No. _____

In the Supreme Court of the United States

CATHERINE LACAVERA

Petitioner,

v.

JOHN W. DUDAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The U.S. Patent and Trademark Office ("USPTO") excludes nonimmigrant aliens from registration before the patent bar. Nonimmigrant aliens are aliens lawfully living and working in the United States pursuant to visas that are more restricted in duration and employment than the visas of immigrant aliens. The exclusion from the patent bar does not apply to immigrant aliens, U.S. citizens, or non-U.S. citizens who reside outside of the United States and who are registered to practice before a foreign patent office that offers reciprocal admission to persons registered to practice before the USPTO. The Court of Appeals for the Federal Circuit ("Federal Circuit") upheld the USPTO rule against a challenge that the rule exceeds the statutory authority of the USPTO and violates the equal protection aspect of the due process clause of the Fifth Amendment to the U.S. Constitution.

The questions presented are as follows:

1. Does the USPTO, in the exercise of its statutory authority to register patent practitioners who have the "necessary qualifications" to practice before it, have the authority to refuse to register nonimmigrant aliens as patent practitioners solely on the basis of their immigration status, where the nonimmigrant aliens are otherwise qualified for registration and authorized by United States Citizenship and Immigration Services ("USCIS") to practice as patent practitioners in the United States?

2. Did the Federal Circuit, in upholding a USPTO rule denying registration to nonimmigrant aliens, inappropriately apply only a "rational review"

standard where it should have applied at least "heightened scrutiny," if not "strict scrutiny," to a federal agency rule that discriminates against nonimmigrant aliens without serving any special national interest?

3. Do bar admission rules, such as the state rule that is before this Court in *Leclerc* v. *Webb* and *Wallace* v. *Calogero*, and the federal rule that is the basis of this case, that deny aliens lawfully within the United States access to employment opportunities based on the duration and employment restrictions of their current visas, violate the aliens' rights to "equal protection" in the absence of any evidence that the visa restrictions relate to valid state or federal interests in ensuring competency of practitioners?

RULE 14.1 STATEMENT

Petitioner (plaintiff-appellant below) is Catherine Lacavera.

Respondent (defendant-appellee below) is Jon Dudas in his capacity as Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lacavera respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Appendix ("App."), *infra,* 3a-9a) is reported at *Lacavera* v. *Dudas*, 441 F.3d 1380 (Fed. Cir. 2006). The order of the court of appeals denying petitioner's petition for rehearing and rehearing *en banc* (App., *infra,* 1a-2a) is available at *Lacavera* v. *Dudas*, No. 05-1204, 2006 U.S. App. LEXIS 14779 (Fed. Cir. Jun. 5, 2006). The district court decision (App., *infra,* 10a-27a) is available at *Lacavera* v. *Toupin*, No. 03-1469, 2004 U.S. Dist. LEXIS 29205 (D.D.C. Nov. 30, 2004). The USPTO decisions refusing to register petitioner (App., *infra,* 38a-51a), and denying petitioner's petition for reconsideration (App., *infra,* 28a-37a), are part of the administrative record of the USPTO.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2006. Petitioner's timely petition for rehearing and rehearing *en banc* was denied on June 5, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person shall be … deprived of life, liberty, or property, without due process of law …" U.S. CONST. amend. V.

Section 2 of Title 35 of the United States Code provides, in relevant part:

> The Office … may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of **good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance** in the presentation or prosecution of their applications or other business before the Office …

35 U.S.C. § 2(b)(2)(D). The United States Patent and Trademark Office ("USPTO") adopted the following regulation pertaining to registration of patent attorneys:

> (a) Attorneys. Any citizen of the United States who is an attorney and who fulfills the requirements of this part may be registered as a patent attorney to practice before the Office. **When appropriate, any alien who is an attorney, who lawfully resides in the United States, and who fulfills the requirements of this part may be registered as a patent attorney to practice before the Office, provided: Registration is not inconsistent with the terms upon which the alien was admitted to, and resides in, the United States** and further provided: The alien may remain registered only (1) if the alien continues to lawfully reside in the United States and registration does not become inconsistent with the terms upon which alien continues to lawfully reside in the United States or (2) if the alien ceases to reside in the United States, the

> alien is qualified to be registered under paragraph (c) of this section.
> …
>
> (c) Foreigners. Any foreigner not a resident of the United States who shall file proof to the satisfaction of the Director that he or she is registered and in good standing before the patent office of the country in which he or she resides and practices and who is possessed of the qualifications stated in § 10.7, may be registered as a patent agent to practice before the Office for the limited purpose of presenting and prosecuting patent applications of applicants located in such country, provided: The patent office of such country allows substantially reciprocal privileges to those admitted to practice before the United States Patent and Trademark Office. Registration as a patent agent under this paragraph shall continue only during the period that the conditions specified in this paragraph obtain.

37 C.F.R. § 10.6 (2003)[1] (emphasis added).

[1] Effective July 26, 2004, the USPTO changed the requirements for registration of patent attorneys. As part of the changes, the USPTO removed and reserved 37 C.F.R. § 10.6-10.9 (2003), and replaced them by 37 C.F.R. § 11.6-11.9 (2004). *See* 69 Fed. Reg. 35428 (June 24, 2004). The new provision pertaining to registration is substantially the same as the former provision. 37 C.F.R. § 10.6 (2003) was the applicable and governing regulation at all times during petitioner's administrative action, and was applied by the district court. (App., *infra,* 13a n. 1.)

STATEMENT

Introduction. This case raises several important questions of federal law: first, whether a federal agency can exceed its statutory authority and usurp the authority of a separate federal agency, in this case whether the USPTO can deny patent bar registration based on the immigration status of nonimmigrant aliens[2] who are authorized by USCIS to practice as patent attorneys in the United States; second, whether a federal agency classification that disadvantages lawfully admitted nonimmigrant aliens without serving any special national interest should be subject to at least "heightened scrutiny," if not "strict scrutiny"; third, whether a federal agency classification that denies employment opportunities to nonimmigrant aliens who are otherwise qualified for such opportunities violates the nonimmigrant aliens' right to equal protection under the due process clause of the Fifth Amendment to the U.S. Constitution.

The USPTO denies patent bar registration to lawfully admitted nonimmigrant aliens, and registers only U.S. citizens, immigrant aliens, and non-U.S. citizens who reside outside of the United States and who are registered to practice before a foreign patent office that offers reciprocal admission to persons registered to practice before the USPTO. In lieu of registration, the USPTO offers nonimmigrant aliens only "limited recognition," the limits of which the USPTO defines

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[2] An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Nonimmigrant aliens are lawfully admitted aliens who fall within one of the categories listed in 8 U.S.C. § 1101(a)(15). Immigrant aliens are all other lawfully admitted aliens. *Id.*; see *Elkins v. Moreno*, 435 U.S. 647, 664 (1978).

on a case-by-case basis in a purported attempt to enforce the limitations in nonimmigrant aliens' visas.

This case is part of an emerging trend in the legal profession to impose on the subclass of nonimmigrant aliens barriers to employment opportunities that this Court already held unconstitutional when applied to the class of aliens. *See e.g.*, *In re Griffiths*, 413 U.S. 717 (1973) (holding that Connecticut court rules restricting admission to the bar to citizens only violate equal protection); *see also Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) (invalidating federal Civil Service Commission policy excluding aliens from most civil service jobs). There are two other cases presently pending before this Court that concern whether nonimmigrant aliens can be excluded from practice before the Louisiana state bar, *Leclerc* v. *Webb*, 419 F.3d 405 (5th Cir. 2005), *petition for cert. filed*, (U.S. Jun. 22, 2006) (No. 06-11), and *Wallace* v. *Calogero*, 419 F.3d 405 (5th Cir. 2005), *petition for cert. filed*, (U.S. Jun. 23, 2006) (No. 06-11). Another court recently upheld the Georgia Bar's extra documentation requirements for aliens, holding that the state has a strong interest in determining whether applicants are breaking immigration laws. *Godoy* v. *Office of Bar Admissions*, No. 1:05-0675, 2006 WL 2085318, at *4-5 (N.D. Ga. Jul. 25, 2006.)

The USPTO rule at issue in this case affects approximately 2.5 percent (approximately 100) of the approximately 4000 applicants for registration each year, who are aliens with visa restrictions and who are therefore denied registration. (Corrected Brief for Defendant-Appellee, at 8, *Lacavera* v. *Dudas*, No. 05-1204 (filed with Fed. Cir. on Jun. 20, 2005) [hereinafter *Def. Fed. Cir. Br.*]). The emerging trend towards erecting barriers to entry to professional employment opportunities stands to affect the over 30 million

nonimmigrant aliens lawfully present in the United States.[3] This Court's review is urgently needed to reverse the trend toward interfering with the authority of USCIS over immigration restrictions and impinging upon the constitutional rights of aliens lawfully residing in the United States.

The USPTO rule should be stricken because it exceeds the statutory authority of the USPTO and violates nonimmigrant aliens' right to equal protection. The USPTO has no Congressional authority to interpret or enforce immigration law. Yet it refuses to register nonimmigrant aliens that are authorized by USCIS to practice as patent practitioners in the United States. The USPTO purports to enforce visa restrictions by creating case-by-case limits on the recognition of nonimmigrant aliens that practice before it. The Federal Circuit decision to uphold the USPTO rule was a marked departure from prior precedents holding that an agency cannot expand its Congressionally-limited authority into an area over which it has no jurisdiction. *See e.g.*, *Adams Fruit Co., Inc.* v. *Barrett*, 494 U.S. 638, 650 (1990) (holding that the Department of Labor's statutory authority to promulgate safety standards cannot be used to bootstrap it into an area in which it has no jurisdiction); *Brown & Williamson Tobacco Corp.* v. *Food & Drug Admin.*, 153 F.3d 155, 161 (Fed. Cir. 1998), *reh'g and reh'g en banc denied*, 161 F.3d 764 (1998), *aff'd*, 529 U.S. 120 (2000) (invalidating FDA regulations of tobacco products because FDA lacks jurisdiction to regulate such products). The decision below invites any agency, regardless of its Congressional mandate, to expand its

[3] *See* Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2004 Yearbook of Immigration Statistics, p. 123 Table 28 (Jan. 2006), available at http://www/uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf.

authority to include creating and policing restrictions on aliens.

The USPTO rule denying registration to nonimmigrant aliens also violates the equal protection aspect of the due process clause of the Fifth Amendment. The Federal Circuit mistakenly applied only the "rational review" standard that is applicable to acts of Congress under *Mathews* v. *Diaz*, 426 U.S. 67, 78 (1976) (App., *infra,* 9a). However, this Court made clear in *Hampton* that in the case of a federal agency rule like the USPTO rule, the decision to deprive aliens of employment opportunities must be justified by reasons that are properly the concern of the agency. *Hampton*, 426 U.S. at 116. Since the USPTO has no special national interest in its discriminatory rule, at least "heightened scrutiny," if not "strict scrutiny," should have been applied to the USPTO rule denying registration to nonimmigrant aliens. *Cf. id.* at 100-105, *cf. Ramos* v. *U.S. Civil Service Comm'n*, 376 F. Supp. 361, 366 (D.P.R. 1974), *aff'd in relevant part*, 426 U.S. 916 (1976).

The Federal Circuit decision set a dangerous precedent by misapplying the law of equal protection to hold that the petitioner was not denied equal protection because the USPTO treats all nonimmigrant aliens the same by refusing to register any of them. (App., *infra,* 9a.) Equal discrimination is <u>not</u> equal protection. This Court established long ago that for purposes of equal protection analysis, "similarly situated" persons must be identified by criteria that threaten a legitimate interest of the agency. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985). Here, the USPTO treats qualified nonimmigrant aliens differently than all other qualified persons seeking registration before the patent bar by denying them registration. There is no evidence that an applicant's immigration status threatens any legitimate interest

of the USPTO in ensuring competency of patent practitioners. The decision below opens the door to any federal agency arbitrarily discriminating against nonimmigrant aliens without establishing even a rational basis for doing so.

Factual Background. Congress granted the USPTO the authority to require persons seeking registration before it "to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance …" 35 U.S.C. § 2(b)(2)(D). The USPTO promulgated a rule that permits registration of aliens provided "[r]egistration is not inconsistent with the terms upon which the alien was admitted to, and resides in, the United States" 37 C.F.R. § 10.6 (2003). According to the USPTO's interpretation of the rule, nonimmigrant status is "inconsistent" with registration because it is limited in time and scope whereas registration is not so limited. (*See e.g.*, App., *infra,* 46a.)

Petitioner is a nonimmigrant alien who possesses the legal, technical and character qualifications for registration to practice as a patent attorney set forth in 37 C.F.R. § 11.7. She has an engineering and a law degree (A111), and she is admitted to practice law before several state bars and federal courts, including this Court (A120-23, A209 and A224). She has been lawfully practicing patent law in the United States for nearly five years pursuant to a series of nonimmigrant visas. (A42; A46-47; A61-63; A80-81; A104-106; SRA 1-4.) Preparing and prosecuting patent applications are among the activities contemplated as within the scope of her visas. (*See e.g.*, A61-63, particularly A62.) She passed the patent registration examination administered on April 17, 2002. (A181.)

Proceedings Below. After passing the registration examination, by letter dated June 17, 2002, petitioner petitioned the USPTO for registration. (A225.) On July 8, 2002, the USPTO issued its Decision On Petition under 37 C.F.R. § 10.170 ("Decision on Petition"), denying petitioner's petition for registration. (App., *infra,* 38a-51a.) On August 6, 2002, petitioner filed a Petition for Review under 37 C.F.R. § 10.2(c) (2003), appealing the Decision on Petition. (A93-102.) USPTO affirmed in a Memorandum and Order ("Order") issued on May 9, 2003. (App., *infra,* 28a-37a.) On July 2, 2003, petitioner filed suit against the USPTO in the U.S. District Court for the District of Columbia, seeking review of the denial of registration. On November 30, 2004, the district court granted the USPTO's motion for summary judgment, affirming the refusal to register petitioner. (*Id.* at 10a-27a.) The district court accorded deference to the USPTO's interpretation of the statute empowering the USPTO to regulate patent practitioners, 35 U.S.C. § 2, because it found that the statute is silent on the issue of whether the USPTO may refuse to register nonimmigrant aliens. (*Id.* at 23a-25a.) It held that a "reasonable interpretation" of the statutory requirements of "good moral character" and "necessary qualifications" includes limiting recognition of nonimmigrant aliens to the terms of their visas. (*Id.* at 25a.) The district court further held that there was no violation of petitioner's right to equal protection because the USPTO treats all nonimmigrant aliens the same by denying registration to all of them. (*Id.* at 26a.) On December 9, 2004, petitioner filed a Notice of Appeal to the Court of Appeals for the Federal Circuit. On February 6, 2006, the Federal Circuit affirmed, and on June 5, 2006, it denied rehearing and denied rehearing en banc. (*Id.* at 2a, 9a.)

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to clarify the bounds of federal agency authority and to determine whether a federal agency with no statutory authority over immigration and naturalization can discriminate against nonimmigrant aliens without serving any legitimate interest of that agency.

I. The Federal Circuit Erroneously Empowered The USPTO To Usurp The Authority Of The USCIS By Refusing To Register As Patent Practitioners Nonimmigrant Aliens Authorized By USCIS To Practice Patent Law In the United States

This case presents an important opportunity for this Court to rein in the tendency of the USPTO, or any federal or state agency, to expand its authority into creating and policing immigration restrictions. The decision below erroneously permitted the USPTO to expand its authority into this area over which it has no jurisdiction.

Congress authorized the USPTO to evaluate practitioners' competency to practice before it, not the terms of practitioners' visas. The USPTO's authority to govern the recognition and conduct of attorneys is expressly limited to consideration of whether the attorney seeking registration has "good moral character" and the "necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation and prosecution of their applications or other business before the Office …" 35 U.S.C. § 2(b)(2)(D). The plain meaning of "necessary qualifications" refers to technical and legal competence to prepare and prosecute patent applications. There is nothing in that sentence, the statute as a whole, or the available legislative history to suggest that "necessary qualifications" was intended

to include citizenship or immigration status. *Id.*; *see* S.R. No. 1979 (1952); S.R. No. 93-1399 (1974); *see also* CONSOLIDATED APPROPRIATIONS ACT, Pub. L. No. 106-113, § 4608-4808 (1999). Because Congress expressly limited the requirements the USPTO may impose on attorneys, and those requirements do not include U.S. citizenship or immigration status, the USPTO had no discretion to impose such requirements. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."), *reh'g denied*, 468 U.S. 1227 (1984).

Furthermore, the USPTO's own rules establish that citizenship and immigration status are not "necessary qualifications" for registration because the rules permit registration of Canadian citizens residing in Canada, practicing Canadian patent law and possessing no immigration status in the United States. 37 C.F.R. § 10.6 (2003).

The Federal Circuit mistakenly held that the USPTO denied petitioner registration because the USPTO interpreted "necessary qualifications" to include "legal authority to render service." (App., *infra,* 8a-9a.) If this were correct, petitioner would have been registered as a patent attorney because she possesses legal authority to render service: her visa authorizes her to practice as a patent attorney in the United States. (*See e.g.*, A61-63, particularly A62.) Nothing in her visa precludes her from being registered. Registration would not relieve her of the obligation to comply with her visa.

The Federal Circuit decision in this case, and the trend in cases like *Leclerc* and *Wallace*, would permit any federal agency or state bar to erect barriers to professional

employment opportunities for the purported purpose of policing immigration restrictions. This is the business of the Department of Homeland Security ("DHS").[4] No other agency has been entrusted by Congress with this authority. No other agency is qualified to perform this function.

The USPTO has demonstrated its inability to interpret and enforce visa restrictions properly by its repeated changes throughout this lawsuit to the USPTO rules and the terms of petitioner's limited recognition,[5] in purported attempts to

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[4] On March 1, 2003, the functions of the Immigration and Naturalization Service were transferred from the Department of Justice to three agencies (United States Immigration and Customs Enforcement, United States Customs and Border Protection, and USCIS) to the newly formed DHS. *See* HOMELAND SECURITY ACT OF 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); *Kalaj* v. *Gonzales*, No. 05-3172, 2006 U.S. App. LEXIS 15490, *2 n.1 (6th Cir. 2006).

[5] After petitioner argued that her limited recognition was more restrictive than her visa because it forced her to work for a fully registered practitioner causing inefficiencies for clients (Corrected Brief for Plaintiff-Appellant, at 32-33, *Lacavera* v. *Dudas*, No. 05-1204 (filed with Fed. Cir. on Apr. 1, 2005 [hereinafter *Pl. Fed. Cir. Br.*]), the USPTO lifted this restriction (*compare* SRA5 *and* A207). After petitioner argued that she was denied a registration number and forced to submit copies of her limited recognition records in each patent application (*Pl. Fed. Cir. Br.*, at 32-33), the USPTO informed petitioner of its new policy of issuing limited recognition numbers to be used in lieu of filing proof of her limited recognition status. (A225.) The USPTO initially refused to reconsider its policy of requiring annual renewal of limited recognition status despite the three year term of petitioner's visa (*see* A25-27, A203-207), but then it changed its rules to grant limited recognition commensurate with the term of the nonimmigrant alien's visa (*compare* 37 C.F.R. 11.9 (2004) *and* 37

achieve "consistency" between petitioner's limited recognition before the USPTO and the terms of her visa. Still today, after over four years of pendency of this case and multiple amendments by the USPTO to its regulations and the terms of petitioner's limited recognition status, petitioner's limited recognition is still far more restrictive than her visa.[6] These restrictions impede petitioner's ability to perform functions that she was expressly authorized by USCIS to perform in the United States, namely preparing and prosecuting patent applications. A real danger of permitting the USPTO, or any other agency that has no authority over immigration matters, to enforce immigration restrictions is that the agency could impose its own set of arbitrary and burdensome restrictions on aliens, just as the USPTO did here.

II. The Federal Circuit Erred When It Applied Only "Rational Review" To A USPTO Rule That Discriminates Based On Alienage Without Serving Any National Interest

This case is a perfect opportunity for the Court to clarify the appropriate degree of scrutiny of a federal agency rule that discriminates on the basis of alienage where the federal agency has no special national interest in its discriminatory rule.

C.F.R. § 10.9 (2003)).

[6] Petitioner's current limited recognition before the USPTO limits her to "prepar[ing] and prosecut[ing] patent applications wherein the assignee of record of the entire interest is [petitioner's employer]" (SRA 5), whereas her visa authorizes her to represent her employer by preparing and prosecuting patent applications regardless of the assignee of record (SRA 1-4).

The Federal Circuit applied only a "rational review" standard in upholding the USPTO rule (App., *infra,* 9a.), citing *Mathews*, 426 U.S. at 78, a case which concerned the constitutionality of provisions in the Social Security Act denying Medicare benefits to nonimmigrant aliens. This case asks the court to consider whether a federal agency rule, as opposed to an act of Congress as was at issue in *Mathews*, which discriminates against nonimmigrant aliens without serving any special national interest should be subject to at least "heightened scrutiny," if not the "strict scrutiny" accorded to similarly discriminatory rules promulgated by the states.

This Court has repeatedly held that state "classifications based on alienage [are] inherently suspect and subject to close judicial scrutiny." *See e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) (applying strict scrutiny review in equal protection challenge to state law that affected only aliens who had not resided in the state for a certain period of time); *see also Nyquist* v. *Mauclet*, 432 U.S. 1, 7 (1977) (applying strict scrutiny to invalidate state law that prevented certain aliens from applying for state financial assistance for higher education). But the USPTO distinguished the long line of cases holding it unconstitutional to deny aliens admission to practice law or any other profession[7] on the basis that these

[7] *See In re Griffiths*, 413 U.S. at 717 (Connecticut court rules restricting admission to the bar to citizens found to deny equal protection); *see also Szeto* v. *Louisiana State Board of Dentistry*, 508 F. Supp. 268 (E.D. La. 1981) (state statute prohibiting aliens from being licensed to practice dentistry violated equal protection clause); *see also Surmeli* v. *State of New York*, 412 F. Supp. 394 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 560 (2d Cir. 1976), *cert. denied*, 436 U.S. 903 (1978) (state's requirement of citizenship or declaration of intent to become a citizen as condition of continued licensure after it had already found alien physician qualified and

cases involved state rather than federal rules. (*Def. Fed. Cir. Br.*, at 45.)

It has been recognized that federal laws that classify on the basis of alienage may receive less searching judicial review than state laws that classify on that basis because of the paramount federal power over immigration and naturalization. *Hampton*, 426 U.S. at 100-101. However, this Court held that where there is no special national interest at stake, the due process clause applicable to the federal government has the same significance as the equal protection clause of the Fourteenth Amendment applicable to the states. *Hampton*, 426 U.S. at 100 (citations omitted). Thus, "[a]s classifications based upon alienage are now also "suspect", it would seem that a classification of aliens which, if state-made, violates equal protection will, if federally made, violate due process." *Ramos*, 376 F. Supp. at 366, *aff'd in relevant part*, 426 U.S. at 916.).

This Court made clear in *Hampton* that federal regulation of aliens receives less searching review only if the federal government asserts an overriding national interest as a justification for an otherwise discriminatory rule and the agency that promulgates the rule has direct responsibility for fostering or protecting that interest. *Hampton*, 426 U.S. at 100-116. In *Hampton*, this Court held that a Civil Service Commission policy excluding aliens from civil service jobs was not designed to foster any national interest in alien naturalization because that interest was far removed from the responsibilities of that agency. *Id.* at 104-105. Similarly, the USPTO's discriminatory regulation is not designed to foster

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licensed him to practice bore no logical relationship to his continued professional competence, and therefore violated equal protection clause).

any national interest in alien naturalization because that interest is not even remotely related to the interest of the USPTO in ensuring competency of those that practice before it.

The USPTO interest in ensuring competency of registered patent attorneys is no different than the interest of every state bar in ensuring competency of practicing attorneys. The question whether a federal agency like the USPTO can deny nonimmigrant aliens registration before the patent bar is analogous to the question presented in two other cases presently before this court, *Leclerc* and *Wallace*, whether the state of Louisiana can deny nonimmigrant aliens admission to the Louisiana state bar. The only distinction in this case is whether a federal agency may discriminate against nonimmigrant aliens if this Court concludes in *Leclerc* and *Wallace* that a state is prohibited from the same manner of discrimination. This Court has already answered this question in the negative. *See Hampton*, 426 U.S. at 100-116; *see also Ramos*, 376 F. Supp. at 361, *aff'd in relevant part*, 426 U.S. at 916. This Court affirmed that "Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states." *See Ramos*, 376 F. Supp. at 366, *aff'd in relevant part*, 426 U.S. at 916. Thus the USPTO rule should be subjected to at least "heightened scrutiny", if not the same degree of "strict scrutiny" applied to state regulations that discriminate against aliens. *See Graham*, 403 U.S. at 371-72; *Nyquist*, 432 U.S. at 8-9.

III. The Federal Circuit Erred By Holding Equal Discrimination Against Nonimmigrant Aliens Satisfies the Equal Protection Guarantee

The Federal Circuit set a dangerous precedent by holding that the USPTO does not discriminate against nonimmigrant aliens because it treats all nonimmigrant aliens the same by refusing to register any of them. (App., *infra,* 9a.) Equal discrimination is not equal protection. This Court has made clear that for purposes of equal protection analysis, "similarly situated" persons must be defined based on criteria that threaten a legitimate USPTO interest. In *City of Cleburne*, for example, the U.S. Supreme Court invalidated a city zoning ordinance and held that although the mentally retarded as a group are different from others not sharing their misfortune, this difference does not threaten a legitimate interest of the city that could justify treating them differently. 473 U.S. at 448.

On its face, the USPTO rule governing registration of patent practitioners discriminates between (a) U.S. citizens, who are registered regardless of their country of residence; and (b) aliens, who may be registered only if (i) they reside in the United States pursuant to a work visa the terms of which are not "inconsistent" with registration or (ii) reside outside the United States and are registered before the patent office in their jurisdiction of residence, and where such foreign patent office offers reciprocal privileges to persons registered before the USPTO. 37 C.F.R. § 10.6 (2003). The USPTO rule imposes residency requirements on aliens -- either permanent residence in the United States or, ironically, residence outside of the United States -- that are not imposed on U.S. citizens. The USPTO refuses to register nonimmigrant aliens, who are temporary residents, even if they are authorized by USCIS to practice as patent practitioners in the United States because the

USPTO claims that registration is "inconsistent" with the duration and employer restrictions in their visas.

The USPTO presented no evidence that the immigration status of attorneys seeking registration before the USPTO threatens a legitimate interest of the USPTO in ensuring competency of those that practice before it. In fact, by granting full registration under 37 C.F.R. § 10.6(c) (2003) to non-U.S. citizens who reside outside the United States and possess no immigration authority to work in the United States, the USPTO has indicated that citizenship and immigration status are not important considerations. The USPTO's own regulations establish that the relevant requirements for establishing competency of patent practitioners are the technical, legal and moral qualifications of applicants. 37 C.F.R. § 10.7 (2003). The USPTO's "Requirements for Registration," do not, and should not, include any requirement of citizenship or immigration status. *Id.* Thus, "similarly situated persons" under *City of Cleburne* for purposes of patent attorney registration, are those who have satisfied 37 C.F.R. § 10.7 (2003). Petitioner met all of these requirements, and yet she was denied registration because she is not a U.S. citizen or permanent resident of the United States. Petitioner and other qualified nonimmigrant aliens are treated differently than all other similarly situated persons who have met the USPTO requirements for registration.

The Federal Circuit mistakenly held that the "[USPTO] regulations in question are rationally related to a legitimate government interest, e.g. minimizing the unauthorized practice of law before the USPTO and its attendant public harm." (App., *infra,* 9a.) This finding is based on pure conjecture. There is no evidence to support the Federal Circuit's assumption that denying nonimmigrant aliens full registration and granting only limited recognition serves any

legitimate interest of the USPTO, much less any supposed interest in minimizing unauthorized practice before the USPTO. There is no evidence that aliens with work visa restrictions are more likely to engage in the unauthorized practice of law before the USPTO than any other class of applicant for registration. There is no evidence that any public harm would attend the grant of registration to aliens with work visa restrictions. There is no reason to believe that nonimmigrant aliens are more likely to leave their clients without adequate representation than U.S. citizens who may remain registered to practice before the USPTO even if they leave the United States, immigrant aliens who may remain registered if they move within the United States, or Canadian citizens with no U.S. immigration status who are registered if the reside within Canada.

The USPTO claimed that limited recognition enables the USPTO to "monitor that resident aliens cease to practice when their employment authorization expires." (*Def. Fed. Cir. Br.*, at 32). Without limited recognition, the USPTO claims it "would be forced to use its investigative power to determine whether petitioner's representations to clients and the USPTO are in concert with her visa restrictions." (*Id* at 50). To the extent the USPTO has any authority to monitor aliens' compliance with their visas, given that it has no responsibility for immigration and naturalization, that authority is no different than the USPTO's authority to monitor all registered practitioners' compliance with all laws of the United States. There is no evidence that monitoring aliens' compliance with the terms of their visas is any more pressing a concern of the USPTO than monitoring all registrants' compliance with all laws of the United States. Therefore, the claimed need to monitor nonimmigrant aliens is no justification for treating nonimmigrant aliens differently.

The USPTO regulations are also not narrowly tailored to serve the claimed interests of the USPTO in preventing unauthorized practice before it and protecting the public. The USPTO denies registration to all nonimmigrant aliens based on its presumption that all aliens are likely to engage in unauthorized practice before it by violating their visas or abandon their clients by returning to their native countries. The USPTO does not consider how long each nonimmigrant alien has lawfully resided in the United States in compliance with his or her visa or whether the nonimmigrant has applied for immigrant status. In petitioner's case for example, she has been lawfully living and working in the United States for nearly five years in compliance with her visas (A42; A46-47; A61-63; A80-81; A104-106; SRA 1-4) and she has applied for and is awaiting immigrant status.

The USPTO also has other adequate remedies to prevent nonimmigrant aliens from engaging in unauthorized practice before it: the USPTO can discipline registered attorneys and/or revoke their registration if they actually violate their visas or break any other law. There is no justification for denying aliens registration because they might violate their visas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 2006

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this _____, 2006, I filed with the Clerk's Office of the U.S. Supreme Court the required number of copies of this Petition for a Writ of Certiorari, and further certify that I served the required number of said Petition to the following:
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