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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:)
)
 [REDACTED])
)
 [REDACTED])
)
 Respondents)
_____)

[REDACTED]
[REDACTED]

RESPONDENTS' EMERGENCY MOTION TO STAY REMOVAL

[REDACTED]

**UNITED STATES DEPARTMENT OF JUSTICE
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_____))
In the Matter of:))
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 [REDACTED])) [REDACTED]
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 [REDACTED])) [REDACTED]
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 Respondents))
_____))

RESPONDENTS' MOTION TO STAY REMOVAL

Ms. [REDACTED] (“Ms. [REDACTED] and her son [REDACTED] [REDACTED] (“[REDACTED]”) face imminent removal despite their pending appeal before the Board of Immigration Appeals (“BIA”). As a result, they respectfully request that the BIA recognize their automatic stay of removal pending the disposition of their appeal, which the BIA accepted on August 28, 2017. Exh. A, Filing Receipt for Appeal. In the alternative, Ms. [REDACTED] and her son request that the BIA use its discretionary authority to grant a stay of removal in their case.

Ms. [REDACTED] and her 3-year-old son [REDACTED] fled El Salvador and came to the United States after an M-18 gang member stalked and sexually assaulted her and other M-18 gang members threatened her and her son. Exh. B, Declaration of [REDACTED] [REDACTED], at 2-3. Despite this persecution, the family did not have the opportunity to present their asylum claim before an Immigration Judge. Instead, in March 2015, Ms. [REDACTED] fell victim to a predatory scheme in which attorneys at [REDACTED] charged her \$3,000.00 to assist with her immigration case, only to tell her that she could not apply for asylum and to acquiesce to a removal order rather than advance her viable asylum claim. Exh. B at 3-4. On

August 28, 2017, Ms. [REDACTED] filed an EOIR-26 Notice of Appeal due to ineffective assistance of counsel, which is currently pending before the BIA. Exh. A. Ms. [REDACTED] respectfully asks the BIA to clarify that the automatic stay provision under 8 C.F.R. § 1003.6(a) applies to their late-filed appeal, or in the alternative, to grant a discretionary stay of removal so that the she and [REDACTED] may remain in safety in the United States as the BIA considers the merits of her appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. [REDACTED] fled to the United States from El Salvador with [REDACTED] after M-18 gang members in El Salvador threatened kill her and her family. Exh. B at 2. In the year before she left, an M-18 member known as [REDACTED] stalked her, sexually assaulted her, and threatened that she had to be his girlfriend. *Id.* When she refused, he would tell her that “[she] would be his whether [she] wanted to or not” and lift his shirt to show her a gun. *Id.* In addition, M-18 gang members targeted her infant son, [REDACTED]. *Id.* Shortly after [REDACTED] was born in 2013, M-18 gang members proclaimed him an “M-18” baby and declared that he would join the gang when he turned 12. *Id.* After leaving El Salvador for the United States, Ms. [REDACTED] and various members of her family continued to receive threats from M-18 gang members. Exh. B at 3. On multiple occasions, M-18 gang members sent messages to her cousins in the United States threatening to kill her and her family members if they return to El Salvador. *Id.*

Ms. [REDACTED] and [REDACTED] entered the United States in 2014. *Id.* On March 23, 2015, Ms. [REDACTED] signed a contract with [REDACTED] for representation in her immigration case. Exh. B at 3; Exh. C, [REDACTED] Contract with translation, at 7-8. She told them what happened to her in El Salvador, and they misinformed her she did not have an asylum claim. Exh. B at 3. Regardless, the law firm convinced her to accept

their services and charged her \$3,000.00 to accept a deportation so they could file a “stay.” Exh. B at 3-4; Exh. C at 7-8.

On May 5, 2015, Ms. [REDACTED] attended a hearing at Atlanta Immigration Court along with an attorney from [REDACTED]. Exh. B at 4. When the attorney informed her that the Immigration Judge had issued her an order of removal, she was distraught. *Id.* She did not understand that the attorney had given up her opportunity to ask for asylum until after the hearing was over. *Id.*

This is a strategy frequently employed by [REDACTED]. Exh. D, [REDACTED] [REDACTED] Response to Bar in Another Case, at 11-12. By the firm’s own admission, [REDACTED] “essentially admit[s] removal” for immigrants from Honduras, El Salvador, and Guatemala in order to later request a “stay.” *Id.* Further, rather than rely on individualized case assessments, the firm openly characterizes thousands of recently arriving Central American women and children as “immigrants... fleeing poverty and harsh economic conditions” and states that this “is unfortunately not a basis for immigration to the United States.” *Id.* at 11.

In addition to improperly advising Ms. [REDACTED], the firm was difficult to reach, frequently failing to return her calls or provide updates on her case. Exh. B at 4. As a result, Ms. [REDACTED] rarely knew what was happening in her case. *Id.* at 4-5. Eventually, she filed a complaint with an attorney at the firm, informing him that the employees she spoke with were never familiar with her case and the appropriate staff never returned her phone calls or messages to provide this information. *Id.*

Ms. [REDACTED] came into contact with her current counsel after [REDACTED] [REDACTED] to provide adequate representation. Exh. B at 5. On August 28, 2017, Ms.

██████████ filed an EOIR-26 Notice of Appeal, which is currently pending. Exh. A. Ms. ██████████ has a check-in scheduled with her local Immigration and Customs Enforcement (“ICE”) Enforcement and Removal Operations (“ERO”) office on September 28, 2017, at which time she may be taken into custody. Exh. E, ICE Form I-220A. Undersigned counsel spoke to ICE ERO Officer ██████████ on September 15, 2017 who advised that the Respondent’s removal is imminent.

ARGUMENT

The BIA has jurisdiction over this case because Ms. ██████████ filed an EOIR-26 Notice of Appeal on August 28, 2017, which is currently pending before the BIA. Exh. A. The BIA should clarify that the automatic stay provision in 8 C.F.R. § 1003.6(a) applies to Ms. ██████████ and ██████████ late-filed appeal. In the alternative, the BIA should exercise its discretionary authority to grant Ms. ██████████ and ██████████ a stay of removal because they meet the standard set by the U.S. Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009).

I. Ms. ██████████ and ██████████ qualify for an automatic stay under 8 C.F.R. § 1003.6(a).

Ms. ██████████ and her son should be entitled to an automatic stay of removal pursuant to 8 C.F.R. § 1003.6(a) while their appeal is under review. The regulation provides:

- (a) Except as provided under § 236.1 of this chapter, § 1003.19(i), and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, *nor shall such decision be executed while an appeal is pending* or while a case is before the Board by way of certification.

8 C.F.R. § 1003.6(a) (emphasis added). Ms. ██████████ and ██████████’s late-filed appeal has been received by the BIA and is currently pending while the BIA decides whether to accept the appeal on certification, *see* 8 C.F.R. § 1003.1(c), or pursuant to its *sua sponte* authority. As a



result, unless and until the BIA dismisses the appeal, Ms. [REDACTED] and her son's removal should be automatically stayed under 8 C.F.R. § 1003.6(a).

The BIA Practice Manual states that only "timely and properly filed" appeals merit an automatic stay. Board of Immigration Appeals Practice Manual § 6.2(a) ("BIA Practice Manual"). However, the plain language of the regulation requires that the automatic stay provision apply while appeals are pending. Because Ms. [REDACTED] and [REDACTED]'s appeal is currently before the BIA and under the BIA's review, the automatic provision under 8 C.F.R. § 1003.6(a) should apply.

"Timely and properly filed" language no longer in BIA Practice Manual.

II. Ms. [REDACTED] and [REDACTED] merit the BIA's use of discretionary authority to grant a stay of removal.

Should the BIA determine that Ms. [REDACTED] and [REDACTED]'s appeal does not qualify for an automatic stay, the BIA has authority to grant a discretionary stay for matters within the BIA's jurisdiction. Practice Manual §6.3(a). In assessing whether or not a stay should be granted, the BIA considers (1) whether the applicant has made a strong showing that she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). However, factors (3) and (4) "merge when the Government is the opposing party." *Id.*

Ms. [REDACTED] and [REDACTED] have a substantial likelihood of success on the merits given the serious misconduct on the part of their former attorneys and the strength of their underlying asylum claims. Furthermore, it is clear from the facts of their asylum claims that they will be irreparably injured absent a stay. Finally, the government's interest will not be substantially injured by the grant of a stay, and it is in the public interest to grant a stay to Ms. [REDACTED] and her son.

A. Ms. [REDACTED] and [REDACTED] are likely to succeed on the merits of their appeal.

Ms. [REDACTED] and [REDACTED] are likely to succeed on the merits of their appeal and their underlying claims for asylum. Unfortunately, their former attorneys at [REDACTED] [REDACTED] deprived them of the opportunity to present their case. Exh. B at 3-4. The attorneys unduly influenced them into accepting a removal order, despite their fear of returning to El Salvador. *Id.* Ms. [REDACTED] has detailed the misleading and inappropriate behavior of [REDACTED], including their unwillingness to answer her calls or provide her with updates in her case. *Id.* She also submitted a complaint against [REDACTED] to the Grievance Committee of the Georgia Bar. Exh. F, Georgia Bar Complaint. The BIA has previously accepted late-filed appeals and remanded to the Immigration Court in cases, like this one, where there was “serious misconduct” by the original attorneys. *See, e.g., In re G-M-D-R-* (BIA Jun. 13, 2016) (remanding to the Immigration Judge where there were “allegations of serious misconduct against former counsel”). In fact, the BIA accepted a late-filed appeal and remanded where the lead respondent “alleg[ed], among other things, that the respondents were unable to meaningfully contest their removability, or to present any applications for relief from removal, due to the alleged misconduct of former counsel.” Exh. G, *In re Dominga Araceli Rivas-Angel*, A# 202 122 172 (BIA May 27, 2016). Ms. [REDACTED] and [REDACTED] were similarly prevented from presenting any claim for relief because of the misconduct of [REDACTED] [REDACTED]. They are therefore likely to succeed in their appeal.

Furthermore, Ms. [REDACTED] and [REDACTED] are likely to succeed on their claims for relief if they are given the opportunity to properly develop and present their cases. Ms. [REDACTED] has endured past persecution in the form of stalking, sexual assault, and threats by [REDACTED]. Exh. B at 2. *See also, e.g., Niftaliev v. U.S. Att’y Gen.*, 504 F.3d 1211, 1217 (11th



Cir. 2007) (finding that the cumulative effect of various incidents compelled a finding of past persecution). In addition, other members of Ms. [REDACTED]'s family, including [REDACTED], have been threatened by M-18. Exh. B at 2-3. *See also, Sanchez Jimenez v. Att'y Gen*, 492 F.3d 1223, 1233 (11th Cir. 2007) (finding past persecution where applicant received personal death threats, other family members were threatened with death, and daughter was kidnapped). Furthermore, Ms. [REDACTED] established that she has a well-founded fear of future persecution by M-18 because she is a member of the [REDACTED] family. Exh. B at 2-3. *See also, Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1995) (recognizing that "kinship ties" may constitute particular social group). With the benefit of competent counsel and the opportunity to fully prepare her case, Ms. [REDACTED] and [REDACTED] are substantially likely to succeed on their claims for asylum, withholding of removal, or relief under the Convention Against Torture. Finally, various Courts of Appeal have proven wrong [REDACTED]' claim that Central American cases do not present viable asylum claims. *Arrazabal v. Lynch*, 822 F.3d 961 (7th Cir. 2016); *Flores-Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015); *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015); *Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014).

B. Ms. [REDACTED] and her minor children will be irreparably injured absent a stay.

If returned to El Salvador, there is a high probability Ms. [REDACTED] and her son [REDACTED] will be tortured and/or murdered by gang members of M-18. The M-18 member [REDACTED] told her "[she] would be his whether [she] wanted to or not," showed her his gun while making the threat. Exh. B at 2. The same gang member sexually assaulted Ms. [REDACTED]. *Id.* M-18 has also continued to threaten the [REDACTED] family even after most of them fled to the United States. Exh. B at 3. If she and [REDACTED] are removed to El Salvador, it is likely that they will be found by their persecutors and suffer immediate physical harm.

In addition, Ms. [REDACTED] has a two-year-old U.S. citizen son, [REDACTED] [REDACTED]. Exh. H, U.S. Birth Certificate of [REDACTED]. If Ms. [REDACTED] is removed, she will have to make the impossible choice between leaving her 2-year-old son behind in the United States or subjecting him to the danger she fears for her and her children in El Salvador. [REDACTED] will be irreparably harmed in either situation, whether he is taken to El Salvador or left behind. The family should therefore be given the opportunity to present their full case before they are removed to a country where they face irreparable harm and family separation.

C. The issuance of a stay will not substantially injure the U.S. government, and is in the public interest.

The government will not be substantially injured if a stay is granted pending appeal in this case. Instead, a stay would have little to no effect on public safety or enforcement of immigration laws, as neither Ms. [REDACTED] nor her children have any history of criminality, fraud, affiliation with dangerous groups, failure to appear, or other flight risk.

Further, while the government has an interest in the prompt execution of any removal order, the government also has an interest in the proper resolution of asylum claims and Convention Against Torture claims in Immigration Court, as well as the identification of substandard attorneys—like those at [REDACTED] [REDACTED]—impeding the proper application of U.S. law.

The public has an interest in encouraging honest counsel and preventing fraud in the provision of legal services. In this case, [REDACTED] took advantage of Ms. [REDACTED] and [REDACTED], using their relative power and authority in matters of immigration law to convince the family that they did not have a viable asylum claim. Exh. B at 2-3. [REDACTED] then charged Ms. [REDACTED] and [REDACTED] \$3,000 to accept a removal

order on their behalves without even attempting to present their asylum cases and without informing the family of their ability to do this pro se. Exh. B at 4; Exh. C; Exh. F. [REDACTED] [REDACTED] has openly stated its general assumption that Central American women and children are economic migrants rather than asylum seekers, and has admitted to accepting removal orders without contest as their regular practice in Central American asylum cases. Exh. D at 11. It is therefore in the public interest for Ms. [REDACTED] to expose and discourage [REDACTED] [REDACTED]' practices and for the BIA to remand this case to the Immigration Judge for proper resolution.

Furthermore, it is a long-standing tradition of this country not to deport people who meet the definition of refugee or who are likely to experience torture upon their return. In recent years, substandard attorneys and improper process have led to the deaths of dozens of Central American asylum seekers after wrongful removals, many of them to El Salvador. Exh. I, Sibylla Brodzinsky and Ed Pilkington, "U.S. government deporting Central American migrants to their deaths," *The Guardian*, October 12, 2015. Ms. [REDACTED] and [REDACTED] have provided sufficient information to the BIA in their Notice of Appeal to demonstrate the strength of their asylum claims. Because Ms. [REDACTED] and her son are likely to face persecution and torture if removed to El Salvador, it would be a manifest injustice to remove them before the BIA reaches a decision on their pending appeal.

Finally, granting Ms. [REDACTED] and [REDACTED]'s Motion to Stay Removal supports the public interests at the foundation of this nation's immigration laws. Far from advancing any of the purposes of the immigration statute, removing Ms. [REDACTED] and [REDACTED] to El Salvador would directly undermine what numerous circuits have recognized as "the prevailing purpose of the INA:" "the preservation of the family unit." *Nwozuzu v. Holder*, 726 F.3d 323,

332 (2d Cir. 2013) (quoting H.R. Rep. No. 82-1365). If Ms. [REDACTED] and [REDACTED] are removed to El Salvador, they will be separated from their two-year-old U.S. citizen child and sibling. Exh. G. Such family separation runs contrary to the public interest.

CONCLUSION

Ms. [REDACTED] and [REDACTED] warrant a stay of removal so they are not wrongfully removed to imminent danger in El Salvador. An automatic stay is warranted in this case because their appeal is pending before the BIA. Further, Ms. [REDACTED] and [REDACTED] merit a discretionary grant of a stay of removal by the BIA due to their strong likelihood of success on the merits, the irreparable harm their family would face if returned to El Salvador, the lack of potential injury to the government, and the strong public interest in deterring substandard attorneys and in proper resolution of asylum claims. For all of these reasons, Ms. [REDACTED] and her son respectfully request a stay of removal until a final decision is reached in their pending appeal.





DATE: September 20, 2017

Respectfully submitted,



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