U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

HQ 70/6.2
AD06-46

Interoffice Memorandum

To: Regional Directors
Service Center Directors
District Directors
National Benefits Center Director
Chief, Service Center Operations
Chief, Field Operations

From: Michael Aytes /s/
Associate Director, Domestic Operations

Date: January 23, 2007

Re: Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006) ("Schneider decision").

Revisions to Adjudicator's Field Manual (AFM) (AFM Update AD06-46):

- Chapter 22.2(b) General Form I-140 Issues (correction of AFM Chapter 22.2 subchapter references only)
- Chapter 22.2(j)(6) Petition for a Physician Based on a National Interest Waiver for Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Health Care Facilities
- Chapter 23.5 Adjustment of Status under Section 245 of the INA

I. Purpose

This memorandum establishes interim procedures for adjudicating national interest waiver (NIW) immigrant petitions and related adjustment of status applications filed on behalf of physicians practicing in medically underserved areas or at facilities operated by the Department of Veterans Affairs (VA) in light of the Ninth Circuit Court of Appeals decision in Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006).

USCIS is implementing the Schneider decision nationwide not only to ensure immediate

compliance with the decision in cases within the jurisdiction of the Ninth Circuit, but also to ensure consistent adjudication of all NIW physician cases nationwide. This interim guidance will be followed by amended regulations to give regulatory effect to the Schneider decision.

In addition, though not mandated by the Schneider decision, USCIS is expanding the fields of medical specialty that may qualify physicians for NIWs by accepting petitions on behalf of physicians who provide specialty care. USCIS will adjudicate and approve NIW petitions for physicians who work in geographic areas that are designated by the Secretary of Health and Human Services' as having a shortage of medical specialists for the Physicians Scarcity Area (PSA) program.

Lastly, this memorandum contains a technical correction to the subchapter references in section 22.2(b) of the AFM, which were originally published on September 12, 2006.

II. Background

A. National Interest Waiver Statute and Regulations

Section 203(b)(2)(B)(ii)(I) of the Immigration and Nationality Act (INA), as amended by the Nursing Relief for Disadvantaged Areas Act (Nursing Relief Act) of 1999,[1] establishes a national interest waiver of the Department of Labor's labor certification process for alien physicians petitioning for EB-2 classification (aliens with advanced degrees or exceptional ability). Pursuant to section 203(b)(2)(B)(ii)(I), the Attorney General, now the Secretary of Homeland Security, "shall grant a national interest waiver [of the job offer requirement] … on behalf of any alien physician with respect to whom a petition for preference classification has been filed … if:

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

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

The physician may not receive lawful permanent resident status "until such time as the alien has worked full-time as a physician for an aggregate of 5 years" in the shortage area, or 3 years in the shortage area if the doctor petitioned for the national interest waiver before November 1, 1998.[2] INA 203(b)(2)(B)(ii)(II) and (IV); 8 USC § 1153(b)(2)(B)(ii)(II) and (IV).

On September 6, 2000, the former Immigration and Naturalization Service (INS), now USCIS, issued an interim rule implementing the NIW provisions which were codified in 8 CFR

---

[1] Pub. L. No. 101-649 (1990) codified as 8 USC § 1153(b)(2)(B). Pub. L. No. 106-95 codified as 8 USC § 1153(b)(2)(B).

[2] Prior to 1999 Nursing Act, section 203(b)(2)(B) of the INA provided for a discretionary waiver whereby the qualified physician had to show that his or her admission to permanent residence would be in the national interest of the United States in order to be approved for the national interest waiver petition.

§§ 204.12 and 245.18. See 65 FR 53889. The regulations implemented the statutory provision allowing filing of an NIW I-140 and an adjustment application without the physician first completing the 3 or 5 years of service in shortage areas. The regulations include provisions that: (1) required NIW physicians to complete the minimum years of medical service within 4 to 6 years after the I-140 approval before the physician could obtain lawful permanent resident status; (2) required physicians who had an NIW denied prior to November 12, 1999, to complete the 5-year rather than 3-year medical requirement; (3) required NIW physicians to comply with reporting requirements, submitting evidence within 120 days of the completion of the second year of the medical practice requirement and additional evidence within 120 days of completing the fifth year requirement to establish that they were still engaged in the area of medical practice which was the basis for approval of the NIW; and (4) limited NIW eligibility to doctors who practiced in a medical specialty that was covered by the designated geographic area.

B. Schneider vs. Chertoff

Plaintiffs in Schneider v. Chertoff challenged specific provisions of the agency's NIW regulations and, in its decision issued on June 7, 2006, the Ninth Circuit found that the following three regulatory provisions were beyond the scope of the statutory language in INA 203(b)(2)(B). The court held that:

(1) Medical practice completed before the approval of the employment-based petition (except medical practice as a J-1 nonimmigrant) counts toward the service requirement;

(2) NIW physicians who had immigrant visa petitions filed on their behalf before November 1, 1998 but denied before November 12, 1999, need only fulfill the 3-year service requirement; and

(3) The regulatory 4/6 year period within which NIW physicians must complete the medical service requirement is *ultra vires* and not a permissible interpretation of the statute.

On the remaining two challenged provisions, the court held that USCIS has the authority to impose reporting requirements on NIW physicians to ensure compliance with the statutory scheme and declined to reach the merits of the question related to whether medical specialists should be covered under the statute.[3]

III. Field Guidance

Congress created the NIW program for physicians to provide quality medical care in designated underserved areas. USCIS remains committed to implementing congressional intent and also is mindful of the states' direct interest in obtaining necessary medical care in underserved areas and their critical role in coordinating with USCIS in the NIW process.

USCIS, however, is not required to allow a physician with an approved NIW and pending adjustment application to continue receiving interim work and travel authorization for an

[3] The plaintiff, Dr. Kasthuri, who raised the claim had his NIW and I-140 petition denied due to abandonment, thereby mooting the issue.

unlimited period without some evidence that the physician is pursuing or intends to pursue the type of medical service that was the basis for the NIW approval. Therefore, while USCIS will not impose a specific timeframe within which the required medical service must be performed, an adjudicator may exercise discretion to deny employment authorization or an adjustment application if he or she believes that the physician is using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

A. Interim procedures

1. Counting of 3/5-year medical service requirement & Prior medical practice

USCIS will now credit the time a physician served in a qualifying capacity in shortage areas and in Veteran Affairs facilities prior to the approval of the Form I-140 if: (1) the physician was in a lawful status (other than J-1 nonimmigrant status) at the time of service and (2) the service meets the regulatory criteria established in 8 CFR § 204.12(a).

Physicians must provide a public interest letter from the state department of health or VA certifying that the medical service provided by the physician at the facility was or is in the public interest. The certification must explicitly cover any past periods of employment that the physician wishes to have credited towards his or her service requirement, and must make a present statement for purposes of qualifying future medical service employment. Additionally, the physician must show that, at least at the time the work commenced, the work was in an HHS-designated shortage area or VA facility, as discussed in section IV.

For pending adjustment applications for NIW physicians with an approved Form I-140, adjudicators may issue a request for evidence (RFE) to physicians to provide information on employment prior to the approval of the Form I-140.

A physician who has completed the service requirement and is submitting supplementary filings as part of his or her adjustment of status application per 8 CFR § 245.18 also may submit retroactive certification or attestation letters from relevant states' department of health[4] or a VA hospital showing that any full-time medical employment completed prior to the approval of the immigrant petition was in fact in the public interest. A public interest letter provided by a state department of health or by the VA as part of a J-1 waiver application of the foreign residency requirement may also be used to prove that past employment was in the national interest.

2. Grandfathered cases

Physicians with NIW immigrant visa petitions filed on their behalf before November 1, 1998 ("grandfathered" cases) are eligible to obtain permanent resident status after only 3 years of service rather than 5 years, even if the initial NIW petition was denied prior to November 12, 1999. Previously, USCIS regulations required doctors who were denied a national interest waiver prior to November 12, 1999, to file a new immigrant visa petition under the provisions of

[4] USCIS will not accept certification letters from local health departments. USCIS continues to require that a letter come from the state department of health.

8 U.S.C. § 1153(b)(2)(B)(ii), which contains the five-year medical practice requirement instead of the three-year requirement. The Schneider Court found these regulations to be *ultra vires*. USCIS will issue revised regulations in the future.

Any physician who wishes to be considered a "grandfathered alien" must submit evidence that a Form I-140 for national interest waiver filed on his or her behalf was pending as of November 1, 1998. If such petition was denied (regardless of the date of denial), such grandfathered alien must establish eligibility for a national interest waiver through a subsequent NIW petition and must satisfy the 3-year service requirement in addition to any other requirements prescribed in 8 CFR § 245.18. The burden is on the applicant to establish that a NIW immigrant visa petition was filed on their behalf before November 1, 1998.

3. No time limitations

USCIS will no longer require physicians to complete the 3/5 year medical service requirement within the 4/6 year period after approval of the NIW petition. Physicians with an approved NIW petition will no longer be restricted to a specific time period in which to fulfill the medical service requirement.

USCIS adjudicators should not issue notices of intent to revoke (NOIR) or revoke the I-140 petition, or deny adjustment applications for physicians solely because the physician did not complete the 3/5 year service requirement within the 4/6 year time limit. USCIS adjudicators, however, may deny an application for adjustment of status as a matter of discretion if the physician appears to be using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

If a physician's adjustment of status application was denied and the I-140 revoked on or after September 6, 2000 but before the effective date of this memorandum (January 23, 2007) solely because the physician did not complete the 3/5 years of medical service within the 4/6 year time limit, USCIS will allow such aliens to file, with appropriate fees, a motion to reopen the immigrant petition and/or application to adjust to permanent resident status. The motion to reopen will only be accepted if the physician: (1) is currently in the United States pursuant to a lawful admission; (2) is maintaining a lawful immigration status; (3) has not been the subject of removal proceedings or a final order of removal; and (4) has not already acquired lawful permanent resident status. The motions to reopen must be submitted within one (1) year of the effective date of this memorandum. In conjunction with the motion to reopen, physicians must submit evidence of progress towards or actual completion of the 3/5 years of medical service in addition to any other filing requirements prescribed in 8 CFR § 245.18.

4. Interim Evidence of Compliance with NIW Requirements at the 2nd and 6th Anniversaries of I-140 Approval

USCIS will continue to require submission of reports within 120 days after the 2nd and 6th anniversaries of the I-140 approval,[5] evidencing that the physicians have either completed or are

[5] Physicians with only the 3-year service requirement do not have to submit interim evidence at the 2nd anniversary since they need only submit evidence within 120 days after completing the 3-year service requirement.

in the process of completing the required years of qualifying medical service. USCIS will issue an RFE for evidence of compliance and requested evidence may include:

(i) Employment documentation such as individual federal income tax returns and W-2 forms as proof of the amount of medical service the physician has completed;

(ii) A contract, an employer's statement of understanding, or a commitment to self-employment as proof of a commitment to complete the medical service in the shortage area;

(iii) Explanation and proof concerning any breaks in, or any delay in the commencement of, the full-time medical service employment; and

(iv) Proof of other valid immigration status under which any non-qualifying employment has been or is being performed.

USCIS adjudicators should not revoke an approved I-140 solely because the required medical service has not been completed. However, adjudicators may revoke a petition if the adjudicator determines that the physician who is the beneficiary of the I-140 does not intend to complete the NIW requirements, that he or she never intended to complete the requirements, or for any other applicable bases for revocation of a petition as permitted under section 205 of the INA and enumerated in 8 CFR § 205.

In reviewing a pending I-485, USCIS adjudicators should review all interim evidence, and based on the totality of circumstances, determine if the physician is complying with the NIW requirements. Adjudicators should determine whether the physician is using the pending adjustment of status application solely as a means for employment in areas or occupations other than the required medical service in a designated shortage area. If the physician fails to submit sufficient evidence of compliance, USCIS may issue an RFE. If a physician fails to provide any evidence of compliance or fails to respond to the RFE, the I-485 may be denied for abandonment. Similarly, a finding of failure to comply with the NIW requirements may be considered a negative factor that could result in denial of adjustment in the exercise of discretion.

5. Specialists

USCIS will now accept NIW petitions submitted on behalf of specialty care physicians who agree to work full-time in areas designated by HHS as having a shortage of specialty care health professionals, i.e. Physician Scarcity Areas (PSA).[6]

Previously, based on HHS' criteria published in 2000, INS limited its definition of qualified physicians in designated shortage areas to those who practiced primary care medicine.[7]

---

[6] To determine if a geographic area is a PSA, access the HHS' Centers for Medicare and Medicaid Services website at http://www.cms.hhs.gov/HPSAPSAPhysicianBonuses and search under Specialty Care PSA Zip Codes.

[7] Primary care medicine is defined as family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry.

8 CFR § 204.12(a)(2)(i). Since 2000, INS, and now USCIS, has given state departments of health more flexibility to sponsor waivers for physicians willing to work in medically underserved areas. For instance, under the Conrad waiver program, state departments of health may sponsor waivers for J-1 specialist physicians who will provide service to medically underserved populations (MUP).[8] The Conrad program is similar to the national interest waiver program as they both have a medical service requirement under which the physician must work in a medically underserved area.

In 2004, HHS considered specialists in its listing of specialist care scarcity areas under the Physician Scarcity Area (PSA) bonus payment program. While HHS did not make a declaration of an absolute shortage area, it did define geographic areas as scarcity areas based on the ratio of physicians to the population of Medicare beneficiaries. The Nursing Relief Act requires USCIS to recognize HHS designations of health professionals without limitation to primary care. In following HHS' designations of MUP and PSA, USCIS will now recognize NIW physicians in primary care and specialty care.[9]

Note: A physician or employer must submit evidence showing that a geographic area is or was designated by the HHS as having a shortage of health care professionals. The designation must be valid at the time the NIW waiver employment began. If the area loses its HHS' designation after the physician starts working, a physician can remain at the facility and the time worked henceforth will qualify as NIW employment so long as the employment continues to satisfy all other national interest waiver requirements.

6. Final compliance requirement

When the medical service requirement is satisfied, physicians must provide evidence of final compliance with the 3 or 5 years service requirement no later than 120 days after the completion of the service requirement. USCIS adjudicators may excuse submission delays in the exercise of discretion.

B. Other filing requirements per 8 CFR §§ 204.12 and 245.18

All other regulatory provisions not affected by the Schneider decision remain in effect.

V. Renewal Employment Authorization Document Adjudication

Physicians with an approved I-140 based on national interest waiver and a pending application for adjustment of status are eligible to apply for an Employment Authorization Document (EAD). EAD issuance is discretionary under 8 CFR § 274a.13(d). NIW physicians seeking employment authorization based on a pending adjustment application may be served

[8] To determine if a geographic area is a MUA or MUP, access the HHS' Health Resources and Services Administration website at http://bhpr.hrsa.gov/shortage/muaguide.htm.

[9] A specialty physician is defined as other than a general practitioner, family practice practitioner, general internist, obstetrician, or gynecologist. Dentists, chiropractors, podiatrists, and optometrists do not qualify for the physician scarcity bonus as specialty physicians, and therefore, cannot qualify for the national interest waiver.

with an RFE, requesting evidence of meaningful progress toward completing the NIW employment obligation or of plans to use the EAD for the purpose of completing the medical service obligation.

Such evidence may include documentation of employment in any period during the previous 12 months (e.g. copies of W-2 forms). If there are any breaks in the NIW qualified employment in the previous 12 months, USCIS may request that the physician provide an explanation and proof of the reasons for the breaks and evidence of intent to work in the NIW employment during the period requested for employment authorization. USCIS will be updating the instructions for Form I-485 to reflect this additional evidence as “initial evidence” required for EAD renewal for NIW physician applicants.

VII. Contact Information

Questions regarding this memorandum may be directed through appropriate channels to the Office of Regulations and Product Management or Service Center Operations.

VIII. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of NIW petitions and applications for adjustment of status. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law of by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

IX. AFM Update

Accordingly, the Adjudicator’s Field Manual is revised as follows:

☞ 1. Chapter 22.2(b) is revised to read:

Chapter 22.2 Employment-Based Petitions

(b) General I-140 Petition Adjudication Issues. The issues discussed in this subchapter pertain to the adjudication of I-140 petitions in general. Additional information on section 203(b)(1) (first employment-based preference) issues is contained in subchapter 22.2(i) of this field manual; on section 203(b)(2) (second employment-based preference) issues is contained in subchapter 22.2(j) of this field manual; and on section 203(b)(3) (third employment-based preference) issues is contained in subchapter 22.2(k) of this field manual.

* * *

☞ 2. Chapter 22.2(j) (6) is revised to read:

(j) Special Considerations Relating to EB-2 Cases.

* * *

(6) Petition for a Physician Based on a National Interest Waiver for Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Health Care Facilities.

(A) Background.

(i) Statutory and Regulatory Authority. Section 203(b)(2)(B)(ii)(I) of the Immigration and Nationality Act (INA), as amended by the Nursing Relief for Disadvantaged Areas Act (Nursing Relief Act) of 1999, establishes a national interest waiver of the Department of Labor's labor certification process for alien physicians petitioning for EB-2 classification (aliens with advanced degrees or exceptional ability). See Pub. L. No. 101-649 (1990) codified as 8 USC § 1153(b)(2)(B). Pub. L. No. 106-95 codified as 8 USC § 1153(b)(2)(B).

Prior to 1999 Nursing Act, section 203(b)(2)(B) of the INA provided for a discretionary waiver whereby the qualified physician had to show that his or her admission to permanent residence would be in the national interest of the United States in order to be approved for the national interest waiver petition.

Pursuant to section 203(b)(2)(B)(ii)(I), the Attorney General, now the Secretary of Homeland Security, "shall grant a national interest waiver [of the job offer requirement] … on behalf of any alien physician with respect to whom a petition for preference classification has been filed … if:

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

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

The physician may not receive lawful permanent resident status "until such time as the alien has worked full-time as a physician for an aggregate of 5 years" in the shortage area, or 3 years in the shortage area if the doctor petitioned for the national interest waiver before November 1, 1998. See INA 203(b)(2)(B)(ii)(II) and (IV); 8 USC § 1153(b)(2)(B)(ii)(II) and (IV).

On September 6, 2000, the former Immigration and Naturalization Service (INS), now USCIS, issued an interim rule implementing the NIW provisions which were codified in 8 CFR §§ 204.12 and 245.18. See 65 FR 53889.

The regulations implemented the statutory provision allowing filing of an NIW I-140 and an adjustment application without the physician first completing the 3 or

5 years of service in shortage areas. The regulations include provisions that: (1) required NIW physicians to complete the minimum years of medical service within 4 to 6 years after the I-140 approval before the physician could obtain lawful permanent resident status; (2) required physicians who had an NIW denied prior to November 12, 1999, to complete the 5-year rather than 3-year medical requirement; (3) required NIW physicians to comply with reporting requirements, submitting evidence within 120 days of the completion of the second year of the medical practice requirement and additional evidence within 120 days of completing the fifth year requirement to establish that they were still engaged in the area of medical practice which was the basis for approval of the NIW; and (4) limited NIW eligibility to doctors who practiced in a medical specialty that was covered by the designated geographic area.

USCIS issued memoranda to supplement regulations, including National Interest Waiver for Second Preference Employment-based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities, signed by William Aytes on October, 30, 2000, and National Interest Waiver for Second Preference Employment-based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities and Section 214(l)(2)(B) of the Act, signed on October 1, 2001.

(ii) Schneider v. Chertoff. Plaintiffs in Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006), challenged specific provisions of the agency's NIW regulations and, in its decision issued on June 7, 2006, the Ninth Circuit found that the following three regulatory provisions were beyond the scope of the statutory language in INA 203(b)(2)(B). The court held that:

(1) Medical practice completed before the approval of the employment-based petition (except medical practice as a J-1 nonimmigrant) counts toward the service requirement;

(2) NIW physicians who had immigrant visa petitions filed on their behalf before November 1, 1998 but denied before November 12, 1999, need only fulfill the 3-year service requirement; and

(3) The regulatory 4/6 year period within which NIW physicians must complete the medical service requirement is *ultra vires* and not a permissible interpretation of the statute.

On the remaining two challenged provisions, the court held that USCIS has the authority to impose reporting requirements on NIW physicians to ensure compliance with the statutory scheme and declined to reach the merits of the question related to whether medical specialists should be covered under the statute. The plaintiff who raised the claim had his NIW and I-140 petition denied due to abandonment, thereby mooting the issue.

USCIS remains committed to advancing the congressional intent of providing

quality medical care in designated underserved areas and also is mindful of the states' direct interest in obtaining necessary medical care in underserved areas and their critical role in coordinating with USCIS in the NIW process.

USCIS, however, is not required to allow a physician with an approved NIW and pending adjustment application to continue receiving interim work and travel authorization for an unlimited period without some evidence that the physician is pursuing or intends to pursue the type of medical service that was the basis for the NIW approval. Therefore, while USCIS will amend NIW procedures to meet the Schneider decision (i.e. not impose a specific timeframe within which the required medical service must be performed), USCIS officer may exercise discretion to deny employment authorization or an adjustment application if he or she believes that the physician is using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

(B) Eligibility. USCIS regulation at 8 CFR 204.12 establishes the basic eligibility requirements for the alien physician, namely that:

- A petition has been filed under section 203(b)(2) of the Act, accompanied by the national interest waiver request;

- The physician agrees to work full-time in a clinical practice providing primary or specialty care in an underserved area or at a VA health care facility for an aggregate of 5 years (not counting any time in J-1 status, but including such time that may have preceded the I-140), or, if the petition was filed prior to 11/1/98, an aggregate of 3 years (not counting any time in J-1 status); and

- A Federal agency or a State Department of Public Health, with jurisdiction over the medically underserved area, has determined that the physician's work in the underserved area or the VA facility is in the public interest (and, to the extent that past work is presented, that it was in the public interest).

(C) Primary or Specialty Care: As of the January 23, 2007, NIW petitions may be submitted on behalf of primary and specialty care physicians who agree to work full-time in areas designated by HHS as having a shortage of specialty care health professionals, i.e. Health Professional Shortage Area (HPSA), Medically Underserved Area (MUA), Medically Underserved Population (MUP), and Physician Scarcity Areas (PSA).

Prior to January 23, 2007, based on HHS' criteria published in 2000, INS limited its definition of qualified physicians in designated shortage areas to those who practiced primary care medicine. 8 CFR § 204.12(a)(2)(i). Primary care medicine is defined as family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Since 2000, INS, and now USCIS, has given state departments of health more flexibility to sponsor waivers

for physicians willing to work in medically underserved areas. For instance, under the Conrad waiver program, state departments of health may sponsor waivers for J-1 specialist physicians who will provide service to medically underserved populations (MUP). The Conrad program is similar to the national interest waiver program as they both have a medical service requirement under which the physician must work in a medically underserved area.

In 2004, HHS considered specialists in its listing of specialist care scarcity areas under the Physician Scarcity Area (PSA) bonus payment program. While HHS did not make a declaration of an absolute shortage area, it did define geographic areas as scarcity areas based on the ratio of physicians to the population of Medicare beneficiaries. The Nursing Relief Act requires USCIS to recognize HHS designations of health professionals without limitation to primary care. In following HHS' designations of MUP and PSA, USCIS will now recognize NIW physicians in primary care and specialty care. A specialty physician is defined as other than a general practitioner, family practice practitioner, general internist, obstetrician, or gynecologist. Dentists, chiropractors, podiatrists, and optometrists do not qualify for the physician scarcity bonus as specialty physicians, and therefore, cannot qualify for the national interest waiver.

Note: A physician or employer must submit evidence showing that a geographic area is or was designated by the HHS as having a shortage of health care professionals. The designation must be valid at the time the NIW waiver employment began. If the area loses its HHS' designation after the physician starts working, a physician can remain at the facility and the time worked henceforth will qualify as NIW employment so long as the employment continues to satisfy all other national interest waiver requirements.

(D) Medically Underserved Areas. In designating areas of the country as "underserved," the Secretary of Health and Human Services (HHS) addresses the shortage of family or general medicine and sub-specialist physicians (designations include Health Professional Shortage Areas (HPSA), Medically Underserved Population (MUP), Medically Underserved Area (MUA), and Physician Scarcity Areas (PSAs)). For work that preceded the I-140, the area must have been a designated shortage area at the time the work commenced but need not have retained such designation. For shortage designations, see these sources:

- Access HHS' Health Resources and Services Administration website at http://bhpr.hrsa.gov/shortage/muaguide.htm to determine if a geographic area is a MUA or MUP.
- Access HHS' Centers for Medicare and Medicaid Services website at http://www.cms.hhs.gov/HPSAPSAPhysicianBonuses and search under Specialty Care PSA Zip Codes to determine if a geographic area is a PSA.

Doctors serving at VA facilities are not bound by the HHS categories noted above.

The VA may petition for doctors that specialize in various fields of medicine, and the location of the work need not be in an underserved area.

(E) Time Limit to Complete the Required Medical Service. The physician has no set time limitation to complete the 3 or 5 years of aggregate service, which may include periods of service prior to the filing or approval of the I-140 NIW petition. While there is no set time limitation, a NIW physician must submit interim evidence of compliance with the medical service requirement prior to the approval of the adjustment of status application.

(i) If a physician's adjustment of status application was denied and the I-140 revoked on or after September 6, 2000 but before January 23, 2007 (effective date of Schneider policy memo) solely because the physician did not complete the 3/5 years of medical service within the 4/6 year time limit, USCIS will allow such aliens to file, with appropriate fees, a motion to reopen the immigrant petition and/or application to adjust to permanent resident status. The motion to reopen will only be accepted if the physician: (1) is currently in the United States pursuant to a lawful admission; (2) is maintaining a lawful immigration status; (3) has not been the subject of removal proceedings or a final order of removal; and (4) has not already acquired lawful permanent resident status. The motions to reopen must be submitted within one (1) year of the effective date of this memorandum. In conjunction with the motion to reopen, physicians must submit evidence of progress towards or actual completion of the 3/5 years of medical service in addition to any other filing requirements prescribed in 8 CFR § 245.18.

(ii) While USCIS adjudicators cannot issue notices of intent to revoke (NOIR) or revoke the I-140 petition, or deny adjustment applications for physicians solely because the physician did not complete the 3/5 year service requirement within a time limit, adjudicators, however, may deny an application for adjustment of status as a matter of discretion if the physician appears to be using the pending adjustment of status application solely as a means for employment in areas or occupations other than medical service in the designated shortage areas.

(F) Required Supplemental Evidence. In addition to the evidence necessary to support the I-140 petition, physicians seeking a national interest waiver based on service in an underserved area or at a VA facility must submit supplemental documentation with the petition. A complete list and detailed explanation of this supplemental evidence is found at 8 CFR 204.12(c).

(i) Employment contract or employment commitment letter. Physicians must provide a contract or letter covering required period of clinical medical practice that was issued and dated within six months prior to the filing date of the petition.

(ii) Public Interest Letter. Physicians must provide a letter issued and dated within six months prior to filing date of petition from the federal agency or from the state department of public health attesting that the physician's work is or will be in the public interest.

(iii) Physicians with Foreign Residency Requirement. The physician must satisfy any of the other requirements for EB-2 classification, other than that of the labor certification. In particular, a physician needing a waiver of the J-1 foreign residency requirement must still obtain such a section 212(e) waiver and satisfy all the waiver conditions set forth in section 214(l) of the Act (including 3 years of service) before the physician's adjustment of status application may be approved. See 8 CFR 204.12(g).

(iv) Admissibility Requirements Established by Section 212(a)(5)(B) of the Act. The physician must meet the admissibility requirements established by section 212(a)(5)(B) of the Act, relating to examinations that immigrant physicians must pass in order to immigrate. Evidence must be provided that the physician has passed parts I and II of the National Board of Medical Examiners Examination (NBMEE) or an equivalent examination as determined by the Secretary of Health and Human Services (HHS), and evidence that the beneficiary is competent in oral and written English.

Examinations that are equivalent to the NBMEE include the:

- Visa Qualifying Examination (VQE)
- Comprehensive Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS)
- U.S. Medical Licensing Examination (USMLE)

A possible form of evidence of competency in oral and written English is an ECFMG certification showing the beneficiary has passed the English language proficiency test.

(G) Effective Dates for Filing. All physician petitions with accompanying national interest waiver requests based on service in a underserved area filed on or after November 12, 1999, shall be adjudicated in accordance with the regulatory provisions found at 8 CFR 204.12(d)(1). Petitions pending at a service center on November 12, 1999, shall also be adjudicated pursuant to the revised regulatory provisions. See 8 CFR 204.12(d)(2).

(i) Cases filed and final decision prior to November 1, 1998. For petitions in which a decision to deny became final prior to November 1, 1998, the petitioners can file a new petition accompanied by a national interest waiver request and the required supporting evidence. Officers shall not accept any motions to reopen or reconsider previously denied cases on behalf of

physicians requesting national interest waivers based on service in an underserved area in these cases.

(ii) Cases filed but no final decision before November 1, 1998: Officers must remember that the Nursing Relief Act makes a special provision for petitions filed prior to the November 1, 1998. For these "grandfathered" cases, the physician need only satisfy 3 years of qualified medical service (not including time in J-1 status) to be eligible for permanent residency status.

Prior to January 23, 2007, USCIS regulations required doctors who were denied a national interest waiver prior to November 12, 1999, to file a new immigrant visa petition under the provisions of 8 U.S.C. § 1153(b)(2)(B)(ii), which contains the five-year medical practice requirement instead of the three-year requirement. The Schneider Court found these regulations to be *ultra vires*. Therefore, the physicians with cases filed before November 1, 1998 are eligible to obtain permanent resident status after only 3 years of service rather than 5 years, even if the initial NIW petition was denied prior to November 12, 1999, since these cases should have been treated as a "grandfathered" case. USCIS will issue revised regulations in the future.

Any physician who wishes to be considered a "grandfathered alien" must submit evidence that a Form I-140 for national interest waiver filed on his or her behalf was pending as of November 1, 1998. If such petition was denied (regardless of the date of denial), such grandfathered alien must establish eligibility for a national interest waiver through a subsequent NIW petition and must satisfy the 3-year service requirement in addition to any other requirements prescribed in 8 CFR § 245.18. The burden is on the applicant to establish that a NIW immigrant visa petition was filed on their behalf before November 1, 1998.

USCIS will only accept a motion to reopen in these cases if the physician: (1) is currently in the United States pursuant to a lawful admission; (2) is maintaining a lawful immigration status; (3) has not been the subject of removal proceedings or a final order of removal; and (4) has not already acquired lawful permanent resident status. The motions to reopen must be submitted within one (1) year of the effective date of the Schneider policy memorandum, dated January 23, 2007. In conjunction with the motion to reopen, physicians also must submit evidence of a pending Form I-140 for national interest waiver as of November 1, 1998, and satisfaction of the 3-year service requirement in addition to any other filing requirements prescribed in 8 CFR § 245.18

(H) Requests to Practice in a Different Underserved Area. USCIS regulations allow a physician to practice medicine in a different underserved area, or a different VA facility. See 8 CFR 204.12(f) for a complete explanation of the

procedure physicians must follow, including an amended petition, in order to request to practice medicine in a different underserved area.

(I) Adjudication of Adjustment Applications. See Chapter 23.5(e)(3) for instructions on adjudicating adjustment of status applications.

☞ 3. Chapter 23.5 is revised to read:

Chapter 23 Adjustment of Status to Lawful Permanent Resident.

***

23.5 Adjustment of Status under Section 245 of the INA.

(e) Employment-based Adjustment Cases.

(1) Background. Adjudication of employment based petitions is covered in **Chapter 22** of this *field manual*. Assuming that the petition was already adjudicated and approved, your responsibility as the adjudicator of the adjustment application is to satisfy yourself that the alien remains eligible for the classification granted by that petition. If the alien is already working in the position described in the petition, verify the duties performed, wages paid, and other aspects of the petition. If there are significant discrepancies which show that the alien is performing lesser duties, receiving lower wages, or is in other ways not meeting the criteria set forth in the petition, consider revocation of the petition under section 205 of the Act (see **Chapter 20.2**)

(2) Conditional Permanent Resident. If the adjustment application is based on an employment creation petition under section 203(b)(5) of the Act, the adjusting alien becomes a conditional permanent resident. As such, he or she must seek removal of the conditions on his or her residence by filing an **I-829**, Petition by Entrepreneur to Remove Conditions, within 90 days prior to the second anniversary of the date on which he or she is granted residence. (See AFM **Chapter 25** for a discussion of the procedures for seeking removal of those conditions.) In placing conditions upon the alien's residence, Congress recognized (among other issues) the potential for fraud and the need for increased vigilance to combat it. It is of utmost importance that you, as the adjudicator handling the application for adjustment (and perhaps the Form I-829 petition) exercise such increased vigilance, and avoid the mind-set that combating fraud is the job of the adjudicator who will be handling the removal of conditions petition two years hence.

(3) National Interest Waiver Physicians.

(A) Concurrent Filing. The provisions of the statutory amendment at section 203(b)2(B)(ii) of the Act and USCIS regulations at 8 CFR 245.2(a)(2) and 204.5(n) allow for a physician to concurrently file an I-140 petition and an I-485 adjustment of status application (if an immigrant visa number is immediately available) prior to

the date by which the physician has completed the 3 or 5-year service requirement. USCIS may not grant final approval of the adjustment application (nor should a visa be issued) until the physician has served his or her 3 or 5 years of aggregate service in a medically underserved area or VA facility. See section 203(b)(2)(B)(ii)(II) of the Act and 8 CFR 245.18(b)(2). In the case of physicians still in J-1 status, the regulation allows for concurrent filing of the I-140 and I-485 while still in J status; however, the application for permanent residence for such physicians cannot be approved until the conditions for the J-1 waiver are met.

(B) Authorized period of stay with pending adjustment application. With an approved I-140 petition as a national interest waiver physician and a pending adjustment application, NIW physicians are in an authorized period of stay while serving the 3 or 5 years of aggregate medical service, assuming that they satisfy the interim evidence requirement demonstrating meaningful progress towards completing the medical service requirement. See 8 CFR 245.18(d)(2) and the discussion below concerning interim evidence of compliance.

(C) Eligible for Employment Authorization Document. With an approved I-140 and during the pendency of the adjustment application, NIW physicians are eligible for an Employment Authorization Document (EAD). See 8 CFR 274a.12(c)(9) and 245.18(d). NIW physicians must seek an EAD in order to provide the qualified medical service if the physicians are not already authorized to perform such services pursuant to a lawful nonimmigrant status. NIW physicians should submit the application for an EAD (Form I-765) simultaneously with the adjustment application to ensure timely processing.

EAD issuance is discretionary under 8 CFR § 274a.13(d). To ensure that the physician intends to pursue and complete the type of medical service for which such immigration arrangements are based, USCIS may use its discretion to serve an RFE, requesting evidence of meaningful progress toward completing the NIW employment obligation or of plans to use the EAD for the purpose of completing the medical service obligation.

Such evidence may include documentation of employment in any period during the previous 12 months (e.g. copies of W-2 forms). If there are any breaks in the NIW qualified employment in the previous 12 months, USCIS may request that the physician provide an explanation and proof of the reasons for the breaks and evidence of intent to work in the NIW employment during the period requested for employment authorization. USCIS will be updating the instructions for Form I-485 to reflect this additional evidence as “initial evidence” required for EAD renewal for NIW physician applicants.

Upon reviewing the evidence, USCIS officers may deny employment authorization to a physician who is not making meaningful progress toward the service obligation or where USCIS determines that the physician is using the pending adjustment application solely as a means for employment in areas or occupations

other than medical service in the designated shortage areas. A physician is not required to complete the medical service obligation within a set time, but he or she is not entitled to use the NIW process to obtain employment authorization to pursue other work instead of that obligation.

(D) Advance Parole. Physicians with pending adjustment applications may apply for advanced parole if they desire to travel during the respective 3 or 5-year service requirement period, and if they no longer have a valid nonimmigrant visa. 8 CFR 245.18(k) sets out the procedures that alien physicians must follow in order to obtain a travel document. Possession of an approved I-131, however, does not guarantee re-admission to the United States. A physician must still establish that he or she is admissible upon re-entry to continue pursuit of the pending adjustment application.

(E) Unique Requirements for Adjustment of Status. Officers need to be aware unique processing differences for these physicians as opposed to other adjustment applicants.

NIW physicians cannot adjust to permanent resident status until the physician has completed 3 or 5 years of aggregate service in a medically undeserved area or VA facility. USCIS issued interim regulations to define the special requirements for the National Interest Waiver physicians as they pursue meaningful progress towards their 3 or 5-year medical service obligation.

In Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006), certain provisions of the interim regulations were overruled, and USCIS subsequently decided to implement the court decision nationally. Thus, officers should refer to the policy memorandum titled, "Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically undeserved areas in light of Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006)," dated January 23, 2007**.**

(i) Delayed procedural requirements

- Delayed fingerprints. Physicians will be scheduled for fingerprinting at an Application Support Center after the submission of evidence documenting the completion of the 3 or 5 years of aggregate service. See 8 CFR 245.18(c).

- Delayed medical report. Physicians will submit the required adjustment medical report, Form I-693, with the evidence submitted at the conclusion of the period of aggregate medical service. See 8 CFR 245.18(c).

(ii) Counting of the 3 or 5 years of medical practice. Any qualifying employment in shortage areas and in Veteran Affairs facilities prior to and after the

approval of the I-140 that was not performed while in J-1 nonimmigrant status shall count towards the medical service requirement as long as the employment was authorized and the service meets the regulatory criteria established in 8 CFR § 204.12(a).

Physicians must provide a public interest letter from the state department of health or VA certifying that the medical service provided by the physician at the facility was or is in the public interest. The certification must explicitly cover any past periods of employment that the physician wishes to have credited towards his or her service requirement, and must make a present statement for purposes of qualifying future medical service employment. Additionally, the physician must show that, at least at the time the work commenced, the work was in an HHS-designated shortage area or VA facility.

For pending adjustment applications for NIW physicians with an approved Form I-140, adjudicators may issue a request for evidence (RFE) to physicians to provide information on employment prior to the approval of the Form I-140.

A physician who has completed the service requirement and is submitting supplementary filings as part of his or her adjustment of status application per 8 CFR § 245.18 also may submit retroactive certification or attestation letters from relevant states' department of health or a VA hospital showing that any full-time medical employment completed prior to the approval of the immigrant petition was in fact in the public interest. USCIS will not accept certification letters from local health departments. A public interest letter provided by a state department of health or by the VA as part of a J-1 waiver application of the foreign residency requirement may also be used to prove that past employment was in the national interest.

(iii) Notification Requirement Upon Filing of Form I-485. Upon receipt and during the pendency of the I-485, USCIS may issue supplemental documents to the physician, outlining medical service requirements for completing the adjustment process. See 8 CFR 245.18(f).

(iv) Interim Evidence of Compliance with Employment Requirement. Although there is not an absolute time within which the service obligation must be completed, physicians with a 5-year service requirement must provide interim evidence of compliance with the medical service requirement at the post 2-year and 6-year anniversary, if necessary, from the date of the I-140 approval. Physicians with only the 3-year service requirement do not have to submit interim evidence at the 2nd anniversary since they need only submit evidence within 120 days after completing the 3-year service requirement. Normally, the physician must submit employment documentation and an employer attestation letter showing that the

physician is complying with the statutory scheme of the Nursing Relief Act and the national interest waiver obligation.

Officers should review the evidence and based on the totality of the circumstances, determine if the physician has been complying with the purposes of the Nursing Relief Act. Evidence of compliance may include (1) employment documentation such as individual federal income tax returns and W-2 forms as proof of the amount of medical service the physician has completed; (2) a contract, an employer's statement of understanding, or a commitment to self-employment as proof of a commitment to complete the medical service in the shortage area; (3) explanation and proof concerning any breaks in, or any delay in the commencement of, the full-time medical service employment; and (4) proof of other valid immigration status under which any non-qualifying employment has been or is being performed.

Physicians are required to submit the interim evidence within 120 days of the 2-year and 6-year, if necessary, anniversary of the I-140 approval; however, an officer at his or her own discretion may excuse submission delays. See 8 CFR 245.18(g).

Officers should pay particular attention to whether the physician is using his or her presence in the United States pursuant to an application for adjustment of status based on national interest waiver petition to pursue other activities instead of full-time medical service in shortage areas. If the physician fails to submit sufficient evidence of compliance, USCIS officer may issue a request for evidence.

- If a physician fails to provide any evidence or fails to respond to the Request for Evidence, the I-485 may be denied for abandonment.

- A determination that a physician has failed to comply with the statutory purpose of the Nursing Relief Act may be considered a negative factor that could result in denial of adjustment in the exercise of discretion.

- USCIS officer may revoke a petition if the adjudicator determines that the physician who is the beneficiary of the I-140 does not intend to complete the NIW requirements, that he or she never intended to complete the requirements, or for any other applicable bases for revocation of a petition as permitted under section 205 of the INA and enumerated in 8 CFR 205.

(v) Evidence for Finalizing the Adjustment of Status. Within 120 days of completing the 3 or 5-year medical service requirement, the physician must submit all documentation to finalize the adjustment of status application.

The documentation includes proof of employment and the required medical examination report. See 8 CFR 245.18(h) and 8 CFR 245.5. A physician cannot be scheduled for fingerprinting until the final documentation is submitted. The adjustment application cannot be approved without this set of required evidence. At his or her discretion, an officer may excuse a delay in submitting the final evidence.

(vi) An approved I-140 should not be revoked purely on the basis of failure to complete the service requirement. However, a petition may be revoked based on a finding that the physician does not intend to complete the NIW requirements, that he or she never did intend to complete the requirements, or for any other applicable bases for revocation of a petition as permitted under section 205 of the INA and enumerated in 8 CFR 205.

(F) Portability. USCIS is statutorily required to allow the filing of an adjustment application before the completion of the medical service requirement that is a statutory prerequisite to approval of adjustment. See section 203(b)(ii)(II) of the Act. The provisions of INA section 204(j), concerning I-140 portability in the event USCIS takes longer than 180 days to adjudicate an adjustment application, do not apply to NIW physicians.

(G) Adjustment Interview. USCIS shall decide if the physician should be interviewed before finalizing the adjustment application. Officers shall follow the procedures found in 8 CFR 245.6 and policy guidance regarding waivers of the adjustment interview, and apply them accordingly to these cases. See 8 CFR 245.18(j).

(H) Non-compliance and Denials. Physicians who fail to comply with the interim evidence requirement at the 2-year post approval of the I-140 may have their I-485 denied and I-140 approval revoked. An officer at his or her discretion may excuse a delay in submitting the required evidence of completed medical service.

(I) Service Center Protocol for Storing Files. Since the adjustment applications for these physicians will need to remain open and pending for over 3 or 5 years, the Service Centers will need to undertake special procedures for storing these A-files. In particular, each Service Center must dedicate a special area to house these files. The appropriate product line within each Service Center will be responsible for ensuring that all required notices to the applicant are processed in a timely fashion.

(J) Further Guidance. Officers with questions about this guidance or the provisions of the statutory amendment should be directed through appropriate channels to HQSCOPS.

☞ 4. The *AFM* Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD06-46 [INSERT SIGNATURE DATE OF THIS MEMO]	Chapter 22.2(b) and (j)(6); Chapter 23.5	This memorandum provides interim field guidance in light of the Ninth Circuit Court of Appeals decision in Schneider v. Chertoff, 450 F.3d 944 (9th Cir. 2006). This memorandum also establishes interim procedures for adjudicating national interest waiver (NIW) immigrant petitions and related adjustment of status applications filed on behalf of physicians practicing in medically underserved areas or at facilities operated by the Department of Veterans Affairs (VA).

cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection