

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 14 September 2011

Name: Richard Joseph Averwater

Office Address: 840 Valleybrook Dr., Memphis, Tennessee 38120
(including county) (Shelby County)

Office Phone: (901) 685-2980 Facsimile: (901) 685-2824

Email Address: AverwaterLawyer@aol.com

Home Address: [REDACTED]
(including county) (Shelby County)

Home Phone: [REDACTED] Cellular Phone: [REDACTED]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am Managing Member of the Law Offices of Richard Averwater, PLLC, my own law firm.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1988 – licensed in Tennessee; BPR #013147, active license.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee only.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

For simplicity sake, I am attaching my resume as Exhibit A, which sets forth my work experience since law school.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

During any period of time in which I was seeking employment, I would always take cases and work as much as possible, either on my own, or by taking contract work. There have been times when I was awaiting a security clearance to clear, or otherwise undergoing the long process involved in some federal employment (for example, in 2008, I was awaiting an offer from CBP, which ended up being in Hawaii, and I could not take the job due to the costs of relocation). During these times, I would work when I could on a contract basis. I have never received unemployment or any type of public assistance at any time. However, I don't believe any period of unemployment ever exceeded 6 months.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am primarily engaged in the practice of immigration law, which includes appellate work. However, my practice is a general practice, and also involves criminal law, wills and estates, family law, personal injury, and other areas of the law. I am continually seeking to learn new areas of the legal practice to expand my knowledge. Immigration law constitutes approximately 80% of my practice at this time, with criminal and family law each accounting for 10%.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

See Exhibit A for my legal experience. I have practiced before most trial level courts in the State of Tennessee at some point. Most of my litigation experience, which is extensive, comes from my years of practice before the federal Immigration Court in many offices throughout the United States. I served as Law Clerk to Judge Joe B. Jones from 1988-1989 and was a criminal prosecutor in Shelby County, Tennessee from 2000-2001.

In addition, the Department of Homeland Security selected me in 2004 to teach cross-training (including the law of search and seizure) to more than 180 federal criminal investigators after the

creation of the Department of Homeland Security in 2003. My immigration work for the federal government, and my law practice now, heavily involves criminal law issues, and the effects of criminal convictions on an alien's right to remain in the U.S. As an FBI Agent, we were again trained in search and seizure law, and more importantly, I experienced it first hand, rather than reading about it in a book.

I have been approved to teach as an Adjunct Faculty member at Embry-Riddle Aeronautical University (Memphis campus) but have not yet begun active teaching.

9. Separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

None.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

None.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

See Exhibit A.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

No prior applications.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

See Exhibit A; As far as my Accounting class at the University of Phoenix online in 2009, I am always seeking to expand my knowledge in different areas, but am not degree-seeking.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 48 years old, born July 20, 1963, in Memphis, Tennessee.

16. How long have you lived continuously in the State of Tennessee?

I have lived my entire life in Tennessee, with these exceptions:

1989 – 1990 – INS Trial Attorney, El Paso, Texas

1990 - 1992 – FBI Special Agent, Tampa, Florida

1993 - 2000 – Alexandria, Louisiana (INS (DHS) Trial Attorney, Oakdale, Louisiana))

I returned to Tennessee in August, 2000 when my father's health began to fail and have resided in Tennessee since then.

17. How long have you lived continuously in the county where you are now living?

Since August, 2000. During 2009 - 2010, I maintained a home in Bartlett and an apartment in Davidson County while I was working a job for the State of Tennessee, but never abandoned my residency in Bartlett, TN. I have owned my home in Bartlett since 2003. I basically commuted back and forth to Nashville from June, 2009 until June, 2010, when I decided to open my own law office.

18. State the county in which you are registered to vote.

Shelby County, Tennessee.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic

proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

See Exhibit A. In addition, I served as a volunteer for Big Brothers and as an Auxiliary Probation Officer for Shelby County during law school. I have also volunteered my time for Habitat for Humanity and the Special Olympics at various times.

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- a. If so, list such organizations and describe the basis of the membership limitation.
 - b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

See Exhibit A. I am currently a member of the Tennessee Bar Association (since 2010) and joined the American Immigration Lawyer's Association (AILA) this year.

29. List honors, prizes, awards or other forms of recognition which you have received since

your graduation from law school which are directly related to professional accomplishments.

See Exhibit A.

30. List the citations of any legal articles or books you have published.

None, although I have created several PowerPoint presentation for my immigration speaking engagements. I was a member of the University of Memphis Law Review during law school, and authored a couple of articles on behalf of a private law firm while a part-time law clerk during law school.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I am a speaker at the annual AILA conference held in Memphis every May. I spoke this year in May, 2011, and have spoken probably 8 separate times at the conference over the years.

I am a speaker on immigration for the TBA, and last spoke in a Webinar in Nashville on August 23, 2011, on immigration related topics and criminal issues relating to aliens.

CLE was given for both these seminars.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached two items: an appeal brief I wrote in 2010 (Exhibit C), and a PowerPoint presentation that I gave in August, 2011 for the TBA (Exhibit D).

I have redacted my client's information in my appeal brief (Exhibit C) for privacy reasons, as

that appeal is currently pending before US CIS.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

I have excellent academic credential and extensive experience in criminal law, including work as a Judicial Clerk, as a prosecutor, and as a teacher for the Department of Homeland Security. My immigration work was particularly heavy with criminal law issues during the time I was assigned to the Federal Detention Center in Louisiana. I have excellent academic credentials, having graduated in the top 8% of my U of Memphis graduating law class and having been a member of the Law Review.

I am known as an excellent writer, as an excellent teacher, and considered fair by all, including the attorneys I litigated against. I am also an excellent employee, having received many years of Outstanding performance appraisal ratings while employed by the federal government.

I am currently also a candidate for federal Immigration Judge in Memphis and Denver, but due to a federal hiring freeze, I have not been notified that I was or was not selected for the positions. I interviewed in Washington D.C. in December, 2010.

I have always thought I would make an excellent Judge because I am fair to all, regardless of my own opinions on the matter. I believe the best trait that a Judge can bring to this job is to apply the law, not his or her "version" of what they think the law should be.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I provide pro bono advice nearly every day over the phone clients who call the office. If I can't help them personally, I do try and find them another attorney or legal aid organization who can. I am on the list of free/reduced-cost lawyers for the Immigration Court in Memphis. I have written the pleadings and provided legal advice for several acquaintances going through divorces in Shelby County.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

I am seeking a position on the TN Court of Criminal Appeals, Western Division. The Court currently consists of 12 members and was created in 1967 to hear felony and misdemeanor appeals, as well as post-conviction relief. The Court is divided into three divisions: western, middle, and eastern. The judges on this Court must be re-elected every 8 years. The Court is governed by its own rules entitled "Rules of the Court of Criminal Appeals."

I would bring to the Court a very high standard of legal writing and research, fair decisions, and extreme punctuality in meeting deadlines which have been set. I am an excellent writer and considered extremely fair by even my most energetic legal opponent. I also have some direct experience with the operations of the Court as I clerked for Judge Joe B. Jones following law school. I also bring to the Court actual real-life experience having served as an FBI Agent and FBI Legal Adviser during 1990 – 1992 in Florida.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

See Exhibit A. If appointed, I would carefully ensure that all my judicial extracurricular activities are approved and in conformity with the Judicial ethics code. I would still love to speak and teach, if allowed. I would remain involved in my church and other activities, but consistent with ethical rules. I would be more than happy to speak to groups and lawyer's associations for free if requested.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

See Exhibit A, and above.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes. I currently represent clients whose "particular social groups," religions, or political opinions are not consistent with my own, but I do so vigorously and without reservation. To do otherwise would not be doing my job as an attorney. Also, I am particularly aware that all of my opinions are not necessarily correct, and am always seeking to expand to knowledge in order to become more empathic with others. As an example, I belong to AILA, which besides being a professional organization, is an advocacy organization. Sometimes it seems they don't believe that there should be any immigration laws at all. I disagree with most of their statements and positions on immigration-related matters, but still belong to the organization in order to keep abreast of the constantly-changing immigration law. Again, as stated above, I believe the best trait a Judge can bring to the Court is the ability to set aside his or her personal opinions and simply apply the law, regardless of his or her personal feelings about the case or the result reached.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. <u>See</u> Exhibit B, attached (reference list)
B.
C.
D.
E.

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

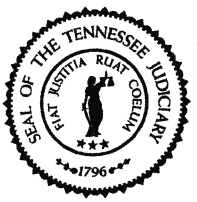
I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] _____ Court of Criminal Appeals _____ of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: September 27 _____, 2011 _____.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

Richard Averwater

Type or Printed Name



Richard Averwater

Signature

September 27, 2011

Date

#013147

BPR #

RICHARD J. AVERWATER

8488 Wolf Valley Lane
Bartlett, Tennessee 38133-2883
(901) 210-6324 cell
(901) 371-8935 office
(901) 685-2980 office
Website: www.MemphisVisa.com

PROFESSIONAL EXPERIENCE

2010 – present **Law Offices of Richard Averwater, PLLC**
Memphis, Tennessee
Managing Member

- Serve as Managing Attorney in sole practitioner law firm focusing providing quality legal services at reasonable costs; areas of practice include personal injury, wills, collection work, family law, aviation and immigration law
- Firm's focus is on immigration law, with an emphasis on immigration litigation before EOIR; types of cases include bonds, cancellation of removal, asylum, withholding of removal, § 212(c) waivers, and pre- and post-hearing voluntary departure; represent aliens before ICE, CIS, and CPB
- Firm also represents aliens before CIS and prepares and files applications for lawful permanent resident status, asylum, extension of non-immigrants statuses, and immigrant and non-immigrant visa applications using new PERM system
- Regular featured speaker at various CLE (Continuing Legal Education) seminars on immigration topics including the effects of criminal convictions on an alien's immigration status

2009 – 2010 **State of Tennessee**
Department of Commerce and Insurance, Office of Legal Counsel
Nashville, Tennessee
Litigation Attorney III

- Litigated cases before the Tennessee Motor Vehicle Commission, the Private Protection Services Board, the Alarm System Contractors Board, and the Tennessee Real Estate Commission in administrative hearings where licensees of these various programs have violated the terms of their licenses or otherwise have failed to comply with applicable Tennessee law
- Investigated assigned cases prior to filing charging documents (Notice of Hearing and Charges); ensured that licensees are in violation of Tennessee law or regulatory requirements prior to filing the case with the Tennessee Department of State; analyzed each case prior to filing for trial litigation issues such as: witness availability, evidentiary issues, strengths and weaknesses of cases, settlement

possibilities, and relative importance of the case, given the overall Department of Commerce strategies and goals; from June through October, 2009, worked for the Tennessee Department of Human Services as a contract attorney writing appellate decisions on TennCare/Medicaid terminations and other related issues

[During the year 2008, I received a final offer of employment from the Department of Homeland Security, Customs and Border Protection (CBP), but could not accept the offer due to the high cost of relocation to Hawaii]

2002 - 2007 **U.S. Department of Homeland Security**
1993 - 2000 **Immigration and Customs Enforcement (ICE)**
 Memphis, Tennessee and Oakdale, Louisiana
 Assistant Chief Counsel (GS-14)

- Represented the Department of Homeland Security, Immigration and Customs Enforcement, in removal and deportation proceedings; more than 13 years of immigration litigation experience; initially hired under the Attorney General's Honors Program in 1989 in El Paso, Texas; GS-14 since 1995
- Selected from entire litigation unit in 2003 to be legal cross-training instructor to over 200 legacy INS and Customs criminal investigators following the merger of INS and U.S. Customs; instructed on topics including immigrant visa classifications, non-immigrant visa classifications, employment-based visa classifications, as well as the procedures and requirements for obtaining such visas
- Always rated "outstanding" on performance appraisal ratings; handled many sensitive and secret files and cases involving high profile aliens and newsworthy matters; designated ICE national security attorney, ICE legal representative to Arkansas Joint Terrorism Task Force (JTTF)
- Possess expert knowledge of the Immigration and Nationality Act, the supporting code of federal regulations, General Counsel Opinions, Memorandums of Understanding, and the history of U.S. immigration law and major legislative changes
- "Secret" security clearance; also reviewed charging documents legal sufficiency prior and often assisted the U.S. Attorney's office and the Office of Immigration Litigation (OIL) in preparation of government responses to habeas and mandamus actions
- Routinely handled appeals to the Board of Immigration Appeals (BIA), including responsive briefs to alien appeals and affirmative appeals on behalf of the Department; assisted the Office of Immigration Litigation (OIL) and the U.S. Attorney's Office routinely on appeals and issues involving criminal aliens and immigration procedures; frequently consulted by outside police agencies on issues involving criminal aliens and the immigration law process

2000 – 2001 **Shelby County District Attorney's Office**
 Memphis, Tennessee
 Assistant District Attorney

- Initially assigned to multiple-offender DUI prosecution team, and then to Division 15 of the Shelby County General Sessions Criminal Court before the Honorable Loyce Lambert-Ryan
- Extremely heavy daily caseload, with case numbers often exceeding more than 150 cases per morning; performed well in a high intensity, high stress, trial environment; prosecuted and tried many criminal cases criminal involving assaults, criminal trespass, DUI, possession of weapons, and possession of narcotics; excellent conviction rate for cases that went to trial

1990 – 1992

**U.S. Department of Justice
Federal Bureau of Investigation (FBI)
Special Agent / Pilot (GS-11)**

- Selected for Special Agent training at Quantico Virginia under extremely competitive conditions; successfully completed intense 15 week training course; training included firearms, defensive tactics, surveillance methodology, legal procedures, forensic sciences, fingerprinting and practical training scenarios; selected from among classmates for additional training in the area of white collar fraud and financial investigations
- Possessed “top secret” security clearance; attended numerous FBI recurrent training courses on topics such as undercover operations, legal issue awareness training, and money laundering and narcotics investigations
- Assigned to Tampa division; investigated federal crimes including bank robberies, kidnappings, fugitives, narcotics traffickers, criminal organizations, and foreign intelligence agents; assigned as-needed to Tampa Special Operations Group (SOG), whose sole purpose was to provide investigative support using various techniques, including ground, vehicle, and aerial-based surveillance; certified as pilot-in-command of Bureau owned Cessna 182RG
- As criminal investigator, employed numerous criminal investigative techniques, including Title III wiretaps, consensual monitoring, pen registers, interviewing, and physical surveillance; certified as a Bureau Legal Advisor following completion of three-week training at Quantico

EDUCATION

**University of Phoenix Online Campus
Phoenix, Arizona**

- Enrolled in June, 2009 as non-degree seeking student with an interest in the field of accounting
- Completed Intermediate Accounting I in 2009, with a final grade of A-

**University of Memphis Law School
Memphis, Tennessee
J.D., May 1988**

- Final rank: 12th out of 143 students (top 8% of class - cum laude)
- Law clerk with insurance defense firm during law school (1986-1988)
- Law Review member
- Who's Who Among American Law Students
- Following graduation, served as law clerk to the Honorable Joseph Jones, Tennessee Court of Criminal Appeals (1988-1989)
- American Jurisprudence Awards:
 - Legislation
 - Agency and Partnership

University of the Ozarks

Clarksville, Arkansas

B.S. Public Administration, May 1985

- Graduated magna cum laude; 3.71 grade point average
- Freshman class president; Junior class vice-president
- Selected for Alpha Chi National Honor Society
- Yearbook Editor (1985); yearbook photographer 1983-1985
- Soccer team member 1981-1985; team captain 1984

PROFESSIONAL MEMBERSHIPS AND ACTIVITIES

Admitted to practice law in Tennessee in October, 1988

Admitted to U.S. District Court, Western District of Tennessee May, 1993

Society of Former Agents of the Federal Bureau of Investigation

FBI Agent's Association

St. Michael Catholic Church coed softball team founder/coach/player (since 2004)

St. Michael Catholic School Board member

Commercial pilot – single and multi-engine land, instrument airplane

Flight instructor – single-engine land (CFI) and instrument airplane (CFII)

Aircraft Owner and Pilot's Association (AOPA)

University of the Ozarks Alumni Association

Christian Brothers High School Alumni Association

Memphis Runner's Track Club member

2009 St. Michael School (Memphis) Distinguished Graduate Recipient

Camp Marymount Board of Directors member

RICHARD J. AVERWATER

Reference List

1. Honorable Charles Pazar, Memphis, Tennessee: sitting Immigration Judge, practiced before his court from 1998 - present; phone (901) 544-3818
2. Jimmy Mounce, Memphis, Tennessee: Former Supervisory Detention and Removal Officer, U.S. DHS/ICE, worked with him from 1996 – 2007; phone (901) 871-3764
3. Kathy Meehan, Alexandria, Louisiana: friend and co-worker, 1993 - present; works for DHS/ICE in Louisiana; phone (318) 613-1338
4. Barry Frager, Memphis, Tennessee: Memphis attorney; known from 2002 – present; friend and former court adversary (I represented DHS, he was in private practice); phone (901) 606-5000
5. Honorable Larry Burman, Arlington, Virginia: sitting Immigration Judge, practiced before his court from 2002 – 2008; phone (703) 920-0987



Basic Immigration Concepts: Client's Status

Richard Averwater, Attorney
Law Offices of Richard Averwater, PLLC
www.MemphisVisa.com
Memphis, Tennessee (901) 685-2980

1

Tennessee Bar University

Determining Your Client's "Immigration
Status"

August 23, 2011
Nashville, Tennessee
12:00 PM – 1:00 PM
WebCast

2



About the Speakers

- Both Sean and Richard handle all immigration matters including Immigration Court hearings, applications for benefits filed with U.S. CIS, and employer sanctions / ICE I-9 audit cases.
- Richard is a former Assistant Chief Counsel with DHS/ICE (13 years), former FBI Agent, and has 19 years immigration law experience.
- Sean's "part-time" job is playing lead guitar for the bands "London" and "DePriest."
- Sean and Rick are both licensed pilots (Rick is also a CFI) and rock musicians.

Introduction

- This presentation is designed for attorneys and others who have never practiced immigration law. It will provide an overview of the United States immigration system, and how aliens immigrate to the U.S., legally and illegally.
- It will focus on the Immigration Court and the requirements to qualify for various forms of relief from removal.
- It will stress the need to know your client's "immigration status" before representing an alien, and why that is so important.



Sources of Immigration Law

- Immigration and Nationality Act (INA) – 8 U.S.C.
- Code of Federal Regulations (8 C.F.R.) – regulations support the statutes
- Board of Immigration Appeals (BIA) precedent decisions - Falls Church, VA
- Circuit Law (depends on where Removal Hearing is held, normally the Circuit in which the aliens resides or is detained)

5

Immigration Definitions

Immigration and Nationality Act - (8 U.S.C. Section 1101) INA section 101 – Definitions:

- 101(a)(3) “alien” – any person not a citizen or national of the United States
- 101(a)(13)(A) “admission or admitted” – the lawful entry of the alien into the United States after inspection and authorization by an immigration officer; when is an LPR seeking admission?
- 101(a)(15) “immigrant” – means EVERY alien, except...



Definitions - continued

- 101(a)(42)(A) “refugee” – ...any person outside their home country who is “unable or unwilling to return to”... a country because of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...”
- Relates to reliefs of Asylum, Withholding of Removal, and the Convention Against Torture.

7

Definitions - continued

- 101(a)(43)(A)-(U) “aggravated felony” – important when dealing with cases involving aliens with criminal convictions
- 101(a)(48)(A) – what is a “conviction” for immigration purposes?
- 101(a)(48)(B) – term of imprisonment includes “any suspension of the imposition or execution of that imprisonment or sentence”

8



Definitions - continued

101(a)(f)(1)-(9) “Good moral character” (GMC) – what is NOT good moral character is listed; it goes on to say, however, that an alien can be found NOT to have GMC even if they don’t fall within one of these classes

9

How Aliens Legally Immigrate

- Family-based immigrant petitions
- Employment-based immigrant petitions
- Derivative status for relatives
- Non-immigrant lawful admission, then adjustment of status to that of lawful permanent resident (LPR) under INA section 245
- Refugees
- Extradited to U.S. to stand trial

10



Legal Immigration

- Remember, an immigrant or non-immigrant visa only gives one permission to travel to a port of entry and SEEK PERMISSION to enter; includes lawful permanent residents.
- A visa does NOT guarantee admission; it simply allows the alien an opportunity to APPLY for admission.
- All aliens must be admissible under INA section 212 when seeking to be admitted into the U.S., or else a waiver available.

11

Types of Visas – Only Two!

- Immigrant Visa - allows alien, if admissible, to obtain lawful permanent residency (a “green card”); may become U.S. citizen at a later date, IF desired.
- Non-Immigrant Visa – many types, such as B-1 (visitor for pleasure), B-2, F-1, M, J-1 Exchange Visitor, H1-A, L, O, R, S, T, U, V, etc... (allows aliens to apply to enter the U.S. for a specific purpose or fixed amount of time). See 8 C.F.R. section 214.2

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Types of Visas

- An alien who immigrates with an immigrant visa is entitled to live and work in the U.S. indefinitely. They may become a U.S. citizen if desired; until then, they are subject to grounds of removal (INA section 237).
- An alien who is admitted as a non-immigrant normally must apply for and be granted work permission, unless the type of visa itself authorizes the alien to work.

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Family-Based Immigration

- Worldwide level of Immigration:
 - “Immediate relative” - section 201(b)(2)(A)(i) – “children, spouses, and parents of a citizen of the U.S.” - NO yearly numerical limitations
 - Preference petitions – section 203(a) - subject to annual numerical limits

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Family Preference Categories INA section 203(a)

- 1st preference – unmarried sons and daughters of citizens
- 2nd preference – spouses and unmarried sons and daughters of lawful permanent residents
- 3rd preference – married sons and daughters of citizens
- 4th preference – brothers and sisters of citizens

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Employment Preference Categories – INA section 203(b)

- 1st preference – aliens with extraordinary abilities, outstanding professors and researchers
- 2nd preference – aliens holding advanced degrees or those with exceptional ability
- 3rd preference – skilled workers, professionals, and other workers
- 4th preference - special immigrants
- 5th preference – employment creation

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Priority Dates

- For Family-Based Petitions, priority date is established by filing Form I-130 (Petition for Alien Relative).
- For Employment-Based Petitions, priority date is established by filing a Request for Labor Certification with the U.S. Department of Labor.

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Visa Bulletin

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Grounds of Inadmissibility – INA section 212

- All aliens, including lawful permanent residents returning from trips abroad, must be admissible to the U.S.
- If inadmissible, is there a waiver available?
- Grounds of inadmissibility include: health-related grounds, criminal grounds, national security grounds, public charge, wrong type of visa, a previous removal, and unlawful presence.

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Removal Grounds - INA section 237

- If an alien has been “admitted” to the U.S. lawfully, the government must proceed under INA section 237.
- Grounds for Removal (formerly called deportation) include: inadmissible at time of admission, criminal convictions, aggravated felonies, firearms and drug offenses, domestic violence, national security, public charge, unlawful voters, and document fraud.
- Alien remains subject to Removal Proceedings until he/she becomes a U.S. citizen

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What is your client's "status"?

- Your client could:
 1. be a U.S. citizen or national
 2. be a lawful permanent resident (I-551)
 3. have entered the U.S. illegally
 4. have been admitted legally, still legal
 5. have been admitted legally, now illegal
 6. be an asylee

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Client's status continued

7. be a refugee (note special procedures to remove) – see 8 CFR section 207.9
8. have Temporary Protected Status, or have applied for it (INA section 244)
9. be pending adjustment of status
10. be a "Deferred Action" case
11. be in Removal Proceedings currently
12. have applied for a "Private Bill"

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Does an alien's "status" matter?

- YES!
- Example: Your client is convicted of Possession of Marijuana in Tennessee, a misdemeanor. She/he is sentenced to time served. The conviction records do not indicate the amount of marijuana involved.
- Is your client removable?

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Why it matters!

1. Your client entered the U.S. illegally and has never become a lawful permanent resident and has not been "admitted."
Alien must be charged under INA section 212.

Alien will be charged with violation of INA section 212(a)(2)(A)(i)(II) – a violation of ANY LAW "relating to" a controlled substance

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Why it Matters!

2. Your client was lawfully admitted to the U.S. or she/he is a lawful permanent resident. This alien must therefore be charged under INA section 237, which applies to “admitted” aliens.

Section 237(a)(2)(B)(i) - **REQUIRES** that the amount of marijuana involved be for personal use and more than 30 grams! The Record of Conviction may not be supplemented with extrinsic evidence under BIA case law, and ICE bears the burden. This alien is **NOT** removable.

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Criminal Convictions

- Some immigration statutes or regulations require crimes to involve “moral turpitude.” See INA section 237(a)(2)(A)(i)(I) (CIMT) and 237(a)(2)(A)(ii) (two CIMT’s)
- For some immigration laws, it doesn’t matter. For example, an alien is not eligible for Temporary Protected Status (TPS) if they have been convicted of “two or more misdemeanors...” 8 C.F.R. section 244.4(a).

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Bond Proceedings

- Although Removal Proceedings are considered “civil” in nature, an alien may still be arrested and detained while their Removal Proceeding is pending.
- INA Section 236 governs bond proceedings
- Aliens may be released “O/R”, be required to post the minimum bond of \$1,500, or a bond in a higher amount may be set if alien is not a flight risk.

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Bond Factors

- The Immigration Judge must consider the following factors in determining if a bond is to be set, and if so, how much to set it at:
family ties, community ties, property owned, work history, criminal history, prior failure to appears, and possible relief from removal. IJ must determine that alien is not a flight risk to allow bond.

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Bonds – Mandatory Detention

- INA section 236(c) governs which aliens are not eligible for release on bond during the pendency of their Removal Hearing. Note the RELEASE must occur on or after October 8, 1998. Aliens not eligible:
 - Aliens inadmissible under INA 212(a)(2)
 - INA sections 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), and (a)(2)(A)(i) if one year or longer is imposed.

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Removal Proceedings

- INA section 240
- Prior to IIRIRA (9/30/1996), aliens were placed in either Deportation or Exclusion Proceedings, depending on whether the alien had “entered” the U.S.
- Effective April 1, 1997, all aliens are removed in one proceeding called a “Removal Proceeding.”
- However, the distinctions remain!

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Removal Proceedings

- Whether or not an alien is charged under INA section 212 or INA section 237 now depends on whether or not the alien has been “admitted” into the U.S., not on whether the alien “entered” the U.S.
- 3 categories of aliens (Form I-862):
 1. “arriving aliens” (INA section 212)
 2. present without inspection or parole (INA section 212)
 3. admitted aliens (INA section 237)

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Removal Proceedings – Two Parts

- 1. Is the alien removal as charged? If you have some basis to suppress evidence, that type of motion would fall here, before conceding removability.
- 2. Is there any RELIEF from removal which will allow the alien to remain in the United States?
- “Two Doors” – bifurcated approach

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Relief from Removal – Types

- Cancellation of Removal:
 - LPR Cancellation (alien is LPR already)
 - Non-LPR Cancellation
- Asylum, Withholding of Removal, and CAT
- Adjustment of Status – INA section 245
- Voluntary Departure
- Section 212(c) relief – PLED prior to April 24, 1996; AEDPA and INS v. Cyr, 533 U.S. 289 (2001)

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Relief from Removal - Continued

- Violence Against Women Act (VAWA), special rules for Cancellation of Removal and I-360 Self-Petition
- Agreed termination of case to seek U Visa, or other unusual circumstances.
- Deferred Action – where ICE postpones the execution of an Order of Removal.

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Cancellation of Removal - LPR

INA section 240A(a) - 3 requirements:

- Lawful permanent resident for 5 years
- Admitted continuously for 7 years, in any status
- No conviction for “Aggravated Felony”
(note commission of certain crimes and service of NTA end continuous physical presence (stop-time rule))

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Cancellation of Removal – Non-LPR

INA section 240A(b) - 4 requirements:

- Ten years continuous physical presence
- Good moral character (10 years backwards, from date of final hearing)
- No significant convictions for anything (certain exceptions apply, mainly for non-CIMTs)
- “exceptional and extremely unusual hardship” to qualifying relatives

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Asylum, Withholding, and CAT

- All three forms of relief from removal involve a fear of persecution or torture on account of “race, religion, nationality, membership in a particular social group, or political opinion.”
- Note 1 year filing deadline for asylum - 1 year since alien’s “last arrival” to U.S. (INA section 208)
- Asylum leads to lawful permanent residency after one year; the other two do not.
- Withholding of Removal – INA section 241(b)(3)³⁷

Adjustment of Status – INA 245

Alien obtains lawful permanent residency (LPR) without leaving the U.S.

INA section 245(a) requires: a lawful admission, that a visa is “immediately available” to the alien, and alien must be admissible (or else a waiver available).

For aliens in the U.S. illegally, or who violated their status, see INA section 245(i) (April 30, 2001 deadline).

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Voluntary Departure – INA 240(B)

- Allows alien to depart the U.S. at his or her own expense, without a Removal Order being entered against them. Voluntary Departure avoids the ten-year bar on reentering the U.S. (5 year bar if “arriving alien,” 20 years if “Aggravated Felon”)
- Discretionary with ICE or Immigration Court.
- Maximum period allowed is 120 days.
- Bond may be required.

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Other Useful Information

- Expedited Removal – INA section 238 (Admin Removal) – no IJ jurisdiction for bond or case
- Visa Waiver Program, crewman, refugees
- Amnesty Program – INA section 245A and 210
- INA section 245(i) is NOT Amnesty
- I-9 Form / Employer Sanctions – applies to EMPLOYEES, not independent contractors
- www.USCIS.gov – VERY helpful
- www.justice.gov/EOIR – VERY helpful

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Important CIS Form Numbers

- I-130 – Petition for Alien Relative
- DOL Form ETA-750 – Labor Certification
- I-485 – Application to Adjust Status
- I-765 – Work Authorization
- N-400 – Application for Naturalization
- I-589 – Application for Asylum
- I-862 – Notice to Appear

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Citizenship Issue?

- If you have a derivative citizenship issue, or an issue involving acquiring citizenship at birth, **CONSULT AN IMMIGRATION ATTORNEY**. These can be very complicated and the law varies, depending upon the alien's date of birth.
- Form N-600 - Application for Certificate of Citizenship

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Questions?

www.MemphisVisa.com

Richard Averwater
(901) 685-2980 office

Thank you!

**BEFORE THE ADMINISTRATIVE APPEALS OFFICE
U.S. CITIZENSHIP AND IMMIGRATION SERVICES**

IN RE: XXXXXxxxxxx)
)
Petition: Form I-140)
)
Receipt number: SRXXXXXXXX 0) **A number: AXXX xxxx**
)
Appeal of Form I-140 Denial and Denial)
of National Interest Waiver)
)
Appeal receipt number: SRCxxxxxxxxxxxxx)

PETITIONER’S BRIEF ON APPEAL

COMES NOW YOUR APPELLANT (“Petitioner,” also referred to as “Self-Petitioner”), XXXXXXXX, who hereby submits this appellate brief in support of his appeal regarding the denials of his I-140 Immigrant Petition for Alien Worker and National Interest Waiver, such applications having been denied by U.S. Citizenship and Immigration Services (CIS) on August 20, 2010. While Appellant proceeded pro se before CIS, he is now represented on appeal by undersigned counsel.

STATEMENT OF THE CASE

Self-Petitioner is a 33 year-old native and citizen of XXXX who last entered the United States in 2008 as an H-1B nonimmigrant. Petitioner initially entered the United States in 1995 as an F-1 student, and has always maintained legal status in this country. There are no negative discretionary factors present in his case.

In December 2009, he self-petitioned under § 203(b)(2) of the Act as an alien holding an advanced degree. He contemporaneously filed Form I-140, along with an application for a

National Interest Waiver (NIW) (a waiver of the requirement of a job offer) under § 203(b)(2)(B)(i) of the Act.

In response to a February 2, 2010, letter from CIS that requested Petitioner submit additional information regarding his application, Petitioner responded on March 29, 2010, and provided additional, relevant, and credible materials in support of the application. Contrary to the CIS opinion, Petitioner directly addressed the issues, concerns, and questions raised by the CIS adjudicator's correspondence. See Petitioner's response, provided to CIS on or about March 29, 2010.

On August 20, 2010, CIS denied Self-Petitioner's Form I-140 application, in conjunction with the denial of his application for a National Interest Wavier. The decision correctly stated the underlying facts of this case; namely, that Self-Petitioner filed the petition to perform services as a Doctoral Research Associate, that Self-Petitioner was awarded a Ph.D. degree in 2007 from the University of Arkansas, and that Petitioner is therefore eligible for classification as a member of the profession holding an advanced degree. The CIS decision also correctly found that Self-Petitioner's educational background reflects a thorough knowledge in the fields of nanotechnology and nanoscience. The decision, however, then incorrectly concludes that Self-Petitioner did not present persuasive evidence on how the national interest would be adversely affected if a labor certification were required for him, and thus the applications were denied.

Self-Petitioner, through counsel, filed a timely appeal of this decision with the Texas Service Center on or about September 17, 2010.

ISSUE PRESENTED

The issue on appeal to the CIS Administrative Appeals Office is whether or not the CIS adjudicator, after considering the evidence submitted, erred in denying Self-Petitioner's Form I-140, along with his request for a National Interest Waiver under § 203(b)(2)(B)(i)?

LAW AND ARGUMENT

Self-Petitioner, through undersigned counsel, contends the CIS adjudicator erred in denying his request for a National Interest Waiver, together with his I-140, under § 203(b)(2) of the Act. Petitioner's denial letter, dated August 20, 2010, reveals that the adjudicator failed to either review or give proper weight to the voluminous and credible evidence submitted by Self-Petitioner.

In denying this Self-Petitioner the waiver, and thus denying his I-140, the CIS adjudicator applied the leading case on National Interest Waivers, namely In re New York State Department of Transportation, 22 I & N Dec. 215 (BIA 1998). The adjudicator found that In re New York State Department of Transportation was closely on point, and thus reached the same conclusion, thus denying the waiver to Petitioner. The CIS adjudicator concluded that Petitioner did not establish that a waiver would be in the national interest, but the written decision did not detail how he or she reached this conclusion. In addition, while the adjudicator cited various factors to be considered (i.e., labor shortage, past record/ future benefit discussion, national importance of the field, qualifications, etc.), the actual decision discussed very little about the proof submitted by Self-Petitioner, leading one to speculate that, possibly, all of the evidence submitted was not fully considered or reviewed.

The standard as to whether a National Interest Waiver should or should not be granted is clear, according to established case law. In re New York State Department of Transportation, 22 I & N Dec. 215 (BIA 1998) sets forth a three-part test: 1. it must be shown that the alien seeks employment in an area of intrinsic merit 2. it must be shown that the proposed benefit will be national in scope, and 3. the Petitioner seeking the waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. In re New York State Department of Transportation, Id. at 217. In In re New York State Department of Transportation case, although Petitioner met the first two requirements, the Board of Immigration Appeals found that he had failed to carry his burden of proof on requirement number three, namely that the Petitioner demonstrate that the national interest would be adversely affected. Id. at 222. Factors to be considered in determining whether or not the waiver is in the national interest are: whether or not the alien made a showing “significantly above” that necessary to prove prospective national benefit (Id. at 217), whether the alien showed he would serve the national interest to a “substantially greater degree” than would an available U.S. worker having the same minimum qualifications (Id. at 218), whether there is a labor shortage present in that field, whether or not prospective national benefits will be gained (Id. at 219), and whether or not the alien’s past record justifies projections of future benefits. Id. at 219.

In re New York State Department of Transportation concludes: it was not the intent of Congress that every person qualified to engage in a profession should be exempt from the requirement of a job offer, that the merits of the individual alien as they relate to the job to be performed is paramount, and the mere fact that the alien plays an “important role” in the activity to be performed is insufficient, in and of itself. Id. at 222-223. The CIS adjudicator’s field manual emphasizes that the determination as to whether a national interest waiver is merited

must be made on a case-by-case basis and will depend on an assessment of the specific facts presented. CIS Adjudicator's Field Manual Update, Chapter 22, page 59-60 (September 12, 2006).

Petitioner XXXXXX concedes that no **one** factor is sufficient to merit the granting of a national interest waiver. However, in this case, when you view fully consider the relevant factors **together and cumulatively**, a different result should have been reached.

Applying the In re New York State Department of Transportation test to Petitioner Jose Aldana's case, the first inquiry is whether or not the alien seeks employment in an area of intrinsic merit. Nanotechnology is the area of scientific research that combines the principles of chemistry, physics, biology, and engineering in order to make devices, products, and processes that can improve the quality of life. Nanotechnology deals with being able to make very, very small particles, structures, or "nanomachines." Nanotechnology gives scientists and engineers the ability to manipulate matter atom by atom to build a specifically desired molecular structure. Being able to build these small nanostructures is important because when things are made that small, their properties change, and their efficiency improves.

Nanotechnology has important and critical scientific implications in the areas of solar cells, liquid crystal displays, cell phones, MP3 players, light emitting diodes, medicine delivery systems within the human body, energy generating systems, and in the construction of smaller and faster computer chips. The applications of nanotechnology are broad, and have been even compared in their impact to the discovery of plastics in the 1960's. Nanomaterials are able to conduct, store, and transmit heat and electricity with enhanced efficiency and are stronger than conventional materials.

It is clear that the field of nanoscience and nanotechnology is currently, and will in the future, play a vital, critical role to many areas. Credible data indicates that the field of scientific research is an every-increasing profession in terms of importance, and the number of graduates in this area continues to increase. For example, the number of post-doctoral appointees in doctorate granting institutions in the fields of science and engineering increased from 25,749 to 30,134 between the years 1999 and 2006. There is no indication this trend will reverse in the near future, given the importance of these scientific fields to nearly every aspect of our lives. See Petitioner's evidentiary submissions, citing data from the National Science Foundation.

Federal funding in the area of nanotechnology is increasing at a significant rate. The federal budget for fiscal year 2011 provides for \$1.8 billion dollars for the National Nanotechnology Initiative (NNI). See Petitioner's submission packet, citing from the NNI website (www.nano.gov). As indicated, the 2011 NNI budget supports nanoscale science, and engineering research and development, at fifteen (15) federal agencies, including the Department of Energy, the National Science Foundation, the Department of Defense, and that National Institute for Health. Evidence indicates that since 2001, the cumulative investment in the National Nanotechnology Initiative nears \$14 billion dollars, and there is no indication this trend will reverse. Id.

The National Nanotechnology Initiative, a U.S. government agency, has declared that a solid educational foundation, a skilled workforce, and state of the art research and development are **essential** to the success of the NNI. See Petitioner's submission, from the NNI website. A new generation of researches and inventors, working at the nanoscale level, will be needed soon, and academic institutions are continuing to develop appropriate programs for such future workers. In addition, NNI projects that this area of science will need additional infrastructure

including research centers and user facilities within the next few years. Specific strategies are already in place to insure that this new workforce can be recruited and trained in order to meet the need for scientists in the field of nanotechnology. See Petitioner's submission, from www.nano.gov.

The importance of nanoscience and nanotechnology to the United States cannot be overstated. As quoted from the NNI website, explaining why nanotechnology should be adequately funded:

“Nanotechnology has the potential to profoundly change our economy and to improve our standard of living, in a manner not unlike the impact made by advances over the past two decades by information technology. While some commercial products are beginning to come to market, many major applications for nanotechnology are still five to ten years out. Private investors look for shorter-term returns on investment, generally in the range of one to three years. Consequently, government support for basic research and development in its early stages needs to maintain a competitive position in the worldwide nanotechnology marketplace in order realize nanotechnology's full potential.” See Petitioner's evidentiary submission, quoting from NNI's website, FAQ's, page 2.

Secondly, Petitioner must show that that the proposed benefit will be national in scope. Given the numerous areas to which nanoscience can be applied, it is clear that this field of technology is “national in scope.” In fact, there is no indication whatsoever that this field or Petitioner's work would benefit only a local area, at the expense of other areas of the United States. The field of nanotechnology is national in scope and its technological implications are endless.

The August 20, 2010 decision of the CIS adjudicator did not specifically find that prong number two (requirement number two) of the In re New York State Department of Transportation test was satisfied, but there is certainly no indication that the adjudicator doubted that the scope of Petitioner's work is nationwide. By omission, it can be inferred that the CIS

adjudicator implicitly found that the first two prongs of the In re New York State Department of Transportation test were satisfied.

Applying the third requirement of the In re New York State Department of Transportation test, Petitioner must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. Various factors should be considered in deciding whether or not a National Interest Waiver is merited, including whether or not the alien made a showing “significantly above” that necessary to prove prospective national benefit, whether or not the alien showed he would serve the national interest to a “substantially greater degree” than would an available U.S. worker having the same minimum qualifications, whether or not there is a labor shortage in that field, whether or not prospective national benefits will be gained, and whether or not the alien’s past record justifies projections of future benefits. Id. at 219.

Petitioner XXXX holds a Ph.D. in Analytical Chemistry from the University of Arkansas, where he graduated from in 2007. Curriculum Vitae, page 1; see also Petitioner’s evidentiary submission. He currently works for the University of Arkansas as a Post-Doctoral Research Assistant, a position he has held since April, 2009. Petitioner’s current work as a research assistant involves finding new formulas and procedures to make nanoparticles. This includes determining the ratios of chemicals and optimal temperatures needed to make nanoparticles of a particular material and size. Once nanoparticles are created, Petitioner modifies their surface so they can be dissolved in water and methanol. Petitioner’s current work also involves determining how different formulations and ratios of chemicals and nanoparticles sizes affect their photo physical properties, such as brightness and decay, using specialized microscopy and measuring equipment. See Petitioner’s evidentiary submission packet.

Petitioner has distinguished himself from others who hold advanced degrees in many ways. Mr. XXXX completed his undergraduate work at the University of the Ozarks in 1999 where he graduated with a dual Bachelor's of Science in Chemistry and Biology. His cumulative grade point average at the University of the Ozarks was 3.92, and he graduated summa cum laude. He was awarded the Hurie Award upon graduation, the most prestigious award given to a graduating senior. This superior record of academic achievement is consistent with Petitioner's entire academic history: in fact, he was valedictorian of his high school in his native country of Guatemala.

Contrary to the finding of the adjudicator, Petitioner has distinguished himself from among both alien **and** U.S. citizen holders of advanced degrees. While the mere fact of holding such an advanced degree is notable, Petitioner Aldana's past superior record of work and academic achievement sets him apart from his peers. Mr. XXXX is a member of several prestigious scientific organizations, including the American Chemical Society, the American Association for the Advancement of Science, and the Materials Research Society. See Petitioner's evidentiary submission packet.

Mr. XXXXX has not only attended prestigious scientific conferences in his area of expertise, he also made formal, scientific presentations at American Chemical Society meetings on at least two occasions in 2003 and 2004 on the topic of "Interfacial Chemistry of Colloidal Nanocrystals." These presentations are documents in Petitioner's evidentiary submissions.

Besides his work and outstanding academic achievement, Petitioner XXXXX has proven himself to be a noted author. Petitioner has co-authored at least four separate (extremely complicated!) articles for various journals and publications. The topics include: Photochemical Instability of CdSe Nanocrystals Coated by Hydrophilic Thiols, Photoluminescence

Upconversion in CdTe Quantum Dots, Size Dependent Dissociation pH of Thiolate Legends from Cadmium Chalcogenide Nanocrystals, and Surface Ligand Dynamics in Growth Nanocrystals. See Petitioner's evidentiary submission. It should be noted that these articles were **thereafter cited** in scholarly works and commercial patents of other scientists and inventors on many occasions, lending credibility to the validity of Petitioner's scientific research. See Petitioner's evidentiary submissions. The CIS adjudicator erred in finding that Petitioner XXXXXX has not distinguished himself from among his peers holding advanced degrees: given the evidence submitted, clearly Petitioner has.

Petitioner's current post-graduate work at the University of Arkansas involves extremely complicated scientific issues (some too complex even for this writer to understand) involving semiconductor Nanocrystals, metallic Nanocrystals, metal oxide nanoparticles, photovoltaic device fabrication, and biochemical techniques. Curriculum Vitae, at 3. Petitioner's superior academic history includes many years of teaching and thus sharing his great wealth of scientific knowledge with others. He has taught Organic Chemistry, University Chemistry, and Physical Organic Chemistry, as well as the labs that go along with these courses. Petitioner is fluent in English, Spanish, and Portuguese, and has assisted other foreign speaking students on numerous occasions.

Petitioner requests that this appellate panel carefully review the letters of recommendation written on behalf of the Petitioner and submitted by Petitioner in his application. These letters are authored by: 1. Bill Durham, Chair of the Department of Chemistry and Biology at the University of Arkansas 2. Xiaogang Peng, Scharlau Professor of Chemistry at the University of Arkansas 3. Todd D. Krauss, Associate Professor of Chemistry at the University of Rochester, and 4. Elizabeth Gomez, Professor of Chemistry at Central Baptist

College, Conway, Arkansas. These letters, from extremely distinguished members and leaders in this scientific field, echo praise for Petitioner, and show how Petitioner XXXXX has already distinguished himself from among his peers. Besides revealing much about Petitioner's intellect and character, these letters also reflect the extreme importance of the field of nanoscience and nanotechnology.

It is clear that there is a need for workers in this scientific area, as discussed above. As previously mentioned, the National Nanotechnology Initiative (NNI) has declared that a solid educational foundation, a skilled workforce, and state of the art research and development are **essential** to the success of the NNI. A new generation of researches and inventors working at the nanoscale level will be needed soon, and academic institutions are continuing to develop appropriate programs for such future workers. As stated above, specific strategies are already in place to insure that this new workforce can be recruited and trained in order to meet the need for scientists in the field of nanotechnology. It is estimated that 2 million workers will be needed to support nanotechnology industries worldwide within 15 years. See NNI FAQ's, supra, at page 2.

Petitioner XXXXX, based upon the evidence submitted, has distinguished himself far beyond the minimum qualifications of other similarly-situated aliens and U.S. workers who meet the minimum requirements for this classification, namely as a members of the profession holding advanced degrees. Petitioner plays more than an "important part" in this field of scientific research; in fact, he is a **leader** in the field and, at even such a young age, he has already distinguished himself from among the elite group. His involvement in this scientific research in such a critical area has broad implications for the future of the United States.

CONCLUSION

Case law and regulatory instructions for adjudicators require that each case be examined on an individual, case by case basis. While it is true that no **one** factor should dictate a positive or negative decision for this Self-Petitioner, when you examine all the factors **cumulatively**, a different result should have been reached by the CIS adjudicator. Viewing this case on an individual basis, **all** relevant factors weigh in the Self-Petitioner's favor. The three-part test, as set forth in In re New York State Department of Transportation, has been met.

Petitioner carried his burden of proof under § 291 of the Act by showing, through credible evidence, that the National Interest Waiver should have been granted. The critical nature of nanoscience and nanotechnology, and its future benefits to the United States, require such a result. Every factor that should and must be considered, as discussed in the In re New York State Department of Transportation case, weighs in Petitioner's favor.

IT IS THEREFORE REQUESTED that the CIS adjudicator's decision dated August 20, 2010 be **REVERSED**, and this Self-Petitioner's Form I-140 be **GRANTED**, in conjunction with the **GRANTING** of his National Interest Waiver under § 203(b)(2)(B)(i) of the Act. There are no negative discretionary factors present, and this brilliant, XXXXXX immigrant, with a **proven** track record, will certainly continue to provide valuable scientific contributions to this country and his community if this waiver is granted.

Respectfully submitted,

Richard Averwater
Attorney-at-Law

CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of _____, 2010, I served a copy of this document by depositing it in the U.S. mails, postage prepaid, and mailing it to the following person(s):

U.S. CIS Appellate Counsel
Texas Service Center
PO Box 852841
Mesquite, Texas 75185-2841

Richard Averwater
Attorney-at-Law