I. STATEMENT OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the American Immigration Law Foundation (AILF) proffers this Amicus Curiae brief to assist the Court in its consideration of §203(b)(2)(B)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. §1153(b)(2)(B)(ii) *as amended by* §5 of the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), Pub. L. 106-95, 113 Stat. 1312 (Nov. 12, 1999) and the validity of the provision's implementing regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), 204.12(d)(6) and 245.18. These regulations were promulgated by the former Immigration and Naturalization Service (INS) and are currently being carried out by the Department of Homeland Security (DHS).

Through NRDAA §5, Congress amended §203(b)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1153(b)(2)(B) to make it faster and easier for certain qualifying physicians to obtain permanent residency in this country by practicing medicine in areas of the country that suffer from a shortage of healthcare professionals. The contribution of these physicians to our nation's health care system cannot be doubted. "Approximately 35 million American live in areas with too few doctors to adequately serve their medical needs. Overall, the lack of doctors affects more than 1,600 geographic areas in the United States." "*Health Worker Shortages & the Potential of Immigration Policy*," Immigration Policy Center, Vol. 3, Issue 1 (February 2004). While no published record documents the

legislative history of NRDAA §5, the obvious purpose of the provision was to provide an incentive to foreign physicians to practice in medically underserved areas. Through Congress' enactment of NRDAA §5, the country benefits from more comprehensive health care coverage and foreign physicians benefit from a more expeditious path to U.S. lawful permanent residency.

The district court's decision in this case upholds the validity of the regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), 204.12(d)(6) and 245.18, all of which delay a physician's ability to adjust his or her status to a lawful permanent resident pursuant to INA §245, 8 U.S.C. §1255. In addition to frustrating the implicit purpose behind Congress' enactment of NRDAA §5, the regulations violate INA §203(b)(2)(B)(ii).

AILF is a non-profit organization established to advance fundamental fairness, due process, and constitutional and human rights in immigration law. AILF has a direct interest in ensuring that the Defendants fairly, fully and accurately implement regulations that achieve the Congressional intent of promoting healthcare coverage in the U.S. by permitting physicians in underserved areas to obtain national interest waivers and adjust their status to lawful permanent residents.

II. SUMMARY OF THE ARGUMENT

In 1999, Congress amended §203(b)(2)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1153(b)(2)(B) to make it faster and easier for certain qualifying physicians to obtain permanent residency by allowing them to bypass a lengthy "labor certification" process and, instead, to obtain a national interest waiver to qualify for permanent resident status. Accordingly, §203(b)(2)(B)(ii) instructs that physicians practicing for an aggregate of either three or five years of service in a medically underserved area of the United States shall be granted such a waiver and, consequently, become eligible to adjust their status from nonimmigrant visa holder to U.S. lawful permanent resident.

Through the promulgation of the regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), 204.12(d)(6) and 245.18, DHS requires foreign physicians to meet requirements not authorized by Congress before they are eligible for adjustment of status. The district court analyzed these regulations by applying the statutory construction analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Significantly, however, the court focused almost exclusively on the second-step of the analysis, the reasonableness of Defendants' regulatory interpretation of INA §203(b)(2)(B)(ii), and failed to recognize that Congress addressed the issues covered by the regulations. Thus, the district court should have invalidated the regulations after

evaluating them under the first-step of the *Chevron* analysis and, accordingly, need not have reached the second-step.

The regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4) and 245.18 prevent crediting the period a physician practiced in a medically underserved area before approval of the national interest waiver towards the required service period. In so doing, the regulations contradict the plain language of INA §203(b)(2)(B)(ii)(I)-(IV), which specifically contemplates prior service in the calculation. Thus, the DHS' regulations to the contrary violate, and are *ultra vires* to, INA §203(b)(2)(B)(ii).

INA §203(b)(2)(B)(ii)(IV) permits physicians for whom a national interest waiver application "was filed" before November 1, 1998 to qualify for permanent residency based on three years of service in an underserved area (rather than five years). The regulation at 8 C.F.R. §204.12(d)(6) contradicts the plain language of the statute by adding the requirement that the application had to be pending on November 12, 1999, the effective date of INA §203(b)(2)(B)(ii)(IV). Not only does this interpretation render meaningless the November 1, 1998 date designated by Congress, but it also conflicts with the DHS' interpretation of a similar grandfathering provision regarding eligibility for permanent residency, INA §245(i), 8 U.S.C. §1225(i).

This Court cannot simply defer to the INS' interpretation of §203(b)(2)(B)(ii). Despite the district court's contrary conclusion, the time permitted to calculate the physician's qualifying service period is not a gap intentionally left by Congress for the DHS to fill in. Rather, Congress intended past service to count towards the qualifying service calculation and intended the lower three-year service obligation to apply based simply on having filed an application before November 1, 1998. Thus, it is a fundamental question of statutory interpretation, and an issue that the Court must determine independently, without any deference to the DHS' interpretation.

III. ARGUMENT

A. STATUTORY BACKGROUND

The Immigration and Nationality Act (INA), 8 U.S.C. §1001 et seq. provides for the allocation of immigrant visas to certain categories of alien beneficiaries based on their employment. INA §203(b), 8 U.S.C. §1153(b). This appeal involves the "second preference" category which is reserved for aliens of "exceptional ability" or "members of the profession holding advanced degrees or their equivalent." INA §203(b)(2)(A), 8 U.S.C. §1153(b)(2)(A). That category is known as "EB-2" -- employment-based second preference. EB-2 classification is obtained by filing an immigrant visa petition on Form I-140 with U.S. Citizenship and Immigration Services (USCIS), a sub-division of DHS.

As a prerequisite to filing the I-140 petition under the second preference category, employers and the alien beneficiaries must first file an Application for Alien Employment Certification (Form ETA-750) with the United States Department of Labor. In this process, known as "labor certification," the employer certifies that qualified U.S. workers have been recruited for the job position but are unavailable, or the employer must demonstrate that an exception exists such as a chronic shortage of U.S. workers in a particular field. In addition, the alien certifies that he or she meets the requirements for the position being offered based on education and/or experience. INA §203(b)(2)(A).

The USCIS may exercise its discretion and waive the labor certification process, which includes the job offer requirement, for certain aliens who satisfactorily demonstrate that their services are in the national interest. INA §203(b)(2)(B)(i). Upon approval of a national interest waiver (NIW), the individual may be eligible to adjust their status to that of a U.S. lawful permanent resident pursuant to INA §245, 8 U.S.C. §1255. Procedurally, a national interest waiver application is a written request for the waiver filed concomitantly with an I-140 petition.

Through the enactment of §5 of the Nursing Relief for Disadvantaged Areas Act of 1999 (NRDAA), Pub. L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), Congress

created two, non-discretionary exceptions from the labor certification process. *See* NRDAA §5 adding new INA §203(b)(2)(B)(ii).

Current INA §203(b)(2)(B)(ii) provides for the mandatory grant of national interest waivers to certain foreign physicians either working in areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or working in veterans facilities. The plaintiffs in this appeal are covered by the former exception for foreign physicians working in medically underserved areas.[1]

The provision has four subsections, containing the conditions that Congress attached to a foreign physician's ability to obtain a national interest waiver. Subsection I mandates that the agency "shall" grant a national interest waiver to "any alien physician" if the "physician agrees to work full time as a physician" in a designated medically underserved area and a qualified federal or state agency "has previously determined" that the work in such area "was in the public interest." INA §203(b)(2)(B)(i)(I), 8 U.S.C. §1153(b)(2)(B)(i)(I). Subsection II provides that an immigrant visa may not be issued and the agency may not adjust the status of such physicians "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 J-1 status)]" in a

[1] The instant brief focuses on the situation of physicians working in medically underserved areas, however, the arguments contained herein apply with equal force to physicians working in veterans facilities.

designated medically underserved area. INA §203(b)(2)(B)(ii)(II), 8 U.S.C. §1153(b)(2)(B)(ii)(II). Subsection III states that qualifying physicians may file I-140 petitions seeking EB-2 classification and applications for adjustment of status under INA §245 "prior to the date by which such alien physician has completed the service described in subclause (II)." INA §203(b)(2)(B)(ii)(III), 8 U.S.C. §1153(b)(2)(B)(ii)(III).

Subsection IV exempts national interest waivers filed by foreign physicians and approved before its enactment from the terms of subsections I-III. In addition, subsection IV provides that the agency "shall grant" national interest waivers to a "physician for whom an application for a waiver was filed . . . prior to November 1, 1998. . . except that the alien is [only] required to have worked full time as a physician for an aggregate of 3 years [(not including the time served in J-1 status)]" in a medically underserved area before the agency can issue an immigrant visa to, or adjust the status of, the foreign physician. INA §203(b)(2)(B)(ii)(IV), 8 U.S.C. §1153(b)(2)(B)(ii)(IV).

The regulations implementing INA §203(b)(2)(B)(ii) at issue here became effective as an interim rule on October 6, 2000 (*see* 65 Fed. Reg. 53889-53896) and are codified at 8 C.F.R. §§204.12 and 245.18.

B. THE DISTRICT COURT ERRED BY UPHOLDING THE REGULATIONS IMPLEMENTING INA §203(b)(2)(B)(ii)

1. The Regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), and 245.18 Violate INA §203(b)(2)(B)(ii) By Impermissibly Excluding Past Service From the Qualifying Aggregate Service Calculation

Subsection II and IV require that a foreign physician practice in a medically underserved area for an aggregate of 5 years or 3 years, respectively, before he or she is eligible for permanent residency. The regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), and 245.18 provide that the "aggregate" clock does not start ticking until the date USCIS approves the I-140 petition (i.e. the national interest waiver application). 8 C.F.R. §§204.12(b)(1) (if aggregate showing of 5 years is required, clock does not start until I-140 petition approved); 8 C.F.R. §§204.12(d)(4) (if aggregate showing of 5 years is required, clock does not start until I-140 petition approved); and 8 C.F.R. §245.18 (same conditions imposed before adjustment of status permitted). For individuals, like Plaintiffs Schneider, Tandar, and Mamuya, who were already working in medically underserved areas (by virtue of employment authorization through a non-immigrant status other than J-1), the regulation impermissibly excludes the period during which they worked in underserved areas prior to the approval of their I-140 petitions (i.e. national interest waiver application) from the calculation of the 3 or 5 year service obligation.

Applying the statutory construction analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the district court, with no analysis of the plain language of the statute, summarily

concluded that "Congress simply did not specifically identify the date or manner in which the qualifying service begins." Order at 26. Thus, the court went on to determine that the regulations were reasonable because they "establish clearly identifiable dates when the qualifying service period begins and ends." Order at 26-27. The court's analysis is flawed, however, because the exclusion of past service in an underserved area from the calculation violates the plain language of INA §203(b)(2)(B)(ii), is not what Congress intended or authorized, and is unreasonable because it arbitrarily delays eligibility for adjustment of status where service in a medically underserved area pre-dates the agency's approval of the national interest waiver application.

A court faced with the task of interpreting a statute must first look to the language of the statute itself for evidence of its meaning. *Estate of Cowart v. Nicholas Drilling Co.*, 205 U.S. 469, 474 (1992); *Robinson v. Shell Oil*, 519 U.S. 337, 340 (1997). If the statutory language is clear and unambiguous, the court must give effect to the "plain meaning" of the words. *Robinson*, 519 U.S. at 340; *Consumer Product Safety Commission v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). The district court erred by failing to recognize that Congress did not intend for the date of approval of the national

interest waiver to commence the time period for the calculation of the service time required for adjustment of status.

Under the plain language of Subsection I of INA §203(b)(2)(B)(ii), foreign physicians "shall" be granted a national interest waiver if the "physician agrees to work full time as a physician" in a designated underserved area and a qualified federal or state agency "has previously determined" that their work in such area "was in the public interest." Thus, two prerequisites must be met before the agency can grant the foreign physician a national interest waiver application.

Foreign physicians who practice in underserved areas *before* USCIS grants their national interest waiver applications clearly meet the conditions of INA §203(b)(2)(B)(ii). First, they can demonstrate their agreement to work in a designated underserved area through their actual service, which is evidenced by submission of proof of their employment and proof (from the Federal Register or a qualified state agency) that the county of employment was medically underserved at the time of their employment. Second, they can establish that a qualified federal or state agency "has previously determined" that their work in such area "was in the public interest" through the submission of a public interest letter. Thus, Subsection I contemplates the grant of a national interest waiver application to

physicians who practiced in underserved areas *before* the agency grants their national interest waiver application.

Subsections II and IV further evidence that service in underserved areas prior to the grant of a national interest waiver counts towards the 3 or 5 year aggregate service requirement. These subsections provide that the agency may not grant adjustment of status to a foreign physician "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 J-1 status)]" in a properly designated medically underserved area. INA §203(b)(2)(B)(ii)(I)&(IV).

While the same group of foreign physicians who are entitled to a national interest waiver are also entitled to permanent residency after an aggregate of 3 or 5 years of service in an underserved area, there is no statutory indication that the calculation of the "aggregate" time period required for permanent residency commences with the grant of the national interest waiver. Indeed the statute presents the contrary indication, that the calculation of aggregate time is a separate requirement for adjustment eligibility.

The structure of INA §203(b)(2)(B)(ii) is clear and unambiguous. An approved national interest waiver, which requires a demonstrated commitment to service in an underserved area, is a condition precedent to eligibility for lawful

permanent residency. Similarly, aggregate service in an underserved area is a condition precedent to eligibility for lawful permanent residency. Significantly, however, each is a separate condition precedent as evidenced by their placement in different subsections. Had Congress intended to require the aggregate service period to commence only *after* approval of the national interest waiver, it would not have created separate subsections. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987) (finding that Congress' use of different language in different sections indicated that it intended the standards contained therein to differ).

Accordingly, by providing that aggregate service begins only after the approval of the national interest waiver, the regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), and 245.18 conflict with the plain language of the statute and Congress' creation of separate condition precedents in separate subsections. Thus, the district court should have invalidated the regulations based on this conflict and terminated the *Chevron* analysis at step-one.

Moreover, in Subsections II and IV, Congress specified that time served in J-1 status would not count toward the qualifying service calculation and courts must give significance to Congress' choice -- by negative implication -- not to exclude the time period worked under another nonimmigrant status. *See Lindh v.*

Murphy, 521 U.S. 320, 326-29 (1997) (discerning Congressional intent regarding the temporal reach of a statute by negative implication).

Of further significance is Subsection II and IV's use of the word "aggregate" in describing the qualifying service period. Black's Law Dictionary defines "aggregate" as meaning:

> Entire number, sum, mass, or quantity of something; total amount; complete whole. One provision under will may be the aggregate if there are no more units to fall into that class. Composed of several; consisting of many persons united together; a combined whole.

Black's Law Dictionary 65 (6th ed., 1990). Thus, use of the word aggregate indicates that Congress intended *both* past and future time periods to be included in the 3 and 5 year calculations. Indeed, the Supreme Court has often instructed lower courts to follow ordinary usage/dictionary definitions of terms when interpreting a given statute, unless Congress gives them a specified or technical meaning. *See e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988). As the NRDAA did not provide a "specified or technical" meaning for the word "aggregate," the Black's definition should control, which would include the full amount of time the physician worked in the medically underserved area. Thus, the regulations connecting the commencement of "aggregate" service with approval of the I-140 petition contravene the plain meaning of the term "aggregate" by creating an additional limiting modifier.

Review of Subsection III further compels the conclusion that foreign physicians may qualify for national interest waivers based on work in underserved areas prior to the grant of a national interest waiver. Subsection III permits qualifying foreign physicians to file their I-140 petitions (i.e. national interest waiver applications) or adjustment of status applications "prior to the date by which such alien physician has completed the [requisite aggregate] service…." INA §203(b)(2)(B)(ii)(III). Congress would not have needed to specify that a national interest waiver may be filed before completion of the aggregate service period if, as the regulations provide, approval of the I-140 petition (national interest waiver application) was a prerequisite to starting the "aggregate" clock. In other words, Congress intended service that pre-dated the filing and approval of the I-140 petition to count towards the aggregate period. The intent of Congress is clear as it specifically provided -- in Subsection III -- for the filing of I-140 petitions after the commencement of the service period but before its completion.

By limiting the commencement of the aggregate period to the date of approval of I-140 petition, the regulation contravenes Subsection III's explicit mandate that pre-approval service counts toward the aggregate service calculation. Had Congress intended the aggregate calculation to commence with approval of the I-140 petition, its statement in INA §203(b)(2)(B)(ii)(III) that I-140 petitions may be filed "prior to the date by which such alien physician has completed the

[requisite aggregate] service…." would be meaningless. Well-established canons of statutory construction require that courts should avoid interpretations that would render other provisions of the Act superfluous or unnecessary.[2]

Similarly, in Subsection IV, by providing that physicians for whom national interest waivers were *filed* before November 1, 1998 only incur a three-year service requirement, Congress further indicates that approval of the I-140 petition/national interest waiver does not trigger the commencement of the aggregate service period. That is, Congress indicated that the mere *filing* of the waiver application is sufficient to confer the benefit of the shorter service obligation. Congress did not say that *approval* of the waiver application triggered the shorter service obligation.

In sum, nothing in the language of the statute suggests a division between foreign physicians who serve in a medically underserved area *before or after* the date of DHS' approval of their national interest waiver application. Rather, the plain language of the statute indicates that Congress clearly intended *all* periods of time served in a medically underserved area – whether before or after the date of the national interest waiver approval – to count toward the calculation of time necessary to qualify for permanent residency. Thus, the district court erred by failing to find in Plaintiffs' favor based on step-one of the *Chevron* analysis.

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[2] *See Ratzlaf v. United States*, 510 U.S. 135, 141-142 (1994); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986).

2. The Regulation at 8 C.F.R. §204.12(d)(4) Impermissibly Contravenes the Statutory Language for "Grandfathered" Cases That Qualify for the Three-Year Service Obligation

Subsection IV provides that "a physician for whom [a national interest] waiver *was filed* under section 203(b)(2)(B) prior to November 1, 1998" need only show three years of service in a medically underserved area to qualify for an immigrant visa or adjustment of status. INA §203(b)(2)(B)(ii)(IV) (emphasis added). However, the regulation at 8 C.F.R. §204.12(d)(4) permits foreign physicians to qualify based on three years of service *only if* the petition was filed before November 1, 1998 and remained *pending* on November 12, 1999 (NRDAA's enactment date). The regulations specifically disallow foreign physicians who filed national interest waivers before November 1, 1998, like Plaintiff Tandar, from qualifying based on 3 years of service if a decision denying the national interest waiver application became administratively final before November 12, 1999. 8 C.F.R. §204.12(d)(6).

Here, Plaintiff Tandar filed a national interest waiver on June 1, 1998, five months before the November 1, 1998 date specified in Subsection IV. Thus, Petitioner Tandar's national interest waiver application was filed before November 1, 1998 and was pending on November 1, 1998. Plaintiff Tandar's national interest waiver was denied on June 21, 1999, approximately four and a half months before NRDAA took effect on November 12, 1999. However, contrary to the

regulations at 8 C.F.R. §204.12(d)(6), NRDAA's November 12, 1999 effective date is *not* the relevant date for purposes of grandfathering. The only relevant date is the November 1, 1998 date specified by Congress in the statute.

Congress unequivocally created a sub-class of "grandfathered" physicians who filed national interest waivers before November 1, 1998 who are subject to the three-year service obligation. Plaintiff Tandar unquestionably falls into this sub-class. Simply stated, filed before November 1, 1998 means filed before November 1, 1998. Had Congress intended that a national interest waiver that was filed before November 1, 1998 must also be pending on November 12, 1999, NRDAA's enactment date, it would have so stated. But Congress did not. Rather, Congress set forth a clear, unambiguous, and unqualified statement that the grandfathering provisions arise simply if the national interest waiver application was filed before November 1, 1998.

Congress knows how to attach qualifications to immigration applications. For example, in §2 of the Child Status Protection Act, Pub. L. 107-20, 116 Stat. 927 (Aug. 6, 2002), Congress provided that certain child beneficiaries of immigrant visa petitions would not lose the benefit of the visa petition because they "aged-out" (turned 21) before the government adjudicated their permanent residency application. Notably, Congress provided that the amendments applied to beneficiaries of (1) immigrant visa petitions approved before the enactment date

but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status; (2) immigrant visa petitions pending on the enactment date; or (3) an application pending before the Department of Justice or the Department of State on the date of enactment. *See Padash v. Ashcroft*, 358 F.3d 1161 (9th Cir. 2004) (discussing beneficiaries of Child Status Protection Act and holding that "final determination" means final decision from which no appeal may be taken). Congress' choice not to include similar qualifying language in INA §203(b)(2)(B)(ii) must be given significance.

In *Jama v. ICE*, _ U.S. _, 125 S. Ct. 694 (Jan. 12, 2005), the Supreme Court minutely examined INA §241(b)(2), 8 U.S.C. §1231(b)(2), and concluded that the text of that provision does not require a foreign country to give explicit, advance consent before an individual can be removed to such country. In so holding, the Court stated:

> We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.

Jama, 125 S. Ct. at 700. Similarly, in reviewing the validity of 8 C.F.R. §204.12(d)(6), the Court cannot assume that Congress intended to require national interest waiver applications to remain pending on November 12, 1999 to confer the three-year service obligation on the beneficiary when Congress did not so state and

has shown elsewhere in the INA that it "knows how to make such a requirement manifest."

Moreover, the agency's interpretation of INA §2039(b)(2)(B)(ii)'s phrase "*was filed* under section 203(b)(2)(B) prior to November 1, 1998" conflicts with its interpretation of a similar grandfathering provision in INA §245(i), 8 U.S.C. §1255(i). Section 245(i) of the INA, as amended by Legal Immigration and Family Equity Act Amendments of 2000, Pub. L. 106-554, 114 Stat. 2763 (2000), waives certain grounds of inadmissibility in conjunction with an application for adjustment to lawful permanent status for certain persons for whom an immigrant visa petition (on Forms I-130 or I-140) "was filed" on or before January 14, 1998. Defendants have interpreted the phrase "was filed" to confer §245(i) benefits to beneficiaries of previously filed visa petitions and allow adjustment of status even if the visa petition was "later denied, revoked or withdrawn." Memoranda of Robert L. Bach, INS Executive Associate Commissioner, dated April 14, 1999 and June 10, 1999 (attached as Appendices A and B) and Memorandum of Michael D. Cronin, Acting Executive Commissioner, dated January 26, 2001 (attached as Appendix C).[3] Thus, Defendants' failure to similarly interpret "was filed" in INA

[3] Defendants, based on a correct reading of the statute, adopted an "alien-based" reading of INA §245(i), whereby the alien is not limited to the particular "grandfathering" application or petition as the only possible basis for adjustment; rather the "grandfathering" petition or application simply preserves the right to adjust status as long as the petition was "approvable when filed" and the alien may

§203(b)(2)(B)(ii) conflicts with its interpretation of this identical phrase in INA §245(i). *Cardoza-Fonseca*, 480 U.S. at 446 n.30 ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (holding that "the consistency of an agency's position is a factor in assessing the weight that position is due.").

Accordingly, the Court must reverse the district court's decision upholding the regulation at 8 C.F.R. §204.12(d)(4) based on an erroneous interpretation of INA §203(b)(2)(B)(ii).

3. The District Court Erroneously Failed to Find that the Regulations are Ultra Vires to INA §203(b)(5)(B)(ii).

The regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4) and 8 C.F.R. §245.18 that commence the aggregate service clock on USCIS' approval of the I-140 petition flouts the express language of INA §203(b)(2)(B)(ii), which expressly contemplates pre-approval service in the aggregate service calculation. To the extent the regulations go beyond the authority of the statute by unduly restricting the commencement of the aggregate service clock, those regulations are ultra vires to INA §203(b)(2)(B)(ii).

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eventually adjust status on the basis of some other petition or application. *See* Appendices A-C.

Similarly, the regulation at 8 C.F.R. §204.12(d)(6) attaches the unwarranted condition that a national interest waiver remain pending on November 12, 1999 before the benefit of the three-year service obligation is conferred. As this condition is not authorized by Congress, it is also ultra vires to INA §203(b)(2)(B)(ii).

It is well established that regulations that are ultra vires to the statute are invalid. *See Morales-Izquierdo v. Ashcroft,* 388 F.3d 1299, 1305 (9th Cir. 2004) (invalidating regulation permitting DHS officers to unilaterally reinstate a prior order without a hearing as ultra vires to statutory requirement that an immigration judge determine removabililty); *Succar v. Ashcroft*, 394 F.3d 8, 2005 U.S. App. Lexis 110, *82 (1st Cir. 2005) (invalidating regulation prohibiting adjustment of status of arriving aliens as ultra vires to INA §245(a)); *Romero v. INS*, 39 F.3d 977, 980 (9th Cir. 1994) (invalidating INS regulation deeming the failure to provide full and truthful material and immaterial information a failure to maintain nonimmigrant status as beyond the authority of the statute because the statute only encompassed failure to disclose material information); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 170-174 (2001) (finding that agency regulation defining navigable waters exceeded the authority granted under §404(a) of the Clean Water Act and reversing decision upholding regulation); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116,

126 (1985) (federal regulation in conflict with a federal statute is invalid as a matter of law). *Accord Molina-Camacho v. Ashcroft*, 393 F.3d 937, 941 (9th Cir. 2005) (BIA acted ultra vires in issuing removal order rendering a portion of the proceedings a "legal nullity").

Thus, the Court should find that the district court also erred by failing to conclude the regulations are ultra vires to INA §203(b)(2)(B)(ii).

4. Deference to the Regulations is Not Required

It is well settled that administrative agencies are not given deference by the courts where the issue is the plain meaning of a federal statute, such as INA §203(b)(2)(B)(ii), or where administrative constructions are contrary to clear Congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) (The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (holding that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("We only defer, . . ., to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous.").

If a court employing traditional tools of statutory construction ascertains that Congress had an intention on the precise question at issue, then the agency's interpretation is not relevant. *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000) (". . . application of the normal principles of statutory construction dictate a clear and unequivocal answer to the issue before us. . . Accordingly, the statute is not ambiguous or uncertain and there is no occasion to apply *Chevron*'s deference rule."); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) ("After employing the "traditional tools of statutory construction," . . ., we conclude that [the intent of] Congress [is clear]. . . Therefore, we may not defer to the BIA's interpretation that the filing period is not subject to equitable tolling.").

Congress intended service in medically underserved areas that pre-dated the agency's approval of the national interest waiver application to count toward the aggregate period required for adjustment of status eligibility, *see* §III.B.1 above. Congress also intended that physicians who filed national interest waivers before November 1, 1998 be grandfathered for the three-year service obligation, *see* §III.B.2 above. Thus, deference to regulations contrary to the statute is not required and the district court further erred by according such deference.

IV. CONCLUSION

This Court should invalidate the relevant parts of the regulations at 8 C.F.R. §§204.12(b)(1), 204.12(d)(4), and 245.18 (relating to the commencement of the

aggregate service period) and 8 C.F.R. §204.12(d)(6) (related to the three-year service obligation).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App. 32(a)(7), I hereby certify, according to computerized count, that this brief contains 5,251 words.

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CERTIFICATE OF SERVICE

On February 22, 2005, I, Kerry Foley, served two copies of this Brief of Amicus Curiae in Support of Plaintiffs' Appeal and Reversal of the District Court's Decision.

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