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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

[1] On March 1, 2003, certain functions of the Immigration and Naturalization Service ("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 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 substituted.

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Defendants Thomas J. Ridge, Secretary of Homeland Security, Eduardo Aguirre, Jr., Acting Director of the Bureau of Citizenship and Immigration Services (BCIS), and the BCIS, (hereinafter collectively referred to as "CIS"), hereby oppose plaintiffs' motion for summary judgment.

INTRODUCTION

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

THE STATUTORY FRAMEWORK

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

1. Employment Based Immigrants

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

8 C.F.R. §204.5(k). The petition must include a certification from the Department of Labor that: (1) there are insufficient numbers of equally qualified domestic workers; and (2) the employer's employment of the immigrant will not adversely affect the wages and working conditions of similarly employed persons in the United States. 8 U.S.C. § 1182(a)(5)(A) & (D); 8 C.F.R. § 204.5(k)(4). Generally, obtaining the requisite certification by the Department of Labor may take more than a year. See Declaration of Craig Howie ("CHD"), ¶¶ 4, 5, attached hereto as Exhibit A.

2. National Interest Waivers

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

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

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

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

(B) Waiver of job offer

(i) National interest waiver

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

(ii) Physicians working in shortage areas or veterans facilities

(I) In general

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

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

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[2] 8 U.S.C. §1153(b)(1) "Priority workers."

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

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

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

* * * * * * *

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

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

3. The Regulations

The 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. 53889-53896. Accordingly, Title 8 of the Code of Federal Regulations was amended to add §§204.12 and 245.18. The interim rule was necessary to codify the provisions of Public Law 106-95 (Nursing Relief Act), and to put into place eligibility rules and procedures for applicants and the agency to employ. CHD ¶¶7-9. 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 Department of Veterans Affairs ("VA") facility may obtain a waiver of the job offer requirement that applies to alien beneficiaries of second preference employment-based immigrant visa petitions. Id. It further explains the requirements the alien physician must meet in order to obtain approval of an immigrant visa petition; and thereafter, approval of an application for adjustment to lawful permanent residence status. CHD, ¶¶7-10.

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

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

H-1-B status is also a non-immigrant status. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b). H-1-B status may be accorded to a physician who may engage in productive employment, but not to an alien physician seeking medical education in the United States. Id. It allows for the physician to reside and work lawfully in the United States for a limited period of time. The number of available H-1-B non-immigrant visas is limited each calendar year. 8 U.S.C. §1184(g)(1)(A). H-1-B status like the J-1 requires that the physician depart the United states after the expiration of the approved period of H-1-B status. H-1B status may not extend beyond six years. 8 U.S.C. §1184(g)(4); 8 C.F.R. §214.2(13)(iii); (15)(ii)(4)(B).[3]

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

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

STATEMENT OF FACTS

1. Plaintiff Stefan Schneider

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

A Petition for Nonimmigrant Worker (I-129) was filed on behalf of Schneider by Pro Health Inc., Long Beach, California. Mtn. 74. The I-129 was approved and Schneider was granted a change of status to O-1 on June 29, 1998. Mtn. 72,74; SAR 63.[4] An I-129 was again approved on July 26, 2000, July 23, 2001, and July 29, 2002, each extending Schneider's O-1 status. SAR 65-66, 93-95.

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

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

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

2. Plaintiff Anwar Tandar

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

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

3. Plaintiff Komsu Mamuya

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

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

4. Plaintiff Muhammad Sattar

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

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

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

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

Mtn. 50.

5. Plaintiff Sandeep Harbans Jain

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

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

During this time, another I-140 and NIW request was filed on behalf of Jain on August 24, 1998. JAR 194-195. The agency issued an RFE on January 15, 1999, to which Jain failed to respond and the second Petition was denied. JAR

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.

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

6. Plaintiff Mahesh Krishnamoorthy

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

Krishnamoorthy alleges that he is a physician currently practicing medicine at Tri-County Medical Center in Franklin County, Georgia. Mtn. 91. Krishnamoorthy filed an I-140 Immigrant Petition for Alien Worker and NIW request on March 14, 2000. KAR 34, 40-41. A request for additional evidence in support of the petition was issued by the agency on November 11, 2000. KAR 44, 51. The I-140 and the NIW request were approved on April 3, 2001. KAR 34, 40-41. Krishnamoorthy filed an I-485 application for adjustment of status on July 26, 2001. KAR 3-6. The I-485 is currently pending.

7. Plaintiff Saravanan Kasthuri

Plaintiff Saravanan Kasthuri is a citizen and native of India. KAAR 3. He alleges that he was admitted to the United States on June 30, 1995 in J-1 nonimmigrant status. Mtn. 107. An I-129 Petition for Nonimmigrant Worker filed on his behalf by Pacific Medical Imaging on October 16, 2000, was approved and H-1B status accorded on December 4, 2000. KAAR 67. Kasthuri alleges that he did not begin employment with his sponsoring employer until June 23, 2001. Mtn. 107. An I-129 filed on his behalf by Columbia Basin Imaging was approved and his H-1B status extended on February 19, 2003. KAAR 66. Kasthuri alleges

that he is a radiologist working at Richland, Washington. An I-140 Immigrant Petition for Alien Worker and NIW request was filed by Kasthuri on March 31, 2003 and remains pending. KAAR 3-5. The agency has no record of Kasthuri ever having filed an I-485 application for adjustment of status.

8. Plaintiff Bogdan Nedelescu

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

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

III. ARGUMENT

A. PLAINTIFFS HAVE FAILED TO ESTABLISH JURISDICTION

It is axiomatic that "the United States, as sovereign, is immune from suit save as it consents to be sued,. . . and terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." Lehman v. Nakshian, 453 U.S. 156, 160, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981), quoting United States v.

Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). The party seeking to invoke the jurisdiction of the federal court bears the burden of establishing that jurisdiction exists. See Data Disc., Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). Rano v. Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

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

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

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

28 U.S.C. §1361, cited by plaintiffs, provides that "the district courts shall

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

Moreover, courts have consistently recognized that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). To obtain an order of mandamus, a petitioner must establish: (1) a clear right to the relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy. See Guerrero v. Clinton, 157 F.3d 1190, 1197 (9th Cir. 1998). Mandamus relief against officers and employees of the United States is available only when the defendant official or agency owes a specific duty to the plaintiff, which is plainly defined, non-discretionary, free from doubt, and "purely ministerial." See Pittston Coal Group v. Sebben, 488 U.S. 105, 121, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988); Tucson Airport Authority v. General

Dynamics Corporation, 136 F.3d 641, 646 (9th Cir. 1998). Mandamus cannot be used to compel or control an act which, by law, is discretionary. See Nova Stylings Inc. v. Ladd, 695 F.2d 1179, 1180 (9th Cir. 1983). Nor does mandamus lie to review the discretionary acts of government officials. Id. at 1180. "'[M]andamus is an inappropriate remedy with regard' to non-consular officials, whose duties were discretionary." Luo v. Coultice, 178 F.Supp.2d 1135, 1139-40 (C.D.Cal. 2001), quoting Patel v. Reno, 134 F.3d 929, 933 (9th Cir. 1997)(as amended).

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

C. PLAINTIFFS FAILTO ESTABLISH JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT OR THE ALL WRITS ACT

Plaintiffs also attempt to base jurisdiction on the Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. §1651. Neither statute confers jurisdiction on the federal courts. See Syngenta Crop Protection Inc. v. Henson, 537 U.S. 28, 29, 123 S.Ct. 366, 368, 154 L.Ed.2d 368 (2002)(All Writs Act does

not confer jurisdiction on the federal courts); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72, 70 S.Ct. 876, 94 L.Ed. 1194 (1950)(Declaratory Judgment Act does not confer subject matter jurisdiction). Plaintiffs must first establish jurisdiction under an independent basis to avail themselves of declaratory relief. Id.; see also Seibert v. Baptist, 594 F.2d 423, 428 (5th Cir. 1979) (Declaratory judgment statute does not establish an independent basis for federal jurisdiction, but only establishes a separate remedy available in cases where jurisdiction otherwise exists). Accordingly, plaintiffs have failed to plead and establish a basis for the Court's jurisdiction.

D. THE PLAINTIFFS ARE NOT PROPERLY JOINED

The plaintiffs are not properly joined and their claims should be severed. Rule 20(a) of the Federal Rules of Civil Procedure permits the joinder of plaintiffs in one action if: (1) the plaintiffs assert any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there are common questions of law or fact. In the instant action, each plaintiff presents different questions regarding length of service, type of service, qualifications and prior administrative filings and rulings. The plaintiffs were admitted to the United States at different times in different non-immigrant statuses. Each practices medicine in different medical specialties at different institutions in different cities. Each plaintiff presents a different factual situation, and each has an independent immigration procedural history. Each has filed various applications and petitions at different times with different agency Service Centers, and each plaintiff has waited different lengths of time for administrative processing of said applications and petitions. Agency decisions regarding each plaintiff's applications and petitions will be personalized, dependant upon the unique set of facts presented by that plaintiff alone. Plaintiffs' claims do not arise out of the same transaction or occurrence and should not be joined. Moreover, while Rule 20 is designed to

promote judicial economy, and reduce inconvenience, delay, and added expense, here trial efficiency will not be promoted by allowing all Plaintiffs to bring a single case. Each claim raises potentially different issues, and must be viewed in a separate and individual light by the Court. See Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997). Moreover, severing plaintiffs will not prejudice any substantial right. Accordingly, this Court should deny plaintiffs' motion and sever the action.

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

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

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

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

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

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

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

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

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

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

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

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

1. 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 medicince, pediatrics and obstetrics and gynecology. 42 C.F.R. Pt.5, App. A, 3.

regulation is proper and should be upheld.[11]

2. Calculation of Required Service

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

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

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

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

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

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

If the physician, other than one in J-1 status, already has authorization (in connection with their non-immigrant status) to accept employment at the facility, the regulations contemplate that the six-year or four-year period during which the physician must provide the service begins on the date that CIS approves the I-140 petition and NIW request. There is nothing to prevent a physician from filing the I-140 petition and NIW request immediately upon commencing services in a shortage area. Therefore, plaintiffs' claims that this requirement somehow extends the mandatory period of required service beyond reasonable expectations is inaccurate. Within the realm of petitions and applications that may be filed with CIS in order to obtain a benefit under the INA, the majority of benefits are tied to the date on which the petition or application is approved, not the date on which the petition or application is filed. See, e.g., I-131 advanced parole, I-485 adjustment of status, I-765 employment authorization, and N-400 naturalization; CHD ¶14. 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. Id. Similarly, an application to adjust an alien's status from that of nonimmigrant to immigrant, and interim benefit applications such as employment authorization and permission to travel filed therewith, are considered approved on the date of approved adjudications, not on the date the applications were filed. Id.

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

At the time the interim rule at issue went into effect, an alien became

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

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

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

3. Effective Dates

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

The agency regulation established an administrative method to implement the noted effective dates by providing guidance for each group of possible petitioners and beneficiaries. 8 CFR §204.12(d). A special rule applies if the alien physician is the beneficiary of an immigrant visa petition filed before November 1, 1998, but only if the visa petition remained pending before the INS (now CIS) or the courts on November 12, 1999, the date of enactment. In that

case, all the other requirements apply but the alien physician may obtain permanent residence after only 3 years of qualifying service. This benefit is not available if a decision denying the visa petition became administratively final before that date. The regulation also provides that the BCIS will not entertain motions to reopen or reconsider a case that was filed before November 1, 1998 but finally denied prior to November 12, 1999 because the provisions of section 1153(b)(2)(B)(ii) were not in effect when those particular cases were denied. In this way, the agency promotes judicial efficiency and finality balanced against the availability of agency resources. CHD ¶13.

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

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

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

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

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

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

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 Amendment, P.L. 103-416, 8 U.S.C. §1184(l); CHD ¶11. Here, a nonimmigrant physician may waive the return requirements in exchange for three years service in a designated

health care shortage area. By fulfilling this requirement, the physician may obtain a change of status from J-1 to H-1B also. Recommendation for this waiver is performed by State departments of health. 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. See 8 CFR 212.7(c)(9)(i)(D); 22 C.F.R. §41.63. Inasmuch as the Conrad conversion is specifically recognized in the statute, it is reasonable that the agency would look to the requirements of that program for guidance in adopting its regulation.

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

5. Tracking Compliance Is Reasonable

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

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

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

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[13] Plaintiffs argue the the rule is at odds with Section 106 of the American Competitiveness in the Twenty-First Century Act ("AC21"), Pub. L. No. 106-313, 8 U.S.C. § 1154(j). AC21 was passed in October 2000, subsequent to the issuance and effective dates of the rule at issue. Plaintiffs' argument that there is no need to file additional immigrant visa petitions when a petitioned employee changes employers or locations conveniently implies that such was permissible at the time. Instead, the INA and CIS regulations at the time the NIW physicians rule became effective specifically required a new I-140 to be filed in the event that the alien was no longer a proper beneficiary of an I-140 petition forming the basis for a pending adjustment of status application (such as in cases where the alien's prospective employer upon adjustment had changed). 8 U.S.C. §1255(a)(3), 8 C.F.R.§ 245.1(c)(4). To date, Department of Homeland Security has not issued regulations implementing AC21.

VI. CONCLUSION

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

Dated: February 2, 2004

Respectfully submitted,
DEBRA W. YANG
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

JOANNE S. OSINOFF
Assistant United States Attorney
Attorneys for Defendants

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.

EXHIBIT A

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 <u>not</u> 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.

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.

T. DeMaegd

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-

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.

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

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EXHIBIT C

FSXMHST1 CLAIMS MAINFRAME SYSTEM 01/30/2004
PAGE: 1 OF 1 CASE HISTORY 18:00
LIN2814A

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

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action

THE UNITED STATES OF AMERICA

RECEIPT NUMBER		CASE TYPE
SRC-03-039-54204		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

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 ralate to the contract's term. The contract you submit should:

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

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

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 delegees 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

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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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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 HSPA 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 1-22-04
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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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(l) 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

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

CERTIFICATE OF SERVICE BY MESSENGER SERVICE

I am employed by the Office of the United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012. I am over the age of 18 and not a party to the within action.

On February 2, 2004, I gave instructions to a duly constituted messenger service to deliver to each person or entity named below, a copy of:

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

addressed to:

CARL SHUSTERMAN
ATTORNEY AT LAW
LAW OFFICES OF CARL SHUSTERMAN
ONE WILSHIRE BUILDING
624 S. GRAND AVENUE, SUITE 1608
LOS ANGELES, CA 90017

I thereafter caused the aforementioned document to be delivered by the messenger service.

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

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: February 2, 2004 at Los Angeles, California.

IRENE D. VEJAR