_____

_____

_____

_____

Attorneys for the Applicant
_____, Esq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----------x

G.,

Applicant,

-against-

Case No.: _____
Agency File No:
_____

U,

Respondents.

----------x

MOTION TO QUASH SUBPOENA

TABLE OF CONTENTS

Page

INTRODUCTION

1. G, Esq. (the "Applicant") is an attorney admitted to pracrice law in the State of New York, and practicing as the _____.

2. The Applicant respectfully submit this Memorandum of law in support of his Motion to Quash Subpoena pursuant to Fed. R. Civ. P. 45.

3. The Applicant is external counsel to E, ("**E**") which carries out business as a construction company based at _____.

4. On _____, the Department of Homeland Security ("**DHS**") issued an Immigation Enfrocement Subpoena to Appear and/or Produce Records pursuant to 8 U.S.C. §1225(d) and 8 C.F.R. §287.4 (the "Subpoena"). See Subpoena attached as **Exhibit A** to the Affidavit of G.

5. The Subpoena is in reference to D, and demands the production on _____ to Immigration Officer _____ of "*All records pertaining to the employment of D, also known as PD, from ___ until the Present at E., _____.*"

6. D has been a legal permanent resident alien since ____, and applied to the United States Citizenship and Immigration Services to naturalize as a U.S. Citizen on ____ on Form N-400 Application for Naturalization bearing receipt number ____ (the "N-400 Application"). See N-400 Application attached as **Exhibit A** to the Affidavit of D.

7. D sets out that his N-400 Application has been managed, and continues to be managed, by the _____ Unit ("UT") of U. The UT Unit is a formerly secretive unit of U whose mission is to delay, derail and deny immigration applications including N-400 applications for naturalization. D submits that the activities of UT in general, and specifcially in his case, are unconstitutional.

8. The Applicant submits that the Subpoena is void as invalid on its face and/or is *ultra vires* the authority of the DHS to issue the Subpoena. In the alternative, it is unlawful as overly burdensome and is an unlawful interference in E's business and employment relationships and amounts to an unwarranted breach of privacy.

9. Moreover, in light of the UT's actions and omissions to date, it is submitted that the Subpoena has been issued in bad faith in disregard of, and as a further interference with, D's statutory right to naturalize, and in violation of the broad provisions of a Court Ordered Stipulation.

10. In that regard, it is submitted that the issuance of the Subpoena should more properly be considered in light of the Government's ongoing actions in depriving D of the benefits of U.S. citizenship, including the right to vote, the right to travel without encumbrance, freedom from immigration controls, as well as the emotive benefits of naturalization.

PROCEDURAL BACKGROUND

D's Application for Naturalization

11. On _____, D filed the N-400 Application. Part 6 of the N-400 Application at Section B set out the standard question in relation to previous employment: "*Where have you worked (or, if you were a student, what schools did you attend) during the last five years? Include military service. Begin with your current or latest employer and then list every place you have worked or studied for the last five years. If you need more space, use a separate sheet of paper*." D completed this part of the form by providing that he had worked for E for the previous __ years (from ___ through ___).

12. D was not scheduled for a naturalization interview on his N-400 interview until almost ___ years later, on _____. At the N-400 interview, which was recorded by audio and video, he was asked questions regarding his previous employment. D answered "*no*" to the question: "…*had [you] worked any place else or been a partner or in any way involved in any other business.*" U then asserted that "*background information*" disclosed that between _____ and _____, D held the position of "___" and "___" of C.

13. When asked why he had failed to mention C in his N-400 Application, D replied "*I thought that I got my pay check from E.*" U noted that D had not listed C in a previous N-400 Application in _____.

14. On ____, U issued an N-14 Request for Evidence to D, requesting the submission of Form 1040 Federal Tax Returns, W-2s and tax return transcripts for fiscal years __, as well

as tax returns for C from _____. The requested documentation was duly submitted by D along with an explanation that C had been dissolved in ____.

15. On ___, U issued a denial of the N-400 Application, relying on what it asserted to be "*false testimony*" in relation to D's employment status with C. In particular, U made a finding of fact that the D was employed with C., as well as a finding that he had provided "*false testimony.*"

16. On the basis that D had been paid a profit as a business owner of C., U determined that the D was obliged to provide information about C. in his N-400 Application. U did not refer to any Federal statute, regulation, or case law in support of its assertion that the D is obliged to provide any such information.

17. Part 10, Section 10, Question 23 of the N-400 form asks "*Have you ever given false or misleading information to any U.S. Government official while applying for any immigration benefit or to prevent deportation, exclusion or removal"* to which the D answered "*no*" on the N-400 form and during his interview on ____.

18. As a result of the foregoing, U found that, on ____, D "*...failed to disclose that [he] did in fact give false and misleading information on his N-400 application (____) filed on _____ and during your naturalization interview in _____ and _____.*" Consequently, U found that he had provided false testimony with respect to whether he had ever provided false and misleading information to the U.S. government.

19. Significantly, U determined that any false testimony need not be material, relying on *Kungys v. United States,* 485 U.S. 759 (1988).

D's Appeal from the Denial of Naturalization

20. D timely filed an N-336 Request for Hearing on Denial of Naturalization, to appeal from the _____ decision. On _____, he was compelled to send a letter, by and through his attorney, _____ addressed to _____ at the UT unit of U. The letter complained of the failure of U to schedule a hearing within 180 days of the appeal filing date contrary to 8 C.F.R. § 336.2(b).

21. On or around the _____, D presented for the N-336 appeal hearing, in the course of which legal arguments were presented setting out the factual and legal errors of the denial. The Hearing Officer did not proffer any reasons why the application should not be granted

but stated that it had to be cleared by UT. The N-336 appeal was not adjudicated within the 120-day timeframe set forth in the regulations for determinations or appeals. See 8 U.S.C. §1447(b) and 8. C.F.R. §336.1(a).

22. Upon the expiration of 120 days, D made a request for a prompt determination. A determination was not forthcoming, but rather, on _____, U issued an N-14 Request for Evidence, seeking "*police clearance letters from the ___, including _____...which details any and all arrests in these jurisdictions, what the charges were and what the disposition (including court dispositions) of those arrests were."* The N-14 Request for Evidence contained the standard warning that *"[f]ailure to submit the evidence requested may result in denial of your application*."

23. On _____, D initially responded by declining to produce this evidence on the grounds that the request was clearly *ultra vires* the agency's authority, had no bearing whatsoever on D's application for naturalization, and was further evidence of bad faith and frivolity on the part of the Respondents. Notwithstanding the foregoing, D subsequently furnished the requested evidence, which clearly demonstrates no history of arrests of criminal convictions in the _____ or _____.

24. On _____, U issued its decision in relation to the N-336 appeal. The appeal decision reiterates the findings of fact in the _____ N-400 decision, and followed the same reasoning. U found that D had "*failed to establish that [he was] not employed by C.*" and that he had "*not overcome the grounds for your Form N-400 denial"* as he had been found to have "*given false testimony under oath with the intent to obtain an immigration benefit."* U determined that D had not established that he was a person of good moral character because, during the statutory period, he gave false testimony to obtain an immigration benefit, and was ineligible for naturalization pursuant to INA§§316(a)(3) and 101(f)(8) and 8 C.F.R. §316.l0(b)(l)(ii).

D's Civil Action challenging Denial of Naturalization

25. On _____, D brought a civil action in the U.S. District Court for the ____ pursuant to 8 U.S.C. §1421(c) which provides for a review by a U.S. District Court of a denial of an application for naturalization. See Complaint attached as **Exhibit B** to the Affidavit of D.

26. On _____, following close of pleadings, upon agreement and stipulation of the parties, the Court by way of a Stipulation and Order of Dismissal ordered the action to be dismissed pursuant to Fed. R. Civ. P., Rule 41 (a)(2). See Stipulation and Order of Dismissal attached as **Exhibit C** to the Affidavit of D.

27. The So-Ordered Stipulation directed U to file a motion to reopen the denial of D's N-400 application by _____, and interview D by _____. The matter has been reopened and D was interviewed on _____. U is required to issue a decision regarding his N-400 application within 120 days of the interview, namely, by _____.

28. More significantly, for the purposes of this Motion to Quash, the Order directed that "*U shall not deny [D's] application for naturalization based solely on his failure to previously disclose his employment with C.*"

29. Whereas the Stipulation expressly does not "*preclude U from conducting further interviews, requesting evidence, collecting biometric data, or seeking any other information CIS deems relevant in furtherance of its adjudication of [D's] application for naturalization"* it is axiomatic that such further investigative actions must be lawful.

D's reopened Naturalization interview

30. D was interviewed pursuant to the reopened naturalization application on _____ (the "Reopened Interview"). The Repoened Interview, which was recorded, was heard before Senior ISO _____and Officer _____, who is the officer before whom the Subpoena commands an appearance and production of records.

31. In the course of the Reopened Interview, D was questioned about his employment with E in _____, at a time when he was undocumented. His attorney submitted that this would have been dealt when he applied for Adjustment of Status to that of a Legal Permanent Resident.

32. Any period of unauthorized employment is waived by way of an application for Adjustment of Status under INA §245(c)(2) and INA §245(c)(8) for immediate relatives of U.S. Citizens.

33. Form N-400 Application for Naturalization only requires a naturalization applicant to list his/her employment for the five years prior to the date of application. Moreover this information gathering is not a statutory requirement, and D's employment history is not material to his qualification for naturalization. U is well aware of this fact, and indeed this point had been litigated and formed part of the So-Ordered Stipulation.

34. D has properly furnished details of his employment history to the U.S. Citizenship and Immigration Services for the five years prior to his application for naturalization. Any dispute over the nature of his relationship with C has been resolved by way of a So-Ordered Stipulation.

ARGUMENT

A. THE SUBPOENA IS INVALID ON ITS FACE

35. The Subpoena has not issued to E, which is the party in posession, control and custody of the requested records. Rather, it has issued to G (the "Applicant"), who is an attorney practicing as the _____ Law Firm, _____ . The Applicant is external counsel to E, ("E") which carries out business as a construction company based at _____.

36. The Applicant is prohibited by client confidentiality considerations from producing any protected documents. Rather, the Subpoena should have issued to E as the proper respondent.

37. In any event, the Subpoena issued on _____ seeking production of _____ years of employment records by 3 p.m. on the same day which is clearly invalid as overburdensome and irrational.

38. In the circumstances, the Subpoena was not in fact served on the Applicant on _____. The Applicant was out of his office at that stage and does not concede proper service by electronic mail.

B. THE ISSUANCE OF THE SUBPOENA IN THE COURSE OF NATURALIZATION HEARING IS *ULTRA VIRES*

39. The provisions of 8 USC §1225(d)(4) and 8 CFR §287.4, which are the authorities relied on by the Respondents, expressly preclude the issuance of the Subpoena in the course of a naturalization hearing.

40. The provisions of 8 CFR 287.4(a)(1) set out who may issue a subpoena and includes *any other* immigration officer *who has been expressly delegated such authority as provided by* 8 CFR 2.1. It is not clear that Chief _____ is so authorized, but that will be a matter for the Respondent to establish.

41. More particularly, 8 CFR §287.4(a)(2) sets out the authority in *other than naturalization proceedings,* and expressly stated that designated officers may issue a subpoena requiring the attendance of witnesses or the production of documentary evidence, or both **"** *for use in any proceeding under this chapter I, other than under* 8 CFR part 335*, or any* application *made ancillary to the proceeding."* This is confirned at 8 CFR §287.4(a)(2)(ii) which sets out procedures for the issuance of a subpoena after the commencement of proceedings, in cases other than those arising under part 335 of this chapter. See also 8 CFR §287.4(b)(2).

42. The provisions of 8 CFR §335 address the examination on an application for naturalization. This section contains its own investigative authority under 8 CFR §335.1 which sets out as follows:

> *Subsequent to the filing of an* ***application*** *for naturalization, the* ***Service*** *shall conduct an investigation of the applicant. The investigation shall consist, at a minimum, of a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the* ***application****. The district director may waive the neighborhood investigation of the applicant provided for in this paragraph.*

43. Accordingly, the First Named Respondent is clearly in disregard of, or attempting to circumvent, the statutory restrictions and separate provisions for investigations of a naturalization application.

44. The Applicant submits that there can be no uncertainty in this regard. However, if there is any remainging doubt, the Court should resolve in the Applicant's favour.

45. In *United States v Minker*, 350 US 179 [1956], the United States Supreme Court held that, "*Concerns regarding the subpoena power are emphatically pertinent to investigations that constitute the first step in proceedings calculated to bring about the denaturalization of citizens*." See also: *Schneiderman v United States*, 320 US 118 [1943]; *Baumgartner v United States*, 322 US 665 [1944]. The Supreme Court in *Minker* also held that, "*This may result in loss of both property and life; or of all that makes life worth living. In such a situation where there is doubt it must be resolved in the citizen's favor*." See also: *Ng Fung Ho v White*, 259 US 276 [1922] *Id*.

46. In *Minker,* the Court agreed to hear two cases: the first where judgment was entered in favor of the respondent naturalized citizen, and the second where judgment was entered against the petitioner naturalized citizens. The Court agreed to resolve the conflicting construction by two Circuit Courts of Appeal of immigration officers' subpoena powers under Section 235(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C.S. § 1225(a). In both cases the immigration authorities had issued subpoenas to naturalized citizens to give testimony in investigations to determine if good cause existed for the institution of denaturalization proceedings against them.

47. The *Minker* Court held that the power granted to subpoena witness to testify in denaturalization proceedings did not extend over persons who were the subject of such proceedings. The Court accordingly affirmed the judgment of the Court of Appeals in the first case, and reversed the judgment of the Court of Appeals in the second.

48. It is submitted that, in any event, it is abundantly clear that the legal framework upon which the First Named Respondent relies in issuing the Subpoena is entirely improper and the Motion to Quash Subpoena should be granted.

C. THE RECORDS SOUGHT BY SUBPOENA ARE IRRELEVANT AND IMMATERIAL, AND THE SUBPOENA IS EXCESSIVE AND UNDULY BURDENSOME TO THE NON-PARTY EMPLOYER.

49. In the event that the Subpoena is not *ultra vires,* it is submitted that it should be quashed as unduly burdensome. The request is overreaching, and concerns matters which are entirely irrelevant and immaterial to the naturalization application, as outside the statutory period and not compellable by any statutory provision.

50. Fed. R. Civ. P., Rule 45(d)(3) requires that the Court must quash or modify a Subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies; or if it subjects a person to an undue burden.

51. As set out above, the information sought in the case at bar is not material for the purposes of D's citizenship application and poses an undue burden on the Applicant and employer.

52. Part 6 of Section B pf the N-400 Application only requires an applicant to respond to the standard question of where s/he has worked during the last five years prior to the application. As set out above, this has no statutory basis.

53. In *Aristocrat Leisure Ltd. v Deutsche Bank Trust Co. Ams.*, 262 FRD 293 [SDNY 2009], the Southern District Court held that, "*Fed. R. Civ. P. 45 mandates a court to quash or modify a subpoena that subjects a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A)(iv).*" The court further held that, "*The movants carry the burden of proving that a subpoena imposes an undue burden on a witness.*" *Id*. The court also held that, "*Because the burden is on the party seeking to quash a subpoena, that party cannot merely assert that compliance with the subpoena would be burdensome without setting forth the manner and extent of the burden and the probable negative consequences of insisting on compliance.*" *Id*.

54. The Southern District Court in the above matter also held that, "*Motions to quash a subpoena are entrusted to the sound discretion of a district court.*" It further held that, "*A court engages in a balancing test to determine whether an undue burden exists.*" *Id*. The Court determined that, "*Whether a subpoena subjects a witness to undue burden within the meaning of Fed. R. Civ. P. 45(d)(3)(A)(iv) usually raises a question of the reasonableness of the*

subpoena and (added) the determination of a subpoena's reasonableness requires a court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it; this process of weighing a subpoena's benefits and burdens calls upon the trial court to consider whether the information is necessary and whether it is available from any other source." *Id*.

55. The Court further held that this "*…obviously is a highly case specific inquiry and entails an exercise of judicial discretion*." *Id*. The Court opined that "*Inconvenience alone will not justify an order to quash a subpoena that seeks potentially relevant testimony*." *Id.* The Court also held that, "*A party objecting to a subpoena on the ground of undue burden generally must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request*." *Id*.

56. In *Concord Boat Corp. v Brunswick Corp.*, 169 FRD 44 [SDNY 1996], the Southern District Court also held that, "*The burden of persuasion in a motion to quash a subpoena issued in the course of civil litigation is borne by the movant*." *Id.* The Southern District Court also held that, "*Resolution of a motion to quash a subpoena turns on the size and resources of a subpoena recipient, the nature and importance of the subject matter of the underlying litigation, and whether a given the document request will not denude the recipient of files and records essential for its continued operation*" *Id.*

57. However, an administrative subpoena imposes additional burdens on an agency. In *SEC v Comm. on Ways & Means of the United States House of Representatives*, 161 F Supp 3d 199 [SDNY 2015], the Southern District Court held that, "*The courts' role in a proceeding to enforce an administrative subpoena is extremely limited. To win judicial enforcement of an administrative subpoena, the Securities and Exchange Commission must show (1) that the investigation will be conducted pursuant to a legitimate purpose, (2) that the inquiry may be relevant to the purpose, (3) that the information sought is not already within the Commissioner's possession, and (4) that the administrative steps required have been followed*." See also *United States v. Powell*, 379 U.S. 48, 57 (1964)

58. Moreover, the documents requested from the Applicant and subject to attorney-client privilege. In re *Okean B.V.*, 60 F Supp 3d 419 [SDNY 2014], the Southern District Court held that, "*Under United States law, communications that otherwise would be*

protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct." *Id.* There is no suggestion that there has been any *"ongoing criminal or fraudulent conduct"* in the case at bar.

59. Similarly, in *Orbit One Communs., Inc. v Numerex Corp.*, 255 FRD 98 [SDNY 2008], the Southern District New York held that, "*Unless it offers an adequate excuse, a party or non-party must obey a valid subpoena. Fed. R. Civ. P. 45(e). However, the court must not enforce a subpoena that requires disclosure of privileged or otherwise protected matter or presents an undue burden. Fed. R. Civ. P. 45(d)(3)." Id.* The Southern District New York also held that, "*A party contending that a subpoena should be quashed pursuant to Fed. R. Civ. P. 45(d)(3)(A)(iv) must demonstrate that compliance with the subpoena would be unduly burdensome*." *Id.* The Southern District Court also held that, "*In the context of Fed. R. Civ. P. 45(d)(3)(A)(iv), an evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party*." *Id.* It is also held that " *Whether a subpoena imposes an "undue burden" depends upon such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.*" *Id.* The court concluded that "*Ultimately, the determination of issues of burden and reasonableness is committed to the sound discretion of the trial court." Id*.

60. In *Jones v Hirschfeld*, 219 FRD 71 [SDNY 2003], the Southern District New York held that, "*Fed. R. Civ. P. 45(d) provides additional protection for non-parties subject to a subpoena by mandating that a court quash or modify the subpoena if it subjects the person to undue burden. Fed. R. Civ. P. 45(d)(3)(A)(iv)."*

61. In *Byrnes v Empire Blue Cross Blue Shield*, 1999 US Dist LEXIS 17281 [SDNY Nov. 2, 1999, 98 Civ. 8520 (BSJ)(MHD)], the defendant's motion to quash the plaintiff' subpoena which required production of documents from non-party who served as actuary to defendant granted in part, denied in part. One of seven contested documents was protected by attorney-client privilege.

62. In the case at Bar, the First Named Respondent has sought production of the Applicant's employment records over the course of a _____ year period. As set out above, an

applicant for naturalization is only required to list his employer for the previous five years on the N-400 Application for Naturalization. There is no statutory requirement for this, or any requirement to produce employment records for that five year period or otherwise. D has fulfilled his requirements in relation to his employment details for previous five years which is not in dispute.

63. It is axiomatic that the production of such a record would be cumbersome for the non-party employer. The Subpoena will subject E to undue burden within the meaning of Fed. R. Civ. P. 45(d)(3)(A)(iv) and does not seek any potential relevant records in connection to the Applicant's application.

64. The balance the interests clearly favours the quashing of the subpoena.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Applicant respectfully requests that this Honorable Court enter an Order GRANTING this Motion and

1. Quashing the outstanding Subpoena seeking the Applicant's employment records from non-party E;
2. For such other and further relief that this Court deems just and proper.

Dated: _____

_____.

Respectfully submitted,

_____
_____
_____
_____
(*Attorney Name & Address*)

To:
_____
_____
_____
Attorney for Respondents
_____
cc.
_____
Assistant United States Attorney
_____
_____
_____
_____.