abandoned and denied. Evidence received in this office after the due date may not be considered.

PLACE THIS LETTER ON TOP OF YOUR RESPONSE. SUBMISSION OF EVIDENCE WITHOUT THIS LETTER WILL DELAY PROCESSING OF YOUR CASE AND MAY RESULT IN A DENIAL.

PLEASE USE THE ENCLOSED ENVELOPE FOR MAILING THIS EVIDENCE BACK TO THIS OFFICE.

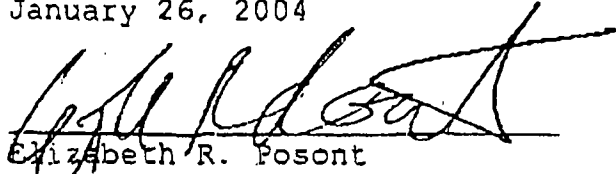
Sincerely,



Terry E. Way
Director
NSC/RKH361/lke253

I, Elizabeth R. Posont, hereby certify that the foregoing 3 pages are a true and correct copy of the Request for Evidence dated January 23, 2004, maintained in receipt file LIN-03-143-50154 at the Nebraska Service Center.

January 26, 2004



Elizabeth R. Posont
Associate Counsel
Nebraska Service Center

DECLARATION OF ERNESTINE LESLIE

I, Ernestine Leslie declare as follows:

1. I am employed by the United States Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS") as Assistant Center Director for Division I of the California Service Center ("CSC"), in Laguna Niguel, California. I have held this position since April 22, 2001. Prior to the transition of the former Immigration and Naturalization Service ("INS") to the Department of Homeland Security March of 2003 I held the same position for INS. I have been employed by INS) since June of 1975 in various capacities. The following facts are based on my personal knowledge. If called to testify, I could and would do so competently.

2. In my capacity as Assistant Center Director, I am responsible for overseeing the adjudication of various employment based immigrant petitions and applications. I am aware that nation-wide the other Service Centers, including Vermont, Texas and Nebraska are also responsible for processing various employment based immigrant petitions and applications. The Service Centers fulfill part of the USCIS' responsibility to adjudicate benefits applications and are allocated part of the USCIS' adjudication resources. The processing times at each Service Center will vary for each application depending on each Center's resources and the amount of incoming applications filed at the Centers.

3. Over the last several years, the Service Centers have experienced a tremendous increase in the number of applications and petitions, which far outstrip the available resources, resulting in backlogs. In dealing with the issue of backlogs, the USCIS has at times designated national priorities for the Service Centers to follow in the processing

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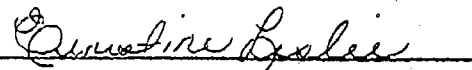
EXHIBIT F

and adjudication of certain applications and petitions, with the goal of allocating its resources to achieve the maximum level of efficiency possible under difficult circumstances. It is important to note that the various types of adjudications compete for limited adjudication resources. USCIS has identified adjudications priorities and then shifted its limited resources to address the most pressing priorities first. When USCIS sets a high priority on the processing or adjudication of a particular type of application or petition and redirects resources to that process, there will be a concomitant decrease in resources left to process and adjudicate the many other types of applications and petitions which compete for the limited adjudication resources. This decrease results in backlogs for many categories of applications and petitions.

7. Service Center Directors also have authority to set adjudications priorities for their respective Service Centers, taking into account a number of factors. When additional resources become available or as priorities shift, the Director or his/her delegates may also designate other applications and petitions as priorities. Accordingly, processing times at the Service Centers will vary.

I declare under penalty of perjury that the foregoing is true and correct. Executed this

30th day of January 2004 at Laguna Niguel, California.



Ernestine Leslie
Assistant Center Director
California Service Center

DECLARATION OF NANCY JANSON


I, Nancy Janson, declare as follows:

1. I am employed by the United States Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS") as Supervisory Center Adjudications Officer (SCAO) for the Vermont Service Center ("VSC"), in St. Albans, Vermont. I have held this position since September 5, 1995. I have been employed by DHS and its predecessor (the Immigration and Naturalization Service or "INS") since 1982 in various capacities.

2. In my capacity as SCAO, I am responsible for overseeing the adjudication of I-485 Adjustment of Status applications.

3. The VSC processes I-485 applications in chronological order from the date when they were filed, and we are currently processing I-485's filed in January 2002. It should be noted that applications for adjustment of status cannot be adjudicated exclusively in receipt date order. With the additional security checks mandated after September 11, 2001, the I-485 cannot be adjudicated until all security clearances have been completed, relating files located, underlying petitions retrieved from file storage, including those of family members.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23 day of January 2004 at St. Albans, Vermont.


Nancy Janson, SCAO
Vermont Service Center
DHS/CIS


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EXHIBIT G

DECLARATION OF MARVIN E. ESTES

MARVIN E. ESTES, pursuant to 28 U.S.C. 1746, declares the following:

1. I am employed by the United States Citizenship and Immigration Services ("USCIS") (formerly Immigration and Naturalization Service), Texas Service Center ("TSC"), as a Supervisory Center Adjudication Officer ("SCAO"). I have been employed by the USCIS since July 1996.
2. In my capacity as a SCAO in the Employment Division, I am thoroughly familiar with the policies and procedures of the TSC. In adjudicating this waiver, the TSC will count the H-1B time if they have a J-1 waiver under PL 103-416 or PL 104-208 to practice medicine in a health professional shortage area ("HPSA") or medically underserved area ("MUA"). TSC counts the H-1B time beginning on and subsequent to the date they received the J-1 waiver and began their H-1B employment in the designated area. H-1B time completed in a HPSA or MUA location does not count if it occurred before they actually got the Service approved waiver. TSC counts all H-1B time from the point where the alien obtained the requisite waiver from the USCIS and began H-1B employment in a HPSA or MUA location.
3. TSC processes form I-485 application for adjustment of status in chronological order from the date they were filed. TSC is currently processing I-485s filed on April 9, 2001.



Marvin E. Estes
Supervisory Center Adjudication Officer 1-22-06
Texas Service Center
USCIS
7701 N. Stemmons Freeway
Dallas, Texas 75247

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EXHIBIT H

DECLARATION OF RUTH E. STEARNS

RUTH E. STEARNS, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am employed by the Department of Homeland Security, Citizenship and Immigration Services Division ("CIS"), as an Assistant Service Center Director of the Nebraska Service Center ("NSC").
2. I am making this declaration for the purpose of a lawsuit filed in California challenging the Nebraska Service Center's adjudication of cases filed by second-preference immigrant physicians seeking a national interest waiver based on service in a medically underserved area or VA facility.
3. I have been employed by CIS (formerly the Immigration and Naturalization Service) since January 1980. I have held the positions of Clerk/Typist, Application Clerk, Immigration Examiner, Senior Immigration Examiner, Supervisory Immigration Examiner, Supervisory Center Adjudications Officer, and Assistant Center Director. I have been performing duties as the Assistant Center Director for the Residence Product Line at the Nebraska Service Center since April 2000.
4. A former J-1 nonimmigrant physician who is subject to the foreign residence requirement will not be required to

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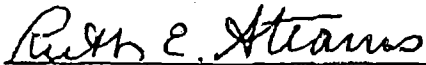
EXHIBIT I

first serve for 3 years as an H-1B at VA facilities or in HHS-designated underserved areas to obtain that waiver and then to serve an additional 5 years to obtain adjustment of status based on the national interest waiver. Any time spent by the alien physician in J-1 nonimmigrant status, however, does not count toward the 5-year medical service requirement for purposes of the national interest waiver.

5. In adjudicating national interest waiver cases for second preference employment-based immigrant physicians serving in medically underserved areas or at Department of Veterans Affairs Facilities, the Nebraska Service Center will count all H-1B time from the point the qualified physician began his or her H-1B employment in a health professional shortage area or medically underserved area location after having been granted the requisite waiver under section 214(1) of the Immigration and Nationality Act.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed at Lincoln, Nebraska,
on this 26th day of January, 2004.


Ruth E. Stearns, Assistant
Service Center Director
Nebraska Service Center

