Practice Advisory

Stays of Removal for DACA Recipients with Removal Orders

March 9, 2018

Table of Contents

I. Introduction ................................................................................................................................. 3
II. Overview of Stays of Removal .................................................................................................. 3
III. Overview of Court-Ordered Stays of Removal ........................................................................ 4
   1. Automatic Stays ............................................................................................................... 4
   2. Discretionary Stays .......................................................................................................... 5
IV. Automatic Stays ........................................................................................................................ 6
V. Discretionary Stays with the IJ and BIA ................................................................................... 7
   1. Standard of Review .......................................................................................................... 7
   2. Overview of Filing ........................................................................................................... 7
   3. Contents of the Motion ..................................................................................................... 8
   4. Special Procedures for Filing an Emergency Motion with the BIA ......................... 9
   5. Checklist for Filing a Motion for a Discretionary Stay with the IJ or BIA .............. 10
VI. Stays of Removal with the U.S. Courts of Appeal ................................................................. 10
   1. Overview of Filing .......................................................................................................... 10

1 Copyright 2018, The Catholic Legal Immigration Network, Inc. (CLINIC). This practice advisory is intended to assist lawyers and fully accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner’s jurisdiction. The author of this practice advisory is Rachel Naggar, Training and Legal Support Staff Attorney. Michelle Mendez, Bradley Jenkins, and Rebecca Scholtz of CLINIC provided substantial contributions to this practice advisory. Additionally, CLINIC would like to thank Mark Barr of Lichter Immigration for his thoughtful review of and excellent suggestions for this practice advisory. The author would also like to thank Katherine M. Lewis, senior associate attorney at Van Der Hout, Brigagliano & Nightingale, LLP, for her contributions to this practice advisory. The sample motions were authored by volunteer attorneys working in conjunction with Bradley Jenkins, manager of CLINIC’s BIA Pro Bono Project, which provides appellate representation to vulnerable immigrants in removal proceedings.
2. Standard of Review ........................................................................................................ 11
3. Circuit Court Decisions .............................................................................................. 13
4. Contents of the Motion ............................................................................................... 13
5. Checklist for Filing a Motion for a Stay with a U.S. Court of Appeals ........................... 14

VII. Discretionary Stays with the Department of Homeland Security ............................. 14
  1. Overview of DHS Stays ................................................................................................. 14
  2. How to Apply for a DHS Stay ....................................................................................... 15
  3. Checklist for Filing for a DHS Stay ............................................................................. 17

VIII. Index of Appendices ................................................................................................. 17
I. Introduction

On September 5, 2017, President Trump announced that he was rescinding the Deferred Action for Childhood Arrivals (DACA) program, leaving approximately 800,000 undocumented youth at risk for apprehension and removal from the United States. The DACA program was expressly available to youth with prior removal orders, so long as they met the DACA requirements. With the rescission of DACA, those individuals with prior removal orders are now extraordinarily vulnerable to apprehension and deportation, despite growing up in the United States since childhood. The purpose of this practice advisory is to assist practitioners filing stays of removal for those DACA recipients who have prior removal orders. This advisory explains how to seek a stay with the immigration court, the Board of Immigration Appeals (BIA) and the U.S. courts of appeal. It also covers how to seek a stay of removal from the Department of Homeland Security (DHS).

II. Overview of Stays of Removal

A stay of removal prevents DHS from executing an order of removal, deportation, or exclusion against an individual. DHS, immigration judges (IJ), the BIA, and the U.S. courts of appeal all have the authority to grant stays of removal. If a stay of removal is in effect, an individual should not be removed from the United States.

Whether a prior DACA recipient can obtain a stay of their removal will largely depend on what other relief the individual has available, and his or her options for filing a motion to reopen. Practitioners should screen DACA recipients for eligibility for other forms of relief as soon as possible, particularly new relief options that may have arisen since the removal order was entered.

There are two categories of stays of removal: court-ordered and administrative. This practice advisory uses the term “court-ordered stay of removal” to describe a stay granted by the immigration court, the BIA, or a U.S. court of appeals. Although the immigration court and the BIA are part of the Department of Justice, not a part of the judiciary, stay requests considered by these adjudicators are governed by similar standards and procedures. This practice advisory uses the term “court” to refer to these three adjudicative bodies.

---


3 See U.S. Citizenship & Immigration Services (USCIS) Frequently Asked Questions, https://www.uscis.gov/archive/frequently-asked-questions#education (“This process is open to any individual who can demonstrate he or she meets the guidelines for consideration, including those who have never been in removal proceedings as well as those in removal proceedings, with a final order, or with a voluntary departure order (as long as they are not in immigration detention).”)

4 For a detailed discussion of the various motion to reopen options for DACA recipients, see CLINIC, Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders (March 2018), which is available on the CLINIC website, https://cliniclegal.org/defending-vulnerable-populations.
An individual with a prior removal order can only seek a court-ordered stay when he or she has a pending case seeking review of the removal order before that adjudicative body. At the immigration court level, this means that an individual can only seek a stay when a motion to reopen or reconsider is pending. At the BIA level, a stay can only be sought while the BIA is reviewing a direct appeal of a removal order, a motion to reopen or reconsider, or an appeal of an IJ’s denial of a motion to reopen or reconsider. At the federal appellate level, a motion for a stay can only be filed when a petition for review or a petition for rehearing is pending. As detailed below, a removal order is automatically stayed in some situations, while in others it is only granted at the discretion of the court.

DHS has the authority to stay the removal of an individual at any time. This is called an administrative stay of removal. There are no circumstances wherein DHS is required to grant an administrative stay; it is always at the agency’s discretion. However, if a stay has been granted by the immigration court, the BIA, or a U.S. court of appeals, DHS must take all reasonable steps to comply with that order. The majority of this practice advisory will focus on court-ordered stays of removal. Information on how to seek an administrative stay with DHS is provided at the end of this advisory, in Chapter VII.

III. Overview of Court-Ordered Stays of Removal

Immigration regulations provide for a removal order to be automatically stayed in a few limited situations. Unless one of those situations applies, the decision to grant a stay is at the discretion of the adjudicating body, whether it be the immigration court, BIA, or a U.S. court of appeals.

1. Automatic Stays

Automatic stays only apply to certain situations where a case or motion is before the immigration court or the BIA. There are no automatic stays at the federal appeals court level. An individual’s removal order will be stayed automatically in the following situations:

- If a direct appeal of an immigration court decision ordering removal is reserved, removal is automatically stayed during the 30-day period for filing the notice of appeal
- If an appeal of an immigration court decision ordering removal is timely filed, removal is stayed pending adjudication of the appeal by the BIA
- If a motion to reopen and rescind an in absentia order is filed in accordance with 8 CFR § 1003.23(b)(4)(ii) or (iii), removal is stayed pending adjudication of the appeal by the BIA
- If a timely direct appeal of an immigration court decision denying a motion to reopen and rescind an in absentia order that was issued prior to the enactment of the Illegal

---

5 See 8 CFR §§ 1003.2(f), 1003.23(b)(v), 1003.6(a); 8 USC § 1252(b)(3)(B).
6 8 CFR § 1241.6(a).
7 8 CFR § 1241.6(c).
8 8 CFR § 1003.6(a).
9 Id.
10 8 CFR § 1003.23(v); 8 CFR § 1003.2(f).
Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)\(^{11}\) is filed, removal is stayed pending adjudication of the appeal\(^{12}\)

- If a case is certified to the BIA, removal is stayed pending a BIA decision,\(^{13}\) and
- If a motion to reopen (or an appeal of a denial of a motion to reopen) is filed by a qualified alien pursuant to the Violence Against Women Act, removal is stayed pending a decision on the motion or appeal.\(^{14}\)

It is likely that some DACA recipients will be eligible to have their removal automatically stayed through the filing of a motion to reopen an \textit{in absentia} order. By definition, DACA recipients were minors when they entered the United States. Some of these young people’s removal cases were tied to a parent who failed to appear, resulting in an \textit{in absentia} order for the minor. Others may not have even been aware that removal proceedings were initiated against them. Still others may have had their hearing notices mailed to a parent or guardian who failed to communicate the hearing date to the DACA recipient or to take the DACA recipient to the immigration hearing. If the DACA recipient can demonstrate that he or she did not receive proper notice of the hearing, a motion to reopen can be filed at any time and the removal order will be stayed automatically.\(^{15}\)

2. \textit{Discretionary Stays}

Where a stay is not automatic, an individual may be able to receive a stay as a matter of discretion. An individual can ask the IJ to stay removal during review of a motion to reopen or reconsider that does not qualify for an automatic stay.\(^{16}\) An individual can ask the BIA to stay removal during review of a motion to reopen or reconsider, or during review of an appeal of the IJ’s denial of a motion to reopen or reconsider.\(^{17}\) An individual can also seek a discretionary stay of removal from a U.S. court of appeals where a petition for review of a BIA order is pending.\(^{18}\)

To obtain a discretionary stay, an individual must file a separate, written motion to stay removal with the court where the motion, appeal, or petition for review is pending. In general, the filing of the motion seeking a stay does not immediately stay the removal order.\(^{19}\) DHS can still remove the individual while the motion is pending and the adjudicative body has not yet rendered a decision. If granted, a discretionary stay remains in effect until the court denies the

---

\(^{11}\) Congress passed IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, on September 30, 1996. This law, among other things, repealed the portion of the Immigration and Nationality Act (INA) providing for an automatic stay when the denial of a motion to reopen an \textit{in absentia} order is appealed to the BIA.

\(^{12}\) 8 CFR § 1003.6(a); BIA Practice Manual Ch. 6.2(a).

\(^{13}\) 8 CFR § 1003.6(a).

\(^{14}\) INA § 240(c)(7)(C)(iv).


\(^{16}\) 8 CFR § 1003.23(b)(v).

\(^{17}\) 8 CFR § 1003.2(f).

\(^{18}\) INA § 242(b)(3)(B); F. R. App. P. 8(a)(2).

\(^{19}\) There is an exception for motions for stays filed with the U.S. Courts of Appeal for the Second, Third, and Ninth Circuits. See \textit{infra}, note 38, for more details.
underlying motion to reopen or reconsider, or denies the petition for review.\(^{20}\) If the individual seeks review of the denial of a motion to reopen or reconsider, or asks a court of appeals to reconsider a denial of a petition for review, the stay will not continue automatically. A new written request for a discretionary stay will need to be filed with the court in which the individual is seeking review.

When a DACA recipient is not eligible for an automatic stay, practitioners should consider filing a motion for a discretionary stay. The stay does not need to be filed concurrently with the motion to reopen or reconsider, or with the petition for review. If the DACA recipient is not in custody or otherwise facing imminent removal, many courts will not rule on the motion for a stay; practitioners may need or choose to wait to file the motion until the individual is in custody or has a date scheduled for removal. Since DACA recipients with prior removal orders are at risk of removal at any time after their deferred action expires, practitioners should prepare the motion for a stay and gather supporting evidence, so that the motion can be filed immediately if removal becomes imminent.

### IV. Automatic Stays

Where an individual is eligible for an automatic stay of removal from the immigration court or BIA, it is not necessary to file a separate motion for a stay of removal. In cases where a timely direct appeal is filed, the filing of the notice of appeal is generally sufficient to stay removal. However, in cases where a motion to reopen is filed, practitioners are encouraged to note on the cover page of the motion to reopen that the automatic stay provision applies. Practitioners should also note the relevant regulation under which the client believes the automatic stay applies. Additionally, if the client may be facing imminent removal, practitioners should serve a copy of the motion on the local ICE Field Office, in addition to serving the DHS Office of Chief Counsel.\(^{21}\) Where a stay is automatic, the IJ or BIA generally will not issue a written order indicating that a stay has been granted. So it is important for practitioners to follow up with the local ICE Field Office to ensure they are aware that a stay is in effect and the client cannot be removed. Practitioners may need to submit evidence, such as a FedEx tracking receipt, to the ICE Field Office showing that the motion was received by the immigration court or the BIA.

The automatic stay is valid until there is a decision on the appeal or motion to reopen.\(^{22}\) Prior to receiving the decision, practitioners should, in conversation with their client, prepare for what steps they will need to take if a negative decision is issued, to minimize the gap between the

\(^{20}\) In the Ninth Circuit, the stay remains in effect until the mandate issues. The filing of a petition for panel or en banc rehearing stays issuance of the mandate until the court decides the petition. FRAP 41(d)(1); See, e.g., Mariscal-Sandoval v. Ashcroft, 370 F.3d 851, 856 (9th Cir. 2004). A petitioner may also move to stay the mandate in some circumstances, which in effect extends a stay of removal if a stay was previously granted by the court of appeals. For example, the U.S. Court of Appeals for the Ninth Circuit has stayed the issuance of the mandate where a petitioner has filed, or plans to file, a meritorious MTR before the BIA. See Myers v. Holder, 661 F.3d 1178 (9th Cir. 2011) (granting petitioner’s motion to stay the mandate pending adjudication of his motion to reopen before the BIA). See also Aguilar-Escobar v. INS, 136 F.3d 140 (9th Cir. 1998); Dhangu v. INS, 812 F.3d 455 (9th Cir. 1987); Alvarez-Ruiz v. INS, 740 F.2d 1314 (9th Cir. 1984); Khourassany v. I.N.S., 208 F.3d 1096, 1101 (9th Cir. 2000).

\(^{21}\) A list of ICE Field Offices is available at [https://www.ice.gov/contact/field-offices](https://www.ice.gov/contact/field-offices). A list of DHS Offices of Chief Counsel is available at [https://www.ice.gov/contact/legal#wcm-survey-target-id](https://www.ice.gov/contact/legal#wcm-survey-target-id).

\(^{22}\) See 8 CFR § 1003.23(b)(4)(iii)(C); BIA Practice Manual Ch. 6.2(d).
receipt of the decision and the filing of any subsequent stay application. To minimize the delay in receipt of the decision, practitioners can frequently call the Executive Office for Immigration Review (EOIR) information hotline at 1-800-898-7180 to find out if a decision has been issued.

V. Discretionary Stays with the IJ and BIA

1. Standard of Review

The BIA has not enunciated a standard of review or a list of factors to be considered when adjudicating a discretionary motion for a stay. Practitioners can look to the standard in *Nken v. Holder*, 556 U.S. 418 (2009), discussed in detail in Chapter VI.2. below, for guidance. In general, practitioners should address the following in their motion:

- The changed circumstances or new relief that was the basis for the motion to reopen
- The harm that the individual or his or her family members will suffer if the individual is removed, and
- How the individual is not a danger to society.

2. Overview of Filing

When preparing a motion for a stay to the immigration court or the BIA, practitioners should follow the rules and formatting guidelines outlined in the Immigration Court Practice Manual or the BIA Practice Manual. Motions should conform to the general rules for filing motions, as well as the specific rules for filing a stay. When filing with the immigration court, practitioners should reach out to the local clerk’s office, as well as to local practitioners, to determine if the IJ or court has any special procedures.

A discretionary motion for a stay can be filed at any time when a motion to reopen or reconsider is pending. It should be filed with the same court where the motion to reopen or reconsider has been filed, which is the court with administrative control over the record. This will typically be the court where the removal order was entered, or, if the case was appealed to the BIA, the BIA will have control over the record. If an individual is not sure who has administrative control over the record, he or she can call the EOIR automated information phone line at 1-800-898-7180, and follow the prompts to determine which court ordered removal and if the case was appealed to the BIA.

There is no fee for filing a motion for a stay with the immigration court or BIA. As previously noted, the filing of the motion does not automatically stay removal. Additionally, the BIA will generally not rule on the motion unless removal appears imminent, which is usually evidenced by the individual being in custody or having a scheduled appointment with DHS. When a discretionary stay is granted, the court will issue a written order, which may be visible to

---

23 The Immigration Court Practice Manual can be found on the EOIR website at https://www.justice.gov/eoir/office-chief-immigration-judge-0.
25 BIA Practice Manual Ch. 3.4(b).
26 *Id.* at Ch. 6.4(d)(i).
deportation officers in their records system, but should also be communicated directly to the local ICE Field Office, particularly in an emergency situation. The stay is valid until the court makes a decision on the motion to reopen or reconsider.

3. Contents of the Motion

A motion for a stay should include all of the facts relevant for deciding the motion, as well as evidence, in the form of attached exhibits, to support those facts. Practitioners should explain in detail the changed circumstances or new relief available that is the basis for the motion to reopen. Practitioners can cite directly to the motion to reopen and the exhibits that have been filed with it.

The motion for a stay should address, with specificity, the harm that the individual or his or her family members would suffer if the individual is removed. Many DACA recipients have spent the majority of their lives in the United States. If removed, many would be separated from their immediate family, including parents, spouses, and children. They may not have family ties or any support in their home country to help them survive.

According to a 2017 national survey of DACA recipients, 91 percent of survey respondents reported being employed, 45 percent reported being in school, 5 percent reported having started their own business after receiving DACA, 16 percent reported purchasing their first home after receiving DACA, and 65 percent reported purchasing their first car since obtaining DACA. Removal would interrupt school, careers, and other pursuits. Additionally, many DACA recipients will face dangerous conditions in their countries of birth. Where a DACA recipient is seeking asylum, the basis for the asylum application should be explained in the motion for a stay. Even where a DACA recipient is not seeking asylum, the combination of dangerous country conditions, his or her lack of familiarity with their home country, and lack of support in that country, can be used to demonstrate the potential for harm.

Declarations from the DACA recipient and his or her family members should be included as exhibits. Practitioners should work with the DACA recipient and family members to make sure the affidavits are accurate and include as much detail as possible. Depending on the circumstances other evidence to be submitted could include:

- Medical or mental health records supporting any claims of a medical condition
- Letter from a treating physician or mental health professional explaining the condition, and how the applicant or family member will suffer if the applicant is removed
- Country conditions evidence, such as news articles or the State Department Human Rights Report, demonstrating the dangers the applicant will face if removed
- Photographs of the applicant. A few photos to give a face to the client can be helpful. It is also helpful to show photos of the client with family members, particularly when arguing that those family members will be harmed by the client’s removal

---

27 Id. at Ch. 6.4(b)(i).
• Employment records and a letter from a current employer,\textsuperscript{29} and
• School records, such as graduation certificates, report cards, or evidence that the applicant is enrolled in school.

If the motion is being filed as an emergency, the motion should explain why removal is imminent.\textsuperscript{30}

The motion should, as one of the exhibits, include a copy of the removal order and the IJ or BIA decision ordering removal.\textsuperscript{31} If the decision ordering removal was issued orally and there is a transcript available, that should also be included. If there is not time to obtain a copy of the decision or a transcript, the decision should be described with as much specificity as possible in the motion. In addition to documenting the client’s recollection of the decision, this may involve having the representative of record in the removal case write a declaration of their recollection.

The motion should contain a cover page labeled “MOTION TO STAY REMOVAL.” The motion should clearly state on the front whether or not the respondent is detained. If the request is an emergency, the cover page should say “EMERGENCY MOTION TO STAY REMOVAL.” If the motion is being filed as an emergency, practitioners should follow up with the court to justify and arrange for emergency consideration. If the client is detained, advocates should diligently check with the deportation officer to determine whether there is a planned removal date. Any information about DHS’s plans to remove the client should be communicated to the court in an effort to persuade the adjudicator to give the motion emergency consideration. If the client is not detained, but has an order of supervision, practitioners should inform the court of the client’s next ICE check in.

4. Special Procedures for Filing an Emergency Stay Motion with the BIA

The BIA has outlined special procedures for the handling of emergency motions to stay removal.\textsuperscript{32} An emergency motion may only be submitted when an individual is in physical custody and is facing imminent removal. The motion should explain why removal is imminent. The BIA will accept and expeditiously rule on emergency stay motions on weekdays, except federal holidays, from 9:00 a.m. to 5:30 p.m. Eastern Time.

In addition to using a mailing service such as UPS or FedEx for expedited shipping, there are companies that provide same-day filing services at the BIA. The BIA has a specific phone number for handling emergency stay motions: 703-306-0093. Practitioners should confirm that their motion has been delivered and then contact the BIA emergency stay number. A clerk may be able to help get the motion to a BIA member for a quick decision. If the name and contact information for the individual’s deportation officer is known, the clerk can inform the deportation officer that the motion was received. If the motion is delivered after 4:30 p.m., the BIA may not review it until the next day. In this situation, practitioners should weigh the risks

\textsuperscript{29} Practitioners should be aware of and counsel the client on the potential consequences of submitting evidence of unauthorized employment.

\textsuperscript{30} BIA Practice Manual Ch. 6.4(d)(i).

\textsuperscript{31} Id. Ch. 6.4(c)(i).

\textsuperscript{32} Id. Ch. 6.4(d)(i).
and benefits of having the BIA reach out to the deportation officer prior to the issuance of a decision.

If a motion for a stay has been filed as a non-emergency motion, but circumstances change and removal becomes imminent while the stay motion is pending, practitioners should reach out to the BIA to determine the procedure for supplementing the current motion with an emergency motion. Practitioners may also file a motion to expedite the non-emergency stay motion, and demonstrate that the client is now in physical custody and removal is imminent.

In general, if removal appears imminent and an immediate decision is needed to stay removal, practitioners should prepare a motion and contact the clerk’s office of the BIA as soon as possible.

5. **Checklist for Filing a Motion for a Discretionary Stay with the Immigration Court or BIA**

A discretionary stay filing with the immigration court or BIA should include the following components:

- Notice of Appearance (Form EOIR-28 for the immigration court or Form EOIR-27 for the BIA)
- Cover page labeled “[EMERGENCY] MOTION TO STAY REMOVAL” and indicating if the client is detained
- Motion to Stay Removal
- Index of Exhibits, followed by all exhibits, separately tabbed
- Certificate of Service, and
- Proposed Order, if filing with the immigration court.

### VI. Stays of Removal with a U.S. Court of Appeals

1. **Overview of Filing**

An individual can seek a stay of removal with a U.S. court of appeals if he or she is filing a petition for review of a BIA removal order, the BIA’s denial of a motion to reopen a removal order, or the reinstatement of a removal order. There is a 30-day period for filing the petition for review after the BIA’s order. However, unlike during the 30-day period for filing an appeal with the BIA, an individual’s removal is not automatically stayed during the 30-day period for filing a petition for review. If a DACA recipient no longer has deferred action, he or she could be removed during this time. Practitioners should consider filing the petition for review and motion for a stay simultaneously and as soon as possible if removal appears imminent. Additionally, except in the Second, Third, and Ninth Circuits, the mere filing of the petition and

---

33 *Id.* Ch. 6.4(d)(ii).
34 *Id.* Ch. 6.5.
35 INA § 242(b)(3)(B).
36 INA § 242(b)(1).
37 INA § 242(b)(3)(B).
motion for a stay does not stay the removal order. An individual can be removed until the court of appeals grants a stay.

The motion for a stay should be filed with the same court where the petition for review is filed. This will be the court of appeals in the circuit having jurisdiction over the removal order. The motion for a stay can be filed with the petition for review or at any time while the petition for review is pending. If a motion for a stay is not filed with the petition for review, practitioners should prepare the motion so that it can be filed if the individual is detained or scheduled to report to an ICE Field Office. If removal appears imminent, practitioners should contact the relevant court clerk’s office to ascertain any specific emergency filing procedures.

2. Standard of Review

In *Nken v. Holder*, 556 U.S. 418 (2009), the U.S. Supreme Court resolved a circuit court split on the issue of what standard should be used when federal courts decide a motion for a stay of removal. The Supreme Court held that the “traditional” standard used to determine whether to stay a court order should apply. This means that in order to prevail on a motion to stay a removal order in federal court, an individual will need to demonstrate the following:

- The individual is likely to succeed on the merits of the underlying petition for review
- The individual will be irreparably injured if the stay is not granted
- The issuance of the stay will not substantially injure DHS, and
- The issuance of the stay will not harm the public interest.

The Court in *Nken* held that a stay is not a matter of right. A mere showing that DHS or the public interest will not be harmed is insufficient. The first two factors – likelihood of success on the merits and a showing of irreparable harm – are the most important factors.

For the first factor, the individual cannot merely show that there is some possibility of prevailing in the petition for review. However, Ninth Circuit has stated that “petitioners need not demonstrate that it is more likely than not that they will win on the merits.” The motion should raise serious legal questions, or have a reasonable probability or fair prospect of success. To show that the petitioner has a reasonable probability of success, practitioners must describe the arguments that will be laid out in the brief in support of the petition for review. Although the

---

38 *In re Immigration Petitions*, 702 F.3d 160 (2d Cir. 2012), provides for a stipulation in the Second Circuit that DHS will not remove petitioners pending a stay. The Third Circuit has issued a similar standing order regarding immigration cases, available at [http://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf](http://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf). The Ninth Circuit General Order 6.4(c) provides that, “Upon the filing of an initial motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the Court.” See also *Deleon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997).


40 *Id.* at 434.

41 *Id.* at 434–435.

42 *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

43 *Id.* at 971.
arguments do not need to be as detailed as in the brief, they need to be sufficiently detailed to show that the petitioner has a strong likelihood of success.\textsuperscript{44}

On the second factor, a mere showing that the individual will be removed from the United States is not enough to show irreparable harm.\textsuperscript{45} He or she must explain what individual circumstances will lead to irreparable harm during his or her time spent outside the United States while the petition for review is pending. This could include harm due to separation from family members, economic hardship, or medical needs.\textsuperscript{46} The facts and evidence used to demonstrate irreparable harm at the federal court level will be similar to the facts and evidence discussed in Chapter V.3. above, relating to motions for a stay with the immigration court and BIA.

Additionally, there is no guarantee that DHS will swiftly bring the individual back to the United States if the petition is granted or remanded for further hearings. An individual could suffer irreparable injury by not being able to attend future immigration proceedings, or having a lengthy delay in returning to the United States. For a more detailed discussion of this issue, see the National Immigration Project’s practice advisory on seeking stays of removal in federal court.\textsuperscript{47}

For the third and fourth factors, the Court in \textit{Nken}, noted that the interests of DHS and the public may overlap.\textsuperscript{48} The Court found that the government and the public have an interest in the prompt execution of removal orders, particularly where an individual is dangerous or has substantially prolonged his or her stay in the United States by abusing the appeals process.\textsuperscript{49} DACA recipients can demonstrate that they are not a danger to the community because, in order to receive DACA, they could not have been convicted of a felony, a significant misdemeanor, or more than three misdemeanors of any kind. President Trump has stated that DACA recipients are not enforcement priorities unless they are involved in criminal activity or a gang,\textsuperscript{50} and that he wants Congress to work out a plan that could include a path to citizenship for DACA recipients.\textsuperscript{51} Additionally, DACA recipients entered the United States as children, often at too young an age to have the mental or legal capacity to violate immigration laws. Furthermore, DACA recipients complied with the process available to them to obtain deferred action and employment authorization.

\textsuperscript{44} See \textit{Koutcher v. Gonzales}, 494 F.3d 1133 (7th Cir. 2007) (declining to grant a stay where petitioner filed a “bare bones” motion without sufficient detail.)
\textsuperscript{45} \textit{Nken v. Holder}, 556 U.S. at 435.
\textsuperscript{46} \textit{Andreiu v. Ashcroft}, 253 F.3d 477, 484 (9th Cir. 2001).
\textsuperscript{48} \textit{Nken v. Holder}, 556 U.S. at 436.
\textsuperscript{49} \textit{Id.}
3. Circuit Court Decisions

Cases Denying a Stay:

*Koutcher v. Gonzales*, 494 F.3d 1133 (7th Cir. 2007). Stay denied where petitioner filed a bare bones motion and failed to address the four factors required to grant a stay.

*Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004). Stay denied despite DHS non-opposition because it was not properly filed and did not include a copy of the order of removal.

*Lucacelo v. Reno*, 161 F.3d 1055 (7th Cir. 1998). Stay denied where petitioner failed to explain in detail why she was likely to prevail in her petition for review and failed to establish specific harm to herself. The court rejected the assertion that all asylum applicants, by definition, merit a stay.

*Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001). Stay denied where petitioner was unable to establish that he could not freely return to the United States if his petition for review were granted, he had no substantial family ties in the United States, and he failed to show a likelihood of success on the merits.

Cases Granting a Stay:

*Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011). Stay granted where petitioner was seeking asylum, demonstrated that he had a substantial probability of success by raising serious legal issues in the BIA’s decision, and showed that he would suffer irreparable harm.

*Demjanjuk v. Holder*, 563 F.3d 565 (6th Cir. 2009). Stay granted where petitioner demonstrated irreparable harm due to his medical condition and the fact that he faced arrest and incarceration if removed.

*Sanchez v. Sessions*, 857 F.3d 757 (7th Cir. 2017). Stay granted where the petitioner’s removal would result in irreparable harm to his minor U.S. citizen children. The petitioner was the sole breadwinner in his family, he would be unable to provide the same support through wages earned in Mexico, and his youngest son required therapy for delayed motor development. Additionally, although he had DUI convictions, his removal would not harm DHS or the public interest because his removal was not based on criminal convictions.

4. Contents of the Motion

The motion for a stay should conform with the Federal Rules of Appellate Procedure as well as any local, circuit-specific rules. Specific local rules can be found on each circuit court’s website. Practitioners can also call the relevant clerk’s office to determine if there are specific local rules or procedures for filing a motion for a stay of removal.

The motion should address the four factors listed above. The motion should be as detailed as possible. If the stay is being filed before the brief in support of the petition for review is filed, the
court will have minimal information about the case and might not even have the record of the prior proceedings. In this situation, practitioners may wish to file, as evidence, documents from the prior proceedings. The motion should include the client’s relevant immigration history, the history of the immigration proceedings, an explanation of the BIA’s decision, an explanation of the errors in the decision which are the basis for the petition for review, and all of the facts relevant to showing the harm that the client and his or her family will suffer if removed. If removal appears imminent, the motion should explain why, and give any anticipated date of removal.

Prior to filing the motion, practitioners should reach out to the Department of Justice’s Office of Immigration Litigation (OIL), the office that will be arguing the government’s position, to ascertain if they oppose the stay motion. Their position should be included in the motion. The court is more likely to grant the motion for a stay if OIL does not oppose the motion or is taking no position.

5. **Checklist for Filing a Motion for a Stay with a U.S. Court of Appeals**

- Notice of Appearance
- Motion to Stay Removal
- Proposed Order, if required by the court
- Exhibits, including a copy of the BIA decision
- Certificate of Service
- Complete copies of the motion, including all exhibits. FRAP 27(d)(3) requires that three complete copies of any motion be filed, but local rules may require more or less copies, and often require electronic filing. Check the court’s local rules for the exact number of copies and method of filing.

**VII. Discretionary Stays with the Department of Homeland Security**

1. **Overview of DHS Stays**

Anyone can seek a discretionary stay of removal from DHS at any time by using the process explained below. A stay can be requested while an individual is pursuing a motion or appeal with the immigration court, BIA, or a U.S. court of appeals, or while the individual is pursuing an application with USCIS, such as an application for a U visa. But a stay from DHS can also be requested where the individual is not pursuing any legal relief.

Prior to the election of President Trump, it was very difficult to obtain a stay from DHS without a motion or appeal pending before a court, or without an application pending with USCIS. The odds largely depended on the local field office with jurisdiction over the individual. Some individuals received stays with a mere showing of strong ties to the United States and lack of a criminal record. More often, individuals needed to present some exceptional medical or humanitarian concern in order to obtain a stay. With the current administration declaring that

---

52 Contact information for OIL is available at [https://www.justice.gov/civil/contact-us](https://www.justice.gov/civil/contact-us).
even individuals without criminal records are a priority for removal, some DHS offices appear to be further limiting their exercise of discretion. However, it remains possible to receive a stay of removal from DHS, so practitioners should consider this approach when working with DACA recipients with prior removal orders.

If a motion, appeal, or petition for review is pending, practitioners should consider requesting a stay from DHS prior to filing a motion for a stay with the court. DHS may be inclined to stay removal while the individual is pursuing his or her legal case. However, once a court has denied a motion for a stay, DHS is unlikely to use its discretion to stay removal.

Given the low chance of obtaining a favorable exercise of discretion from DHS where no motion with the court or application with USCIS is pending, practitioners must consider the risks of seeking a stay when advising these clients. Many DACA recipients with prior removal orders may have fallen off DHS’s radar and their whereabouts are unknown to DHS. In applying for DACA, these individuals took the risk of presenting themselves to USCIS. When DACA was authorized, USCIS stated that information provided by DACA seekers on their applications would not be disclosed to ICE for purposes of immigration enforcement, unless the individual met the criteria to be issued a Notice to Appear. That policy remains in effect, but is subject to change at any time. If an individual is arrested or has a date to appear at an ICE office, there is nothing to lose in filing a request for a stay. Practitioners should know that submitting an application for a stay with DHS will highlight the existence of the individual.

DHS determines the length of a stay, but generally grants stays of six months or one year. At the end of the stay period, the individual is usually scheduled to report to the local ICE Field Office. At this time, the individual should submit a new stay request (including a new Form I-246, fee, and all supporting evidence). The deportation officer will make a determination to re-authorize the stay, deny the stay, or have the client report back at a later date while the application is reviewed.

2. How to Apply for a DHS Stay

To seek a stay with DHS, an individual must submit Form I-246 along with the filing fee, specific passport-related documents, and evidence supporting the request. Individuals should follow all of the instructions on Form I-246, particularly those relating to the fee and passport-related documents. Everything should be submitted together, in person, in a packet to the local ICE Field Office. Practitioners should check with experienced local practitioners to determine if there is a specific individual or office within the region that receives these requests, or if there are any other unique local procedures.

All DHS stays are discretionary. No legal brief needs to be submitted. However, practitioners should submit a cover letter or memorandum describing the reasons why the individual deserves

---


to be granted a stay. The cover letter is the opportunity to tell the client’s story and address any concerns that DHS may have (such as a client’s criminal history). Practitioners should summarize the supporting evidence that is being submitted and highlight the portions of the evidence that are most compelling for the client.

If the individual does not have a pending motion with the immigration court, BIA, or federal appeals court, or an application for relief with USCIS, practitioners should try to identify some other temporary need for the individual to remain in the United States. This could be to complete school or to address a medical issue for the applicant or a close family member. DHS is more likely to grant a stay where there appears to be an end-point to the need for the individual to remain in the United States, rather than a request to stay indefinitely.

Additionally, many of the factors discussed above in Chapter V.3., related to court-ordered stays should be similarly addressed in the cover letter to DHS. These include:

- How the client is not a danger to the community
- How the client, or the client’s U.S. citizen or lawful permanent resident family members, will suffer if the client is removed
- How the client has the potential to obtain lawful status in the future (if applicable), and
- How it is in the public interest for the client to remain in the United States.

Practitioners should not rely on the cover letter or a declaration from the client alone. Practitioners should work with the client to gather as much supporting evidence as possible to submit with the request. Some suggestions of evidence to submit include:

- Declarations from family members with lawful immigration status, explaining the harm they will suffer if the applicant is removed.
- Medical or mental health records supporting any claims of a medical condition
- Letter from a treating physician or mental health professional explaining the condition, and how the applicant or family member will suffer if the applicant is removed
- Country conditions evidence, such as news articles or the State Department Human Rights Report, demonstrating the dangers the applicant will face if removed
- Letters from elected officials. It is strongly encouraged to reach out to the offices of the client’s representatives and elected officials to ask for a letter of support. Sometimes the elected official will submit the letter directly to the ICE Field Office.
- Letters from other individuals in the community who can speak to the client’s good character, such as employers, clergy, and friends
- Evidence of prior DACA grants, to demonstrate that the client has attempted to seek lawful status and successfully complied with the DACA requirements
- Employment records
- School records, such as graduation certificates, report cards, or evidence that the applicant is enrolled in school

---

56 See supra, note 29.
• Tax returns or other proof that the applicant has complied with tax filing requirements,
and
• Evidence to mitigate any criminal history. This may include proof of completion of community service, a letter from the probation officer, or a certificate of completion of an anger management course.

An individual is required to submit one of the following with the application:

• Original passport valid for six months past the requested period of the stay
• A copy of a passport valid for six months past the requested period of the stay and a copy of the individual’s birth certificate or other identity document, or
• If the individual does not have a passport, evidence that the individual has applied for a passport from his or her country’s consulate.

Practitioners should be aware that submitting an original passport to DHS will assist DHS in removing the client if the stay is denied.

3. **Checklist for Filing a Stay Request with DHS**

• Form G-28, Notice of Entry of Appearance of Attorney\(^\text{58}\)
• Form I-246 Application for Stay of Deportation or Removal
• Fee of $155
• Cover letter or memorandum
• Passport-related documents
• Records of conviction. If the client has been arrested, a certificate from the court or other evidence of the disposition of that arrest must be submitted
• Index of supporting evidence
• Supporting evidence, individually tabbed

### VIII. Index of Appendices

Appendix A: Sample motion for a stay to the BIA
Appendix B: Sample letter informing ICE that a stay motion has been filed
Appendix C: Sample motion for a stay filed in the U.S. Court of Appeals for the Third Circuit
Appendix D: Sample unopposed motion for a stay filed in the U.S. Court of Appeals for the Fourth Circuit
Appendix E: Sample motion for a stay filed in the U.S. Court of Appeals for the Fifth Circuit
Appendix F: Sample motion for a stay filed in the U.S. Court of Appeals for the Ninth Circuit
Appendix G: Sample motion to stay the mandate filed in the U.S. Court of Appeals for the Ninth Circuit
Appendix H: Sample memorandum to DHS for a stay
Appendix I: Sample client declaration
Appendix J: Sample declaration of a family member

\(^{57}\) Id.
The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—almost 350 organizations in 47 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC’s BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Project in response to growing anti-immigrant sentiment and policy measures that will hurt immigrant families. The Project’s primary objective is to increase qualified representation for immigrant respondents in immigration court proceedings. To accomplish this, the DVP Project conducts court skills trainings for nonprofit agency staff and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

The DVP Project offers a variety of written resources including timely practice advisories and guides on removal defense tactics, amicus briefs before the BIA and U.S. courts of appeals, and pro se materials to empower the immigrant community. Examples of these include “Working with Child Clients and Their Family Members in Light of the Trump Administration’s Focus on ‘Smugglers’ Practice Advisory” (May 2017) and “Immigration Court Practitioner’s Guide Responding To Inappropriate Immigration Judge Conduct,” amicus briefs on the “serious nonpolitical crime” bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, and an article in Spanish and English on how to get back one’s immigration bond money.

These resources and others are available on the DVP webpage at cliniclegal.org/defending-vulnerable-populations.
Appendix A
Michelle Mendez
Training and Legal Support Senior Attorney
Catholic Legal Immigration Network, Inc. (CLINIC)
8757 Georgia Avenue, Suite 850
Silver Spring, Maryland 20910
Telephone: [redacted]
Fax: (301) 565-4824
Email: [redacted]

Pro Bono Counsel for Respondents

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

In the Matter of:

Respondents

RESPONDENTS’ EMERGENCY MOTION TO STAY REMOVAL
In the Matter of:     

RESPONDENTS’ MOTION TO STAY REMOVAL

Ms. [redacted] (“Ms. [redacted] and her son [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], 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.
August 28, 2017, Ms. filed an EOIR-26 Notice of Appeal due to ineffective assistance of counsel, which is currently pending before the BIA. Exh. A. Ms. 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 may remain in safety in the United States as the BIA considers the merits of her appeal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Ms. fled to the United States from El Salvador with 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 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, . Id. Shortly after 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. 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. and entered the United States in 2014. Id. On March 23, 2015, Ms. signed a contract with for representation in her immigration case. Exh. B at 3; Exh. C, 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] “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.

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.

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] 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, # 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]. 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. ’s family, including , 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. established that she has a well-founded fear of future persecution by M-18 because she is a member of the 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. and 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 ’ 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. and her minor children will be irreparably injured absent a stay.

If returned to El Salvador, there is a high probability Ms. and her son will be tortured and/or murdered by gang members of M-18. The M-18 member 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. ; Id. M-18 has also continued to threaten the family even after most of them fled to the United States. Exh. B at 3. If she and 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]. 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. 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. to expose and discourage ’ 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. and have provided sufficient information to the BIA in their Notice of Appeal to demonstrate the strength of their asylum claims. Because Ms. 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. and ’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. and 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,
If Ms. and 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. and 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. and 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. 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,

Michelle Mendez
Pro Bono Counsel for Respondents
Catholic Legal Immigration Network, Inc.
8757 Georgia Avenue, Suite 850
Silver Spring, Maryland 20910
Telephone: 
Fax: (301) 565-4824
Email: }

File No. A
File No. A
UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:

Respondents

INDEX OF EXHIBITS IN SUPPORT OF RESPONDENTS' APPEAL

EXHIBIT A
Filing Receipt for Appeal ................................................................. 1

EXHIBIT B
Declaration of ................................................................. 2-6

EXHIBIT C
Contract with translation ................................................................. 7-9

EXHIBIT D
Response to Bar in Another Case ................................................. 10-12

EXHIBIT E
ICE Form I-220A .............................................................................. 14

EXHIBIT F
Georgia Bar Complaint ................................................................. 15-25

EXHIBIT G
In re Dominga Araceli Rivas-Angel, A# 202 122 172 (BIA May 27, 2016) ................. 26-28

EXHIBIT H
U.S. Birth Certificate of ................................................................. 29

EXHIBIT I

Certificate of Service

12
Appendix B
July 3, 2017

Randi Borgen
Immigrations and Customs Enforcement
Peter Rodino Federal Building
970 Broad Street
Newark, NJ 07102

Dear Ms. Borgen:

Included herein please find the petition for review and motion for stay of removal which were filed on behalf of Mr. [REDACTED]. Please note that, according to the Third Circuit’s standing order regarding immigration cases, the filing of this motion for stay of removal [immediately grants a temporary stay] of Mr. [REDACTED]’s removal.

Please do not hesitate to contact me should you have any questions regarding the status of Mr. [REDACTED]’s case.

Sincerely,

[Signature]

Karissa F. Blyth
Appendix C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. __________

Alien Reg. No. __________

Petitioner

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL
Respondent

Petition for Review of an Order
of the Board of Immigration Appeals

PETITIONER’S MOTION FOR STAY OF REMOVAL

PEPPER HAMILTON LLP
Anthony Vale
Jessica K. Bae
3000 Two Logan Square
Philadelphia, Pennsylvania 19103
valea@pepperlaw.com
baej@pepperlaw.com
Telephone: 215-981-4000

Counsel for Petitioner
PETITIONER’S EMERGENCY MOTION TO STAY PENDING APPEAL

Petitioner [REDACTED], a lawful permanent resident ("LPR") of the United States for over fifteen years, moves for a stay to prevent Immigration and Customs Enforcement ("ICE") from removing him to the Dominican Republic during the pendency of his petition for review of a decision of the Board of Immigration Appeals ("BIA"). A single judge of the BIA issued a final order of removal against Petitioner on August 2, 2017. (See BIA Order, attached as Exh. 1). Petitioner is detained at the Pike County Correctional Facility in Lords Valley, Pennsylvania.

ISSUES PRESENTED

Under Section 240(a) of the Immigration and Nationality Act ("the Act"), Immigration and Customs Enforcement ("ICE") may remove an LPR if he has been convicted of certain crimes. Despite a criminal record, an LPR may qualify for cancellation of removal proceedings if he has been a permanent resident of the United States for at least five years, has resided continuously in the United States for at least seven years after having been lawfully admitted in any status, and has not been convicted of an aggravated felony. *Id.*

The issue here is whether Mr. [REDACTED]'s guilty plea to a second-degree misdemeanor Pennsylvania crime relating to obstruction of justice was an aggravated felony under federal law. The crime to which Mr. [REDACTED] pled guilty
constitutes an *aggravated felony* under federal law only if the Pennsylvania statute requires that Mr. [redacted] was “motivated by a specific intent” to obstruct justice. *See Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999).* Mr. [redacted]’s misdemeanor conviction under Pennsylvania law required only “knowledge” that his conduct would obstruct justice; it did not require proof of any specific intent. The element of specific intent required for the crime of obstruction of justice by federal law is absent in Pennsylvania law. Hence, the Pennsylvania statute criminalizes activities that fall outside the scope of obstruction of justice under federal law, and Mr. [redacted] therefore was not convicted of an *aggravated felony*.

The BIA judge acknowledged the correct legal principles, but failed to apply them correctly to the facts of Mr. [redacted]’s guilty plea.

**STATEMENT OF FACTS**

Petitioner is a 35 year old LPR of the United States, and citizen of the Dominican Republic. He was admitted to the United States on an immigrant visa on May 11, 2002, and has resided and worked and paid taxes here continuously for over fifteen years. *See IJ Proceedings (“IJ Pro.”), at Exh. 3, attached as Exh. 2.* Mr. [redacted] is the father of two young U.S. citizen children. Immigration Judge Order (“IJ Order”) at 8, attached as Exh. 3. He has numerous additional family members, including his mother, stepfather, and siblings, who are residing in the
United States as LPRs, and who have been present for, and supportive of, Mr. throughout the removal proceedings. IJ Order at 8; Immigration Proceedings Transcript ("Tr.") at 26:23 – 27:21, attached as Exh. 4.

On July 10, 2014, Mr. was convicted of possession of a controlled substance in the Magisterial District Court, Luzerne County, Pennsylvania, in violation of 35 Pa. Cons. Stat. § 780-113(a)(16). IJ Order at 1. He was sentenced to 17 days in jail. Id. Based on that conviction, Mr. was placed in removal proceedings and charged with removability pursuant to INA § 237(a)(2)(B)(i) for conviction of a drug offense. Id. at 2.

On October 27, 2016, Mr. entered into a plea agreement that included a guilty plea to the second-degree misdemeanor offense of Intimidating a Victim/Witness – Refrain From Report (18 Pa. Const. Stat. 4952(a)(1)). IJ Pro. at Exh. 11. He received a sentence of six to twelve months in Luzerne County Correctional Facility, with immediate parole upon minimum served. Id.

At a removal hearing on November 14, 2016, Mr. appeared pro se and denied the charge that the drug conviction was a removable offense. Tr. at 6:4-14. The Immigration Judge, therefore, scheduled the case for a contested removal hearing. Tr. 7:1-3. DHS did not identify any other removable offenses at the hearing. Tr. at 7:5:12. On December 7, 2016, Mr. submitted his
Application for Cancellation of Removal for Certain Permanent Residents. IJ Pro. at Exh. 3.

On December 19, 2016, Mr. [redacted] appeared for the contested removal hearing. The Immigration Judge found that the drug conviction was a removable offense, but confirmed that Mr. [redacted] was statutorily eligible for cancellation of removal. Tr. at 17:7. DHS initially agreed with that assessment. Tr. at 17:14-16. The Immigration Judge set a discretionary merits hearing for March 1, 2017. Tr. 17:18-18:22. DHS, however, interjected and pointed out that they saw a conviction for “intimidating a witness/victim refrained from reporting” and believed that it may have been an aggravated felony. Tr. 19:10-17.


On February 27, 2017, Mr. [redacted] appeared before the Immigration Judge for the final time (again, pro se), at which time the Immigration Judge issued his oral decision, finding that Mr. [redacted] was not eligible for cancellation or voluntary departure because he had been convicted of an aggravated felony offense. See IJ Order. Mr. [redacted] reserved his right to appeal at that time.
Petitioner obtained counsel for the first time and on June 19, 2017, filed an appeal brief with the BIA, seeking review of whether the Immigration Judge erred in finding that Mr. [Redacted] was ineligible for discretionary relief due to his guilty plea to intimidation of a witness, which the Immigration Judge classified as an aggravated felony. Mr. [Redacted] appealed the Immigration Judge’s decision to the BIA, and a single judge dismissed his appeal on August 2, 2017.

**LEGAL STANDARD**

The test for injunctive relief applies for stays of removal in the immigration context. *See Nken v. Holder*, 556 U.S. 418 (2009). Accordingly, when evaluating a motion for a stay pending appeal, a court must weigh (1) the likelihood of success on the merits; (2) whether the moving party will be irreparably harmed should the motion be denied; (3) potential harm to the government if the stay is granted; and (4) where the public interest lies. *Id. Nken* explains that the first two factors are “most critical” and that the last two factors merge, because the government is the respondent. *Id.* at 434, 435. Though not a “matter of right,” courts may grant motions to stay in the “exercise of judicial discretion” based on “the circumstances of the particular case.” *Id.* at 433.

**ARGUMENT**

This Court should grant Petitioner’s Motion to Stay pending review of the BIA’s decision because (1) Mr. [Redacted] is likely to succeed on the merits of
his appeal; (2) he will be irreparably injured absent a stay; and (3)-(4) a stay will in no way harm the government, but instead will serve the public interest.

A. Petitioner Is Likely to Succeed on the Merits of Appeal of the Board of Immigration Appeals’ Order Dismissing Petitioner’s Appeal

To receive a stay of removal, an applicant must demonstrate a “strong showing that he is likely to succeed on the merits.” Nken, 556 U.S. at 433. This factor, however, merely requires that the movant have “some probability of success on the merits.” Mayorga v. Attorney General U.S., 756 F.3d 126 (3rd Cir. 2014) (emphasis added).


Mr. [redacted] was not convicted of an aggravated felony, but pled guilty to a Pennsylvania misdemeanor. The Pennsylvania offense of intimidation of a witness under 18 Pa. Const. Stat. 4952(a)(1) may be based upon knowing, but not intentional, actions. Therefore, the Pennsylvania statute is broader than the federal generic version of the crime, which requires that an obstruction of justice offense be committed with specific intent. See Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999).

In determining whether an offense is an “aggravated felony” under INA § 240A and 8 U.S. Code §1101(a)(43), the court must compare the federal
definition of the offense, as defined by Congress and interpreted by the Board and federal courts, with the elements of the state criminal statute under which the respondent was convicted.

The Supreme Court has held that “[b]ecause we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, and then determine whether even those acts are encompassed by the generic federal offense.” Moncrieffe v. Holder, 133 S. Ct. 1678 (2013), citing Johnson v. United States, 559 U.S. 133, 137, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).

“This categorical approach has a long pedigree in our Nation's immigration law… The reason is that the INA asks what offense the noncitizen was ‘convicted’ of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed.” Moncrieff at 1685. "[C]onviction" is "the relevant statutory hook." Carachuri-Rosendo v. Holder, 130 S.Ct. 2577, 2588, 177 L.Ed.2d 68 (2010); see United States ex rel. Mylius v. Uhl, 210 F. 860, 862 (C.A.2 1914).

Pa. Cons. Stat. 4952(a)(1) provides that “a person commits an offense with an intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to: (a) Refrain from
informing or reporting to any law enforcement officer.” The Pennsylvania statute permits a conviction based not only on intent, but also on mere knowledge. Thus, Pennsylvania law allows for a conviction based on weaker facts than federal law. The BIA Judge even conceded that “section 4952(a)(1) is indivisible, despite listing two alternative mental states.” BIA Order at 3.

The federal generic version of this offense is 8 U.S. Code §1101(a)(43)(S) “Crime relating to obstruction of justice,” under which the term “aggravated felony” means “an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.”

The BIA has repeatedly held that this generic version of the offense of obstruction of justice requires that the effort to obstruct a proceeding or investigation be “motivated by specific intent.” See Matter of Espinoza, 22 I&N Dec. 889 (BIA 1999); see also Matter of Valenzuela-Gallardo, 25 I&N Dec. 838 (BIA 2012).

Moreover, the BIA has determined that specific intent is a “critical element” to an obstruction of justice offense. Matter of Valenzuela-Gallardo at 842, quoting Matter of Espinoza at 894 (“Rather, the standard we set forth was that an obstruction offense must include ‘the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of
justice.”)\(^1\) These holdings have set a floor, not a ceiling, on the conduct required to classify an action as an aggravated felony obstruction of justice offense.

According to *Moncrieffe*, the BIA must assume that Mr. [redacted]’s conviction under the statute was committed “with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice” because that is the minimal mens rea with which a conviction can be sustained. Because “knowledge” is a lesser, and therefore broader, mens rea than the “specific intent” that the BIA has determined that the federal generic offense requires, Mr. [redacted] cannot have been convicted of an aggravated felony obstruction offense.

2. **The BIA Judge Erred in His Application of the Categorical Approach**

The BIA Judge acknowledged that “[a]n offense qualifies as an aggravated felony under…the Act if it includes the critical element of an affirmative and intentional attempt, *motivated by a specific intent* to interfere with the process of justice.” Order at 2 (emphasis added). The BIA Judge then conceded that section 4952(a)(1) is not divisible and that, therefore, the categorical approach applies. Order at 3. The BIA Judge also conceded that “under the least culpable reading of the statute…he *knowingly* engaged in affirmative conduct (sic) obstruct,

\(^{1}\) The BIA Judge in this case cited this very proposition in his Order (page 2).
impede, impair, prevent or interfere with the administration of criminal justice.” BIA Order at 3 (emphasis added). Because the statute is indivisible and the BIA Judge conceded that Mr. [REDACTED] could have been convicted with the mens rea of “knowledge” as opposed to specific intent, this should have led the BIA Judge to the conclusion that the Pennsylvania statute was broader than the federal generic version, which requires specific intent. The BIA Judge, however, ignored the specific intent requirement that he previously cited and concluded instead that Mr. [REDACTED]’s “conviction is categorically obstruction of justice.” BIA Order at 3. This conclusion is inconsistent with the cases cited by the BIA Judge.

B. Mr. [REDACTED] is eligible for cancellation of removal under Section 240A(a)

Eligibility for cancellation of removal proceedings for an LPR requires that the LPR has resided in the United States for at least five years, has been admitted to the United States in any status for at least seven years, and has not been convicted of an aggravated felony. INA § 240(A)(a).

Mr. [REDACTED] arrived in the United States on an immigrant visa on May 11, 2002. See IJ Pro., at Exhs. 1 and 15. It is undisputed that he is an LPR and has met the temporal residency requirements for relief.

The only disputed issue was whether his conviction for second-degree misdemeanor intimidation of a witness was an aggravated felony for the purposes of INA § 101(a)(43)(S). As discussed above, a conviction under Pennsylvania’s
intimidation of a witness statute does not qualify as an aggravated felony. Because Mr. [redacted] has no convictions that would bar cancellation of removal, and because he has resided in the United States as an LPR for over fifteen years, he is statutorily eligible for cancellation of removal.

C. **Mr. [redacted] will be Irreparably Harmed Absent a Stay**

To receive a stay of removal, an applicant must next demonstrate that he or she will be irreparably harmed absent a stay. *Nken v. Holder*, 556 U.S. at 433. Mr. [redacted] has satisfied this factor as well.

If removed from the United States, Mr. [redacted] will be separated from the home he has known since he was twenty years old, as well as his family and his two U.S. citizen children. Mr. [redacted] will lose all contacts in the construction and transportation industry in which he has worked and paid taxes for 15 years. IJ Pro. at Exh. 3. Deportation will sever the only support system that Mr. [redacted] has, cutting him off from familial ties and impeding his ability to find gainful employment in a country where he has not resided for over a decade.

If the motion to stay is denied, Petitioner will also be deprived of his family’s daily companionship and emotional support throughout the pendency of this Court’s review of the merits of his petition for review, an indeterminate period of time that, in some cases, can last years.
D. The Issuance of a Stay will Not Substantially Injure the Respondent and will Not be Contrary to the Public Interest

Once the court has weighed the applicant’s likelihood of success and the potential for irreparable harm if the stay is not granted, the court must then “assess[] the harm to the opposing party and weigh[] the public interest. These factors merge when the Government is the opposing party.” _Nken_, 556 U.S. at 435. The Supreme Court noted in _Nken_ that the first two factors of the stay inquiry (likelihood of success and irreparable harm) are the “most critical.” _Id._ at 434. While there is “always a public interest in the prompt execution of removal orders,” there is a countervailing “public interest in preventing aliens from being wrongfully removed.” _Id._ at 427. The public interest in efficient execution of removal orders cannot trump the irreparable harm that would suffer should this stay be denied.

The Government’s interest in the efficient deportation of individuals is considerably outweighed given the Immigration and BIA Judges’ failure to accurately apply the law and adhere to precedent in Mr. ___’s case. Providing Petitioner a meaningful opportunity to have his case accurately assessed, to confirm his eligibility for cancellation of removal and to retain his status as an LPR is consistent with the public interest. _Id._ at 436. “[I]f a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.” _AT&T v. Winback &
Conserve Program, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994). Petitioner has done so here, therefore a stay favors the public interest.

CONCLUSION

Petitioner respectfully requests that this Court stay the enforcement of the Order entered below and enjoin Respondent from removing Petitioner from the United States pending the outcome of the appeal in this matter.

Respectfully submitted,

s/ Anthony Vale
Anthony Vale, Esq.
Jessica K. Bae, Esq.
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
Telephone: (215) 981-4000
Facsimile: (215) 981-4750
valea@pepperlaw.com
baej@pepperlaw.com

Attorneys for Petitioner
Dated: August 16, 2017
[PROPOSED] ORDER GRANTING Petitioner’s EMERGENCY MOTION TO STAY REMOVAL FROM THE UNITED STATES PENDING APPEAL

AND NOW, this ____ day of ______________, 2017, after considering Petitioner’s Emergency Motion to Stay Removal from the United States, it is hereby ORDERED that Petitioner’s request is GRANTED, and the Order and Opinion entered by the Honorable Pauley in the Board of Immigration Appeals on August 2, 2017 is hereby suspended pending the outcome of the appeal in this matter.

BY THE COURT:

__________________________
CERTIFICATE OF SERVICE

I, Jessica K. Bae, hereby certify that on August 16, 2017, a true and correct copy of the foregoing Emergency Motion to Stay Petitioner’s Removal from the United States Pending Appeal was served electronically upon the below-listed listed parties via the Court’s CM/ECF system and/or U.S. Mail:

<table>
<thead>
<tr>
<th>U.S. Department of Justice</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Division</td>
<td></td>
</tr>
<tr>
<td>Office of Immigration Litigation - Appellate Section</td>
<td></td>
</tr>
<tr>
<td>P.O. Box 878, Ben Franklin Station</td>
<td></td>
</tr>
<tr>
<td>Washington, DC 20044</td>
<td></td>
</tr>
</tbody>
</table>

/s/ Jessica K. Bae
Jessica K. Bae
CERTIFICATE OF WORD COUNT

I hereby certify that this motion complies with the word count limitation established by Fed. R. App. P. 27(d)(2)(A) because this motion contains 2,835 words, according to the word count feature of Microsoft Word 2010. This count excludes the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Jessica K. Bae
Jessica K. Bae
Appendix D
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. [REDACTED]
Alien Reg. No. [REDACTED]

Petitioner

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL
Respondent

PETITIONER’S UNOPPOSED MOTION FOR STAY OF REMOVAL FROM THE UNITED STATES PENDING A RULING ON HIS PETITION FOR REVIEW OF DECISION OF THE BOARD OF IMMIGRATION APPEALS

Anthony Vale
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
215.981.4000

Michelle N. Mendez
CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
8757 Georgia Avenue, Ste. 850
Silver Spring, MD 20910
Himedes V. Chicas
LAW OFFICES OF JEZIC & MOYSE, LLC
2730 University Boulevard West, Ste. 604
Silver Spring, MD 20902

Counsel for Petitioner
I. INTRODUCTION

Petitioner [Redacted], a lawful permanent resident of the United States for almost twenty years, moves for a stay of removal pending this Court’s adjudication of his petition for review of a decision of the Board of Immigration Appeals (“Board”), which affirmed an order for his removal from the United States. Petitioner is detained at the Buffalo Federal Detention Facility in Batavia, New York, and is at risk of immediate removal to Nigeria.¹

The principal issue on the petition for review is narrow but important: whether a child in the sole legal custody of his U.S. citizen father is precluded from meeting the requirement of 8 U.S.C. § 1431(a) that the child be in the “legal and physical custody” of the citizen parent where the father is in prison but otherwise has the sole right and obligation to raise his son. A finding that petitioner is a U.S. citizen would protect him from removal to Nigeria, a country that is essentially foreign to him.

A single member of the Board issued a final order of removal against petitioner on December 4, 2017, dismissing his appeal.

¹ Counsel for petitioner contacted the ICE deportation officer assigned to [Redacted] on December 12, 2017. The officer stated that there were no immediate plans to remove [Redacted], but gave no other assurances.
Although detained in New York, petitioner filed in this Court, as the government’s Notice to Appear was filed in Baltimore, Maryland, the Immigration Judge who heard Mr. [redacted]’s case sat in Baltimore, Maryland, the case had a Baltimore, Maryland caption, and both the government and Mr. [redacted] opposed a change of venue from Baltimore, Maryland. Moreover, on June 21, 2016, the Immigration Judge decided that, based on the requests of the parties, venue would remain in Baltimore, Maryland. (A-209).

II. ISSUES PRESENTED

On this petition for a stay: whether the Court should stay the removal of petitioner, a lawful permanent resident of the United States, to Nigeria, pending appeal?

On the merits of the petition for review:

(1) whether petitioner was in the “legal and physical custody” of his father in the United States within the meaning of 8 U.S.C. § 1431(a) such that petitioner

2 The Immigration and Naturalization Act states: “A petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” 8 U.S.C. § 1252(b)(2). Accordingly, venue in this Circuit is proper because the Immigration Judge sat in Baltimore. The Seventh Circuit (in an unpublished decision) has held that the internal memorandum cited by the Board (footnote 1) does not over-ride the statute. See Poroj-Mejia v. Holder, 397 F. App’x. 234, 236 (7th Cir. Oct. 18, 2010). This Circuit, in any event, has held that section 1252(b)(2) is non-jurisdictional. Sorcia v. Holder, 643 F. 3d 117, cert denied, 132 S.Ct. 776 (2011).
derived United States citizenship from his father and is therefore protected from removal.

(2) whether the Board should have deferred consideration of removability based on 18 U.S.C. § 16(b) (defining a crime of violence) pending the Supreme Court’s decision in Sessions v. Dimaya, No. 15-1498 (argued Oct. 2, 2017), in which the Court will address whether that subsection is void for vagueness.

(3) whether the Board erred in its finding that the Immigration Judge correctly determined that petitioner was not entitled to relief from removal under the Convention Against Torture.

III. COMPLIANCE WITH RULE 18 AND LOCAL RULE 27(A)

Petitioner is seeking a stay from this Court without having filed a motion for a stay with the Board. Because petitioner has no open matters before the Board, the Board’s practice is to not consider requests for a stay in these situations. Therefore, seeking a stay before the Board “would be impracticable.” Fed. R. App. P. 18(a)(2)(A).

Pursuant to Local Rule 27(a), counsel has contacted the Office of Immigration Litigation, U.S. Department of Justice, and informed that office that petitioner intended to file this stay motion. On December 15, 2017, counsel for petitioner discussed this motion with the Department of Justice, and the
Department of Justice has indicated that they do not intend to oppose this request for a stay.

IV. STATEMENT OF JURISDICTION

The Board had jurisdiction over the underlying proceedings pursuant to 8 C.F.R. § 1003.1(b). This Court has jurisdiction to review the decision of the Board pursuant to 8 U.S.C. § 1252. The Board issued its order on December 4, 2017. Mr.’s appeal was perfected on December 14, 2017. The order issued by the Board was a final order subjecting Mr. to removal and is therefore properly before this Court.

V. STATEMENT OF FACTS

Petitioner ("Mr.") is a 26-year-old lawful permanent resident of the United States, who entered the United States in January 1998. (A-14-16). He was born in Nigeria. (A-14). His father was a U.S. citizen and his mother Nigerian. (A-193). His mother could not look after him, and he lived initially with his grandmother in Nigeria. (A-191-92). When he was six years old, his father, who lived in the United States, arranged for his son, accompanied by the grandmother, to come to the United States. (A-16). Except for two brief periods in Nigeria, the only home he has ever known has been in the United States, and he has no family or relatives who would be willing to offer care or support in the event that he was deported to Nigeria. (A-21, A-125-26, A-134).
On arrival in the United States in 1998, Mr. lived with his father and
his grandmother. His father was sent to prison, and Mr. remained under
the care of his grandmother, but she was only the day-to-day caregiver. (A-39).
His father had sole legal custody and provided financial support and guidance. (A-39).
He had the final decision-making authority on large and small decisions in his
son’s life. Id. Mr. visited his father in prison as often as he could. (A-19-20).
Mr. was in regular communication with his father throughout his
childhood. (A-38).

In 2008, when he was seventeen, Mr. got into trouble and was
convicted of various offenses in Baltimore and sent to prison. (A-162.)

In 2010, Mr. applied for United States citizenship on the ground that
he derived citizenship from his father. (A-197-200). The USCIS denied his
application. Id. In 2015, he was placed in removal proceedings as a result of his
criminal convictions, pursuant to INA § 237(a)(2)(iii). (A-162).

The Immigration Judge found that Mr. had not derived U.S.
citizenship from his father, and held that he should be removed to Nigeria. (A-178-79).
The IJ stated that Mr. could not meet the statutory requirement
that he have lived “in legal and physical custody of the citizen parent”, namely his
father. See 8 U.S.C. § 1432(a). Notwithstanding that the father had sole legal
custody, and that Mr.’s mother had abandoned him in Nigeria, the IJ
determined that Mr. [REDACTED] was not in “the legal and physical custody” of his father because his father was in prison. (A-174-75). The IJ made no adverse credibility determination. The IJ found that Mr. [REDACTED] had been convicted of a “crime of violence” within the meaning of 18 U.S.C. § 16(b), and ordered him to be removed.

Mr. [REDACTED] appealed to the BIA. On December 4, 2017, the Board dismissed Mr. [REDACTED]’s appeal. The Board did not set aside any factual findings on the role of Mr. [REDACTED]’s father in his upbringing, but the Board held that, because his father was incarcerated, Mr. [REDACTED] could not meet the statutory requirement that he have been in the “physical custody” of his father.

The Board declined to rule on the constitutionality of the ‘residual clause” found in 18 U.S.C. § 16(b), which was the basis for the order of removal, or to defer a determination pending a decision from the United States Supreme Court on the constitutionality of the residual clause.3

VI. LEGAL STANDARD FOR A STAY

The test for injunctive relief applies to stays of removal in the immigration context. *Nken v. Holder*, 556 U.S. 418 (2009). Accordingly, courts deciding whether a stay of removal is appropriate should generally weigh (1) the likelihood

---

of success on the merits; (2) the irreparable harm to the petitioner if a stay is not granted; (3) the potential harm to the government if a stay is granted; and (4) the public interest. *Nken* explains that the first two factors are “most critical” and that the last two factors merge, because the government is the respondent. *Id.* at 434, 435. While not a “matter of right,” courts may grant stays in the “exercise of judicial discretion” based on “the circumstances of the particular case.” *Id.* at 433 (internal quotations and citation omitted)).

**VII. ARGUMENT**

**A. Mr.  is Likely to Succeed on the Merits**

To receive a stay of removal, an applicant must demonstrate a “strong showing that he is likely to succeed on the merits.” *Nken*, 556 U.S. at 433. As other circuits have held, this does *not* require applicants to demonstrate that success on the merits is “more likely than not.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (citing *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010)).

Mr.  satisfies this standard.

1. **Mr.  Can Demonstrate Likelihood of Success on the Merits on his Claim for Derivative Citizenship.**

   In order to derive citizenship from his father, Mr.  must satisfy 8 U.S.C. § 1431(a), which requires that Mr.  have resided in the legal and physical custody of his citizen parent, in this case his father. In affirming the IJ’s
ruling that Mr. ’s father’s incarceration precluded Mr. from satisfying the physical custody element, the Board incorrectly applied a “clear error” standard of review. Instead, the Board should have reviewed the IJ’s legal conclusion de novo, and held as a matter of law that Mr. derived citizenship from his father, his sole custodian. This led the Board to affirm the IJ’s erroneous conclusion that the imprisonment of Mr. ’s father precluded Mr. from satisfying the “physical custody” aspect of the statutory requirement.

The Board accepted the factual findings of the IJ that Mr. ’s mother had no role in his upbringing and that the father, although incarcerated, played a significant role in his son’s life and continued to have the obligation to provide and care for his son. For example, the Board noted that Mr. ’s father “played a supervisory role in [Mr. ] upbringing and provided financial support as well.” Under Maryland law, this is the type of care that is descriptive of “physical custody.” See Santo v. Santo, 448 Md. 620, 627 (2016) (citing and quoting Taylor v. Taylor, 306 Md. 290, 296 (1986) (Physical custody means “the right and obligation to provide a home for the child and to make daily decisions as necessary while the child is under that parent’s care and control.”).

The decision that Mr. did not derive citizenship from his father is not consistent with Congress’s goal of keeping families intact. If upheld by this Court, the Board’s ruling will result in Mr. ’s deportation to Nigeria, where
he knows no one and has no family willing or able to provide care or support for him, and will remove him from those family members with whom he has spent the substantial majority of his life.

In enacting the Child Citizenship Act of 2000, Congress intended two things: (1) to protect non-citizen parental rights by requiring only the citizen parent to have legal and physical custody of the child regardless of whether the non-citizen parent and the citizen parent are legally separated or divorced; and (2) to focus on the preservation of the family unit. 7-98 Immigration Law and Procedure § 98.03 (discussing the first); Nwozuzu v. Holder, 726 F.3d 323, 329 (2d Cir. 2013) (discussing the second).

With respect to the first factor, Mr. ’s mother ceded her parental rights to Mr. ’s father very early in Mr. ’s life. (A-185). Thus, Congress’s purpose of requiring custody with the citizen parent is satisfied. As to the second, both Mr. and his father have resided in the United States for the majority of their lives. (A-122, A-181-82). Mr. ’s “family unit” is with his father and his grandmother—the record in this case is undisputed that Mr. ’s father exercised a great deal of oversight and responsibility for his son notwithstanding his incarceration. (A-39-A-40). By contrast, if Mr. was removed from this country, he would lose those very ties. Congressional intent weighs in favor of finding that Mr. resided in the physical custody of his
father, and therefore derived citizenship from him. Thus, a stay of deportation should issue pending the resolution of an appeal before this Court.

2. The Supreme Court’s pending decision in Sessions v. Dimaya Could Substantially Affect Mr.’s rights.

The Immigration Judge who decided Mr.’s case initially determined that his conviction for robbery for a dangerous weapon constituted a crime of violence under 18 U.S.C. § 16(a). Upon Mr.’s motion for reconsideration of that determination, the Immigration Judge determined that Mr.’s conviction did not in fact fall within the ambit of § 16(a). Instead, and based on an argument raised for the first time in the briefing on the motion for reconsideration, the Immigration Judge found that his conviction constituted a crime of violence under 18 U.S.C. § 16(b). As the constitutionality of this statute is questionable, a stay is appropriate pending the Supreme Court’s determination of the issue.

Section 16(b) provides that a felony is a “crime of violence” if it “is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” A similarly-worded statute defining crime of violence in the Armed Career Criminal Act was held unconstitutional in 2015. There, the Supreme Court reasoned that the wording of such a “residual” clause left too much to judicial guesswork and did not provide for a clear framework under which persons could regulate their behavior. See Johnson v. United States, 135 S. Ct. 2551, 2557

The same problem inures with the residual clause in Section 16(b). A number of circuits have found that it is unconstitutional. See United States v. Diaz, 865 F.3d 168, 179 n.7 (4th Cir. 2017) (citing cases from the Third, Sixth, Seventh, and Ninth Circuits, but not deciding the issue). This issue is squarely before the Supreme Court in Sessions v. Dimaya. Originally argued in January of 2017, it was reargued on October 2, 2017. The Court has not yet released a decision in the case. Should the Supreme Court find that the Section 16(b) is unconstitutionally vague, it would require a reversal of the Immigration Judge’s finding that Mr. ’s conviction for robbery with a dangerous weapon constituted a crime of violence. This would, in turn, affect Mr. ’s rights. If he was not found guilty of a crime of violence, he would be eligible for cancellation of removal, which is relief he is not presently eligible for. Therefore, a stay should issue pending the outcome of Dimaya.
3. The Board erred in determining that petitioner was not entitled to relief under the Convention Against Torture.

The Immigration Judge who decided Mr. ’s case determined that it he did not meet the “more likely than not” standard for potential torture, and therefore was not entitled to relief under the Convention Against Torture (“CAT”). This was error.

Where a non-citizen demonstrates past persecution, “a rebuttable presumption arises that [he] has a ‘well-founded fear of future persecution, and the burden then shifts to the Department of Homeland Security to show that the conditions in the country have changed or the alien could avoid a future threat through relocation.” *Liana Tan v. United States*, 446 F.3d 1369, 1375 (11th Cir. 2006). Mr. demonstrated that he had been the subject of past persecution—he was tormented by fellow schoolchildren on the two occasions that he briefly returned to Nigeria. (A-121-22). On one of the occasions that he returned to Nigeria, in 2001, armed gunmen stopped the car he was in shortly after he and his grandmother arrived in the country and almost kidnapped him. (A-119).

Mr. also presented unrefuted evidence from two experts in support of his CAT claim. Each opined on the dangers present throughout Nigeria, including specifically the danger to foreigners, and particularly to foreigners with light skin, such as Mr. . Both experts opined that they believed that removing Mr. to Nigeria would put his life in severe jeopardy. (A-153-57).
In addition to the evidence from his experts, Mr. [redacted] put in evidence myriad news articles and United States State Department warnings about travel to Nigeria, among other things (A-155).

Finally, Mr. [redacted] testified about his past persecution in Nigeria and his future fears of persecution. (A-119-27). The IJ noted in her opinion that Mr. [redacted] was a credible witness who “appeared fairly honest and straightforward about his criminal history and the circumstances surrounding his convictions” and “testified in detail about his experiences and his fears relating specifically and only to his return to Nigeria, and he did not appear to fabricate elements of his testimony in order to bolster his claim.” (A-217).

Given the weight of the evidence that Mr. [redacted] produced before the IJ, it was error for the Board to determine that the IJ’s conclusion was not clearly erroneous. For this reason, a stay of removal should issue pending this Court’s resolution of his petition.

B. **Mr. [redacted] will be Irreparably Harmed Absent a Stay**

To receive a stay of removal, an applicant must next demonstrate that it will be irreparably harmed absent a stay. *Nken*, 556 U.S. at 433. Mr. [redacted] has satisfied this factor as well.

As noted above, the only home Mr. [redacted] has ever known is the United States. Although his mother lives in Nigeria, as a result of prior violence towards
him while in Nigeria, no family members would be able or willing to provide any support to him upon his return. (A-125-26). As a result of his foreign status, it is unlikely that he would be able to find gainful employment in Nigeria. (A-126). And, because he is easily identified as an American and a Christian, he faces a substantial risk of violence towards his person should he be removed from this country. (A-123-25). In sum, were Mr. [redacted] to be removed to Nigeria, it is highly likely that he would in short order become homeless in a country foreign to him, with few prospects that that status would ever change, and with substantial risk of bodily harm. (Id.)

Further, if Mr. [redacted] is removed while this Court considers his petition for review, the government would not necessarily return him to the United States, even if his requested relief is granted. Although U.S. Immigration and Customs Enforcement facilitates the return of some removed aliens following a remand, it is unclear whether petitioner would qualify for such assistance. (See U.S.C.I.S. Directive 11061.1, “Facilitating the Return to the United States of Certain Lawfully Removed Aliens,” (Feb. 24, 2012)).

C. The Issuance of a Stay will Not Substantially Injure the Respondent and will Not be Contrary to the Public Interest

After assessing the applicant’s likelihood of success and the potential for irreparable harm if the stay is not granted, the court must proceed by “assessing the harm to the opposing party and weighing the public interest. These factors merge
when the Government is the opposing party.”  Nken, 556 U.S. at 435. The Supreme Court noted in Nken that the first two factors of the stay inquiry (likelihood of success and irreparable harm) are the “most critical.”  Id. at 434. While there is “always a public interest in the prompt execution of removal orders,” there is a countervailing “public interest in preventing aliens from being wrongfully removed.”  Id. at 427. The public interest in efficient execution of removal orders cannot trump the irreparable harm that would suffer should this stay be denied.

The Government’s interest in the efficient deportation of individuals is considerably outweighed by the harms that Mr.  would face in the event of his deportation to Nigeria, as evidenced by his CAT claim raised in proceedings below and before this Court. The two experts that Mr.  put before the Immigration Judge detailed the rampant crime and corruption present in Nigeria, as well as the violence that Christians like Mr.  faced as a result of pervasive militant activity around the country.  (A-153-57). Coupled with the fact that Mr.  is a light-skinned African-American man, with an obvious American accent, and myriad tattoos proclaiming his Christian faith, his experts opined that it was very likely that Mr.  would be the victim of violence upon his return.  (Id.). It would not be contrary to the public interest for a stay to issue. Nor would
the government suffer any substantial injury if Mr. [REDACTED] remains in the country pending the disposition of his appeal.

VIII. CONCLUSION

For the foregoing reasons, petitioner asks that this court grant the emergency stay of removal and afford him an opportunity to seek protection in this country.

Dated: December 18, 2017

/s/ Anthony Vale
Anthony Vale
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
215.981.4000

Michelle N. Mendez
CATHOLIC LEGAL IMMIGRATION NETWORK, INC.
8757 Georgia Avenue, Ste. 850
Silver Spring, MD 20910

Himedes V. Chicas
LAW OFFICES OF JEZIC & MOYSE, LLC
2730 University Boulevard West, Ste. 604
Silver Spring, MD 20902

Counsel for Petitioner

-16-
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify the following:

1. The foregoing motion complies with the type-volume limitations of Rule 27(d)(2). The motion contains 3,837 words according to the Microsoft Word 2010 word-counting function, excluding the parts of the motion exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 27(d)(1).

2. The foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: December 18, 2017

/s/ Anthony Vale
Anthony Vale
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
215.981.4000

Counsel for Petitioner
CERTIFICATE OF SERVICE

I, Anthony Vale, hereby certify that on December 18, 2017, I served the foregoing Petitioner’s Unopposed Motion for Stay of Removal from the United States Pending a Ruling on his Petition for Review of Decision of the Board of Immigration Appeals upon the Respondent via CM/ECF.

Dated: December 18, 2017 /s/ Anthony Vale
Appendix E
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No.__________

Alien Registration No.: A__________

______________________,

Petitioner,

v.

ERIC HOLDER, Attorney General,

Respondent.

______________________

EMERGENCY MOTION FOR STAY OF REMOVAL
PENDING RESOLUTION OF PETITION FOR REVIEW

CUSTODY STATUS: DETAINED

______________________

BECK REDDEN LLP
Gretchen S. Sween
515 Congress Avenue, Suite 1750
Austin, Texas 78701
gsween@beckredden.com
Telephone: 512.707.1000; 512.900.3217
Fax: 512.708.1002

Pro Bono Counsel for Petitioner
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case:

American Gateways (Stephanie Taylor)

Beck Redden LLP (Gretchen Sween)

Immigrant Rights Clinic, Rutgers School of Law–Newark (Anjum Gupta)

Department of Homeland Security

Board of Immigration Appeals

Immigration Judge Anibal D. Martinez

ATTORNEY OF RECORD:

/s/ Gretchen S. Sween

Gretchen S. Sween

Pro Bono Counsel for Petitioner
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>CERTIFICATE OF INTERESTED PERSONS</td>
<td>i</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td>ii</td>
</tr>
<tr>
<td>TABLE OF AUTHORITIES</td>
<td>ii</td>
</tr>
<tr>
<td>NATURE OF THE EMERGENCY AND RELIEF REQUESTED</td>
<td>1</td>
</tr>
<tr>
<td>STATEMENT OF FACTS AND OF THE CASE</td>
<td>2</td>
</tr>
<tr>
<td>LEGAL STANDARD</td>
<td>8</td>
</tr>
<tr>
<td>ARGUMENT</td>
<td>8</td>
</tr>
<tr>
<td>I. <strong>IS LIKELY TO SUCCEED ON THE MERITS.</strong></td>
<td>8</td>
</tr>
<tr>
<td>A. BIA erred in finding Ms. M was not persecuted “on account of” her membership in a particular social group</td>
<td>9</td>
</tr>
<tr>
<td>B. BIA erred in concluding that Ms. M failed to show the government was unable or unwilling to control her persecutor</td>
<td>11</td>
</tr>
<tr>
<td>C. BIA erred in failing to consider the other issues raised on appeal including the IJ’s flagrant abuse of discretion in denying Ms. M a brief continuance</td>
<td>14</td>
</tr>
<tr>
<td>II. <strong>MS. M WILL BE IRREPARABLY INJURED ABSENT A STAY.</strong></td>
<td>16</td>
</tr>
<tr>
<td>III. <strong>THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE RESPONDENT NOR BE CONTRARY TO THE PUBLIC INTEREST.</strong></td>
<td>19</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>20</td>
</tr>
<tr>
<td>CERTIFICATE OF SERVICE</td>
<td>21</td>
</tr>
<tr>
<td>CERTIFICATE OF CONFERENCE</td>
<td>22</td>
</tr>
</tbody>
</table>
APPENDIX

BIA order dismissing appeal dated Dec. 9, 2014 ......................... TAB A

Record Excerpts ................................................................................. TAB B

DHS Brief in Matter of LR 2009 ......................................................... TAB C

E-mail communications with ICE regarding deportation date ........... TAB D
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>CASES</th>
<th>PAGE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chitay–Pirir v. INS, 169 F.3d 1079 (7th Cir. 1999)</td>
<td>13</td>
</tr>
<tr>
<td>Deloso v. Ashcroft, 393 F.3d 858 (9th Cir. 2005)</td>
<td>13</td>
</tr>
<tr>
<td>Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982)</td>
<td>15</td>
</tr>
<tr>
<td>Matter of Hashmi, 24 I&amp;N Dec. 785 (BIA 2009)</td>
<td>16</td>
</tr>
<tr>
<td>Matter of A-R-C-G-, 26 I &amp; N Dec. 388 (BIA 2014)</td>
<td>9, 10</td>
</tr>
<tr>
<td>Matter of Kasinga, 21 I&amp;N Dec. 357 (BIA 1996)</td>
<td>10</td>
</tr>
<tr>
<td>Rodriguez Galicia v. Gonzales, 422 F.3d 529 (7th Cir. 2005)</td>
<td>15</td>
</tr>
<tr>
<td>United States v. W.T. Grant, 345 U.S. 629 (1953)</td>
<td>18</td>
</tr>
</tbody>
</table>
**RULES & STATUTES**

5th Cir. R. 27.3.1 ...........................................................................................................1, 3

8 U.S.C.
  § 1229a(b) .............................................................................................................15, 19

Fed. R. App. P. 27 ........................................................................................................1

INA
  § 101(a)(42)(A) .........................................................................................................10
  § 208(a) ..................................................................................................................10

8 C.F.R.
  § 1003.29 (2008) .....................................................................................................16
  § 1240.1(c) ...........................................................................................................15
  § 1241.1(a) ...........................................................................................................1
NATURE OF THE EMERGENCY AND RELIEF REQUESTED

Petitioner [Redacted] (Ms. M), who fled Nicaragua to escape extreme domestic violence, has filed a timely Petition for Review of a decision by the Board of Immigration Appeals (BIA), which dismissed her appeal of an Immigration Judge’s (IJ’s) decision. Ms. M files this emergency motion for a stay of removal, under Fed. R. App. P. 27 and 5th Cir. R. 27.3.1.

Ms. M has no criminal history and has been in Immigration and Customs Enforcement (ICE) custody since her arrival earlier this year. She is subject to immediate removal. See 8 C.F.R. § 1241.1(a) (stating that an order of removal becomes final upon dismissal of an appeal by the BIA); see also TAB A (BIA order dismissing appeal dated Dec. 9, 2014). 1 In response to repeated requests for a specific deportation date, ICE stated: “ICE will not disclose a pending removal date for security reasons. In your filing I would suggest you use imminent as the removal date.” See TAB D (emphasis added); see also Certificate of Conference.

This emergency motion is being filed on December 22, 2014 as soon as practicable after Ms. M obtained pro bono appellate counsel who obtained the information required by 5th Cir. R. 27.3.1 that ICE was willing to provide.

1 The Administrative Record in this case has not yet been filed. Therefore, citations in this motion are to: TAB A (BIA’s order); TAB B (Record Excerpts “RE”); TAB C (DHS Brief in Matter of LR 2009).
Because her deportation is imminent, she entreats the Court to act immediately in the interest of justice. She satisfies all factors requisite to granting a stay.

STATEMENT OF FACTS AND OF THE CASE

I. THE FACTS PARTICULAR TO MS. M’s CASE SHOW SHE WILL LIKELY PREVAIL ON THE MERITS.²

Ms. M is a native and citizen of Nicaragua. She is now thirty-eight years old. RE133. Five years ago, she began a domestic relationship with ☐. RE137; RE159. Three years into the relationship, Ms. ☐ tried to end it and her partner responded with a sustained, relentless campaign of violence. He beat her at least weekly. He would often light into her immediately upon returning home—punching her, cursing at her, calling her “whore,” and threatening to kill her. If he did not find her at home, he went to her workplace to attack her there. He stood in the street outside their home, shouting curses at her in front of neighbors. He threatened her with knives. He threw a rock at her head. He blackened her eyes. He kicked her so she bled so extensively she believes she had a miscarriage. RE159-160; RE164.

Ms. M sought police protection, but thereafter the abuse only worsened. In September 2013, she locked him out of their house and put “a bond

² Because the IJ found her credible, the facts as she asserted them must be taken as true. See, e.g., Matter of R-A-, 22 I&N Dec. 906, 942 (A.G. 2001; BIA 1999) (“As the respondent has been found credible by the Immigration Judge . . . her account is to be taken as true.”).
on him” with the police. RE160. But [redacted]’s harassment and assaults continued unabated. He stalked her, waited outside her workplace, then, armed with a machete, pounced—threatening to “cut [her] in two. *Id.*

The second time he attacked with his machete Ms. [redacted] only survived because his brother, who had followed [redacted] on that occasion, intervened. *Id.*

Feeling utterly unconstrained by the police protection that Ms. [redacted] had sought, [redacted] attacked her again in late January 2014. Arriving home from work, Ms. [redacted] found [redacted] waiting, armed again with his machete. [redacted] told her: “This is how I wanted to catch you, this is it.” [redacted] swung the machete, striking her hard with the blunt portion of the machete, bruising and terrifying her. [redacted] barely managed to escape into her house; but [redacted] stayed outside, cursing and vowing to kill her that same night. Eventually, [redacted] left, but returned a few hours later at 2 a.m. Ms. [redacted] fled to a police station. The police then went to her house, where they found [redacted] on the roof, armed with the machete, trying to gain entry. Even though he was arrested because he was clearly attempting a home invasion armed with a deadly weapon, he was soon released. Neither the police nor any other government authority gave Ms. [redacted] any notice of the release. She only learned from her family that her abuser

---

3 Neither the IJ nor the Asylum Officer clarified what putting “a bond on him” meant. She may have been referring to a restraining order, as the U.S. Department of State Human Rights Report on Nicaragua states that Nicaraguan law provides for the issuance of restraining orders; however the enforcement of the orders is tenuous and they are not effective. RE117.
was again on the loose and stalking her—because he showed up at her house within hours of his release. A member of her family phoned her at work saying: “He is here, he is out and coming to get you.” Fearing for her life, Ms. M... did not return home. She left for the United States the next day. To escape, Ms. passed through Honduras, El Salvador, Guatemala, and Mexico. pursued her all the way north to Guatemala before she evaded him. RE161; RE085-87.

II. FACTS ABOUT VIOLENCE AGAINST WOMEN IN NICARAGUA SHOW MS. M... WILL LIKELY PREVAIL ON THE MERITS.

Violence against women and widespread corruption in the police and courts are two of Nicaragua’s three “principal human rights abuses.” RE096. Nicaraguan laws theoretically protect women against gender-based violence, but the government’s failure to enforce the laws effectively has led to widespread impunity for perpetrators of violence against women. RE116-117.

In 2012, Nicaragua’s National Police reported that only about 17% of domestic violence cases went to court. Of the cases filed in 2012, 62% were ruled petty crimes, even when the life of the victim was in danger. The Women’s Network Against Violence, a non-governmental organization which the U.S. State Department cites in its 2013 Human Rights Report, noted that more than 60% of crimes against Nicaraguan women went unpunished in 2012. Id.
The State Department cites examples of systemic impunity for violence against women, including the case of a middle-class woman found shot to death in her home in 2010 following a domestic dispute with her politically-connected husband. Women’s organizations called the case “a prime example of judicial impunity in gender-based violence cases” after the government failed to mount official investigations or make arrests for three years. The case received so much attention that the Inter-American Commission of Human Rights took it up in March 2013, RE118.

As another example of the prevalence of violence against women and girls in Nicaragua, the State Department cites the case of five National Police officers and a private security guard assigned to President Daniel Ortega’s own personal security team accused of the 2012 kidnapping and rape of a 12-year old girl with mental disabilities. Two of the men faced no charges and one of the National Police officers even kept his job. In this atmosphere of impunity for accused perpetrators, reporters observed an increase in gender-based violence. In 2013 the rate of reported violence against women—including murders, rapes, beatings and maimings—had tripled during the previous seven years. Although Nicaraguan law provides for the issuance of restraining orders, enforcement is tenuous and such orders are not perceived to be effective. Femicide, including the murder of women by their current and former intimate partners, was a factor that led Nicaragua’s National Assembly to pass Law 779, which criminalizes domestic violence. Law
779, however, has been largely ineffective to date in altering the deeply-rooted
tolerance in Nicaraguan society for violence against women and impunity for its
perpetrators. RE116-117.

III. The PROCEDURAL HISTORY SHOWS MS. M WILL LIKELY PREVAIL ON THE MERITS.

Ms. M entered the United States without inspection and was detained
by the Department of Homeland Security (DHS) on March 19, 2014. She was
referred to an Asylum Officer who conducted a credible fear interview. The officer
found a significant possibility that Ms. M’s fear of persecution was on
account of her membership in a particular social group, namely, “women in
domestic relationships that they are unable to leave,” and that she would be found
credible in a full asylum hearing. RE155-156.

Ms. M appeared pro se before the IJ via video teleconference from the
detention facility. RE038. After preliminary group hearings, she submitted
an Application for Asylum and for Withholding of Removal, and the same day the
IJ set her merits hearing for July 7, 2014. RE133. On July 1, 2014, Ms. M
filed a motion for a three-week continuance to allow time for supporting evidence
to arrive from Nicaragua. RE094. But the IJ pushed forward with the merits
hearing, just 18 days after Ms. M had filed for asylum. RE074-76. Ms. M
again appeared pro se via video teleconference. Id. The IJ, after briefly
questioning Ms. M through a Spanish language interpreter, issued an oral
decision and order. RE007. He found that Ms. M had “testified credibly in that her testimony was specific, consistent, and detailed.” RE013. But he denied her Motion for Continuance, expressing doubt that any additional evidence Ms. M might obtain “would, you know, be the pivotal factor or deciding factor in her case,” because her testimony had been sufficient to establish her credibility. Id.; RE077. Then, the IJ stated that Ms. M had failed to meet her burden of proving persecution on account of a protected ground—having just denied her a short continuance to introduce evidence to support that precise element. RE013.

In his oral decision, the IJ rejected the cognizability of Ms. M’s proposed particular social group as “circular,” an assessment contrary to current BIA law. RE014. The IJ also found that that the harm Ms. M suffered was not “by an entity for which the government was unable or unwilling to offer protection.” RE013-15.

Ms. M timely filed a Notice of Appeal with the BIA. RE021-22. Thereafter, Ms. M obtained pro bono counsel at the Rutgers School of Law Immigrant Rights Clinic through the Catholic Legal Immigration Network. Over a year later, during the law school final-exam period, the BIA issued a two-page decision dismissing Ms. M’s appeal.4 Ms. M, whose petition for review is now pending before this Court, is subject to deportation within days as ICE referred her to its travel department upon learning she intended to appeal.

4 Because of the timing, Ms. M had to scramble to find new counsel to bring an appeal as the threat of deportation was looming.
LEGAL STANDARD

Granting a motion for stay of removal requires finding four factors: (1) her petition is likely to succeed; (2) the applicant will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest favors a stay. Nken v. Holder, 556 U.S. 418, 434 (2009). Nken explains that the first two factors are “most critical.” 556 U.S. at 434. The last two factors merge because the government is the respondent. Id. at 435. While “not a matter of right,” courts may grant stays in the “exercise of judicial discretion” based on “the circumstances of the particular case.” Id. at 433 (internal quotations and citation omitted).

ARGUMENT

Ms. M deserves a stay because (1) success on the merits of her petition for review is likely; (2) she will be irreparably injured absent a stay; and (3)-(4) the issuance of the stay will not injure the Government but will instead serve the public interest.

I. MS. M IS LIKELY TO SUCCEED ON THE MERITS.

Ms. M’s petition is likely to succeed. First, the BIA implicitly admitted that the IJ made a foundational legal error in rejecting her particular social group as “vague and circular,” a conclusion at odds with the BIA’s own recent decision in Matter of A-R-C-G-, 26 I & N Dec. 388 (BIA 2014). Then, without explanation, the BIA stated that it would dismiss the appeal anyway because (1) it agreed with
the IJ that Ms. M’s persecutor did not harm her on account of her membership in that group; and (2) that she had not shown that the government was unable or unwilling to protect her because the persecutor had been “detained and arrested numerous times for his abusive treatment” of Ms. M, which is factually incorrect. TAB A at 2. The BIA then erroneously concluded that it need not consider the additional issues raised in her appeal. Id. For instance, the BIA made no reference to the baseless denial of her Motion for Continuance, which prevented her from introducing evidence from Nicaragua relevant to the government’s inability/unwillingness to protect her. Each of the BIA’s proffered reasons for dismissing Ms. M’s appeal is wrong as a matter of law.

A. BIA erred in finding Ms. M’s was not persecuted “on account of” her membership in a particular social group.

This case should be controlled by the BIA’s recent decision in Matter of A-R-C-G-, 26 I & N Dec. 388, 388-89 (BIA 2014), holding that “married women in Guatemala who are unable to leave their relationship,” constitutes a cognizable particular social group.5 In A-R-C-G- the BIA expressly rejected the very argument that the IJ made here and then the BIA rubberstamped: that the harm Ms. M sustained was the result of “criminal acts, not persecution.” Id. at 390. That is, the IJ and then the BIA found that, because the man who persecuted Ms. M was

5 Although Matter of A-R-C-G- was decided shortly after the IJ made his oral decision in this case, as the BIA noted in A-R-C-G- itself, the latter had been presaged by developments dating back to 2001. See Matter of A-R-C-G-, 26 I&N Dec. at 391-94.
also a criminal/drug-user, this means that his persecution of her was not “on account of” her domestic relationship with him. This argument is facially untenable. In *A-R-C-G-* itself the DHS conceded the nexus requirement under virtually identical circumstances. *See id.* at 390, 392.

Ms. M established that she was persecuted on account of her membership in a particular social group. *See* INA §§ 101(a)(42)(A), 208(a). That is, she established that her abusive domestic partner was motivated to harm her because she is a Nicaraguan woman bound to him in an intimate relationship that she was unable to leave. *See, e.g.*, *Matter of A-R-C-G-*., 26 I & N Dec. 388 (BIA 2014); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996); *Matter of H-*, 21 I&N Dec. 337, 343-44 (BIA 1996).

Oddly, the IJ and BIA penalized Ms. M because her persecutor had also perpetrated other criminal acts. But most persecutors are criminals, and their criminal status does not negate the fact that they persecuted the asylum-seeker on account of a protected ground. Years before the BIA decided *A-R-C-G-*, DHS itself acknowledged: that domestic abusers target their female partners because they believe that the woman occupies a subordinate position in the relationship, that this belief is bolstered in societies that allow such behavior, and that the asylum-seeker’s domestic-relationship status can be immutable where leaving the abusive relationship is hindered by “economic, social, physical or other constraints.” *See TAB C* at 14-16, 20-21.
Ms. M’s testimony, that the IJ found credible, indicates that her domestic partner targeted her because of their intimate relationship. He only began his relentless campaign of abuse when she tried to leave him, suggesting a belief that he owned her. She tried and failed to escape from him. Her inability to escape further motivated him to harm her because he knew he could do so with impunity, regardless of any action she might take. His assaults were public and extreme. He repeatedly stalked and attacked her with a machete, threatening to kill her and chop her up. The police did nothing meaningful to restrain him.

His confidence in flouting the authorities is enabled by Nicaraguan institutions and cultural norms such that perpetrators of domestic violence are rarely brought to justice and, even when convicted, do not generally receive meaningful punishment. See RE116-118. The uncontroverted evidence shows that believed he had the authority to abuse and control Ms. M “on account of” her domestic relationship with him.

B. BIA erred in concluding that Ms. M failed to show the government was unable or unwilling to control her persecutor.

To qualify for asylum, an applicant must show that the harm she suffered was inflicted “by the Government, or by forces that the Government is unable or unwilling to control.” Matter of A-M-, 23 I&N Dec. 737, 741 (BIA 2005). The IJ erred in concluding that Ms. M failed to show that the Nicaraguan government had been unable or unwilling to control . RE014. The IJ’s
error rests on two fallacious observations: (1) the view that “measures taken by the
government to address” domestic violence suggest that the government was not
unable or unwilling to control, id.; and (2) that’s arrests somehow show the government’s resolve and capacity to protect Ms. —
even while acknowledging that all but one of those arrests were for crimes unrelated to his assaults of Ms. —.. Id. The BIA merely rubberstamped without discussing the IJ’s two fallacious premises.

First, the mere fact that a government has official policies in place ostensibly
to control private persecutors does not mean that it in fact provides effective
protection from their abuses or that it is able or willing to control the persecutors. Matter of O-Z- & I-Z-, 22 I&N Dec. 23, 26 (BIA 1998). As in O-Z & I-Z- (involving Ukrainian laws v. legal norms), the State Department’s Human Rights Report expressly notes that while Nicaragua has domestic violence laws that theoretically protect women, “the government failed to enforce the law effectively…leading to widespread impunity and increased violence.” RE116.

Second, an arrest, by itself, does not show that the government is willing and able to control a particular persecutor. The Fifth Circuit has not yet addressed this precise legal question, but other circuit courts have. See Chitay–Pirir v. INS, 169 F.3d 1079, 1081 (7th Cir. 1999) (holding that arrests by police, without more, are

6 The IJ cited the Nicaragua Country Report at 22-23. Those pages mention Nicaraguan laws penalizing spousal rape and other domestic abuse. However, those pages also describe the ineffectiveness of such laws, something the IJ did not discuss.
not sufficient to rebut claims that the government is unable or unwilling to stop persecutors); *Deloso v. Ashcroft*, 393 F.3d 858, 868 (9th Cir. 2005) (same).

Ms. M\textsuperscript{3} has demonstrated that the Nicaraguan authorities were unable or unwilling to protect her under circumstances similar to those in *Chitay–Pirir* and *Deloso*. RE012. She explained that he had been arrested numerous times for other bad acts, but the Nicaraguan police had always released him. She sought protection twice after his assaults became life-threatening and only once, when he was caught in the act, was he detained. Thus, the BIA’s conclusory assertion that he was “detained and arrested numerous times” for abusing Ms. M\textsuperscript{3} is demonstrably wrong. TAB A at 2.

The first request for police support, in September 2013, followed weeks of violence and threats. If authorities took any action at all to protect Ms. M\textsuperscript{3} on that occasion, it was entirely ineffective. After she went to the police, he escalated the violence by invading Ms. M\textsuperscript{3}’s home armed with a machete. Only the intervention of his brother, not government authorities, saved Ms. M\textsuperscript{3}. Thereafter, he stalked her with his machete at her workplace, threatening to “cut [her] in two.” RE158-162.

Ms. M\textsuperscript{3} lodged her second request for police protection before dawn on January 25, 2014, hours after he again struck her with his machete, and “said he would kill [her] that night.” RE161. Police detained him after finding him on the roof of her home, trying to break in. *Id*. It is unclear whether
was charged with any crime; in any event, he, like the alleged persecutors in *Chitay–Pirir* and *Deloso*, was soon free—and without any notice to Ms. M. *Id.* Within hours of his release, [redacted] was again waiting outside Ms. M’s home and, like the persecutors in *Chitay–Pirir* and *Deloso*, was poised to harm her again. *Id.* Only because she was at work and her family called to warn her in time was she able to flee for her life—escaping the country the very next day, with [redacted] at her heels. *Id.*; RE087. Ms. M reasonably concluded that [redacted], his fury stoked by a brief detention, intended to make good on his threats and that she would be murdered before Nicaraguan authorities would intervene. RE158-162.

C. **BIA erred in failing to consider the other issues raised on appeal including the IJ’s flagrant abuse of discretion in denying Ms. M a brief continuance.**

For no legitimate reason, the IJ refused to continue the removal hearing to permit a detained, *pro se*, non-English-speaking asylum-seeker to submit evidence being sent to her from Nicaragua. Indeed, when Ms. M broke down sobbing during the hearing, the IJ seemed eager to get through the proceeding as quickly as possible, asking few questions and then taking a “ten minute” break before delivering his oral decision. RE082-89. Refusing a continuance violated Ms. M’s right to due process and prejudiced her ability to support her claims.

Noncitizens have statutory, regulatory, and constitutional rights to present all material evidence at impartial hearings. 8 U.S.C. § 1229a(b)(4); 8 C.F.R. §
1240.1(c); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005) (holding due process requires a court to afford an applicant a reasonable opportunity to present evidence on her behalf); *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1039 (5th Cir. 1982) (holding that the Government violates the fundamental fairness that is the essence of due process when it creates a right to petition and then makes the exercise of that right impossible).

A respondent in a removal proceeding is entitled to a continuance for good cause. *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (citing 8 C.F.R. § 1003.29 (2008)). Ms. M, operating *pro se* within the constraints imposed by detention, filed for just one continuance of a mere three weeks for highly relevant evidence from the police, forensic evidence, and medical evidence she had requested from Nicaragua. RE094; RE076. The IJ denied the request, stating that good cause had not been shown because Ms. M’s “testimony alone suffices to establish she was the victim of domestic violence,” thus additional evidence was “not necessary in light of [her] testimony.” RE013. However, in the very next sentence, he found that she had “failed to meet her burden of proof.” *Id.* The evidence he did not allow her to present would have further fortified her claims.

The IJ did not ask Ms. M about the exact nature of the evidence she was awaiting. RE076. And the BIA ignored the detailed affidavit that Ms. M submitted with her appeal describing that evidence. *See Tab A.* That evidence

---

7 Her merits hearing was on July 7, 2014; she had requested a continuance until July 30, 2014.
would have illuminated, *inter alia*, the nature of the ineffectual “bond” that she obtained against [REDACTED], whether he was formally charged after his arrest during the January 25 home invasion, and on what basis he was released.\(^8\) The IJ also denied Ms. M[REDACTED] the opportunity to present a more complete picture of the widespread tolerance of domestic abuse in Nicaragua, including evidence of the murder of a co-worker at the hands of her co-worker’s husband, of the prevalence and difficulty of leaving common-law marriages in Nicaragua, of the government’s failure to protect her, of her persecutor’s motivations, and of his ties to police.

Moreover, the IJ’s decision shows that he denied the continuance based on the legally erroneous belief that her particular social group is not cognizable. In light of *A-R-C-G-*[, Ms. M[REDACTED] is plainly a member of a cognizable social group. If given the opportunity, she would have presented further evidence that she was persecuted on account of her membership in that particular social group and that the government is unwilling and unable to protect members of that group.

The IJ’s denial of her continuance prejudiced her, and the BIA plainly erred in refusing to address this clear abuse of discretion recounted in her appeal.

For each of these reasons, Ms. M[REDACTED] is likely to succeed on the merits.

**II. MS. M[REDACTED] WILL BE IRREPARABLY INJURED ABSENT A STAY.**

Forced deportation to Nicaragua would irreparably harm Ms. M[REDACTED]. A showing of irreparable harm is “dependent upon the circumstances of the particular

---

\(^8\) Ms. M[REDACTED] submitted a detailed affidavit in support of her appeal to the BIA describing the evidence. The affidavit is in the Administrative Record, which has not yet been produced.
case.” *Nken*, 556 U.S. at 433 (internal quotations and citation omitted). In Nicaragua, Ms. M will be subjected to further persecution and likely killed by an abuser who has demonstrated his commitment to harming her. He was even willing to hound her all the way from Nicaragua to Guatemala. RE085.

Additionally, if Ms. M is deported now, an eventual victory on the merits of her petition will ring hollow because ICE has no reliable, fair, or binding policy to ensure her return to the United States if this Court grants her petition for review. While the Supreme Court in *Nken* stated that the burden of wrongful removal is “serious” but not “categorically irreparable,” that statement was based on the Solicitor General’s express assurance that individuals “who prevail can be afforded effective relief by facilitation of their return along with restoration of the immigration status they had upon removal.” 566 U.S. at 435 (citing Brief for Respondent). Subsequent developments, however, showed that the Supreme Court had been misled. *See, e.g.*, *Nat’l Imm. Project v. U.S. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012) (“When the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed. Here, however, . . . it seems the Government’s lawyers were engaged in a bit of a shuffle”). Internal Government e-mails produced after *Nken* show there is no inconsistent “policy and practice” of returning individuals who prevail on a petition for review. *Id.* at 726-30.
Were the Government to take the position that some new policy, which has not yet been tested and is not binding, now obviates the need for a stay of removal to prevent irreparable harm, that position should be unavailing. See United States v. W.T. Grant, 345 U.S. 629, 632 n.5 (1953) (noting courts should “beware of efforts to defeat injunctive relief by protestations of repentance and reform”). Any new policy promising to effectuate actual returns would require coordination among several agencies, any one of which could effectively defeat the promise of return. Considering the current dissention over recent executive-level changes in other immigration policies, it is virtually inconceivable that yet more new policy that might pertain to this case might be forthcoming. See also 8 U.S.C. § 1229a(b)(5) (permitting IJs to administratively close proceedings or order removal in absentia).

In short, if Ms. M is removed before her petition for review is adjudicated, she faces grave danger; even if she survives, no policy guarantees that ICE would facilitate her return, that the border patrol would permit her to enter the country, that she could afford to return, or that she could even obtain the requisite travel documentation from Nicaraguan authorities required to return. Because a pathway to return is a chimera, and because the irreparable harm she faces is plainly evidenced by the record of past persecution and State Department reports, she satisfies the second factor requisite to a stay.
III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE RESPONDENT NOR BE CONTRARY TO THE PUBLIC INTEREST.

Both the third and fourth factors weigh decisively in Ms. M’s favor. *Nken* explains that these last two factors, injury to other parties in the litigation and the public interest, merge in immigration cases because the Government is both the opposing litigant and the public’s representative. 556 U.S. at 435. The Court further noted that the interests of the Government and the public in the “prompt execution of removal orders” is only heightened where “the alien is particularly dangerous” or “has substantially prolonged his stay by abusing the process provided to him.” *Id.* at 436 (citations omitted).

The Government has no particular interest in Ms. M’s removal. She has no criminal history and poses no threat to the community. She is a 38-year-old woman who is simply trying to avoid a violent death in Nicaragua. *Id.* Further, *Nken* recognizes a “public interest in preventing aliens from being wrongfully removed,” which must weigh heavily in the Court’s consideration. 566 U.S. at 436. Because the Government cannot make any particularized showing that granting a stay of removal would substantially injure the Government, and because the Government has no interest in enabling the violation of domestic and international human rights laws, granting a stay would serve the public interest.
CONCLUSION

For the foregoing reasons, Ms. M respectfully asks that the Court grant this emergency motion for a stay of removal pending resolution of her petition for review.

Dated: December 22, 2014

Respectfully submitted,

/s/ Gretchen S. Sween
Gretchen S. Sween
BECK REDDEN LLP
515 Congress Avenue, Suite 1750
Austin, Texas 78701
gsween@beckredden.com
Telephone: 512.900.3217
Fax: 512.708.1002

Pro Bono Counsel for Petitioner
Appendix F
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner,

v.

LORETTA E. LYNCH, United States Attorney General,
Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals
No. A[redacted]

PETITIONER’S EMERGENCY MOTION UNDER
CIRCUIT RULE 27-3 FOR A STAY OF REMOVAL

Counsel for the Petitioner
TABLE OF CONTENTS

STATEMENT OF FACTS ...........................................................................................................1
PROCEDURAL HISTORY ........................................................................................................3
ARGUMENT .............................................................................................................................8

I. Petitioner is likely to succeed on the merits of her petition for review. ...........................................8
   A. The Agency erred in finding that [redacted] was not persecuted by the [redacted] Cartel “on account of” her gender identity .......................................................................................9
   B. The Agency ignored the alternative possibility that [redacted] was persecuted based on her membership in another social group..................................................................................11
   C. The Agency discounted the Cartel violence because they are private actors whom [redacted] could avoid by relocating..........................................................11
   D. The Agency committed a number of errors in considering [redacted] transgender identity .............................................................................................................................13
   E. The judge denied [redacted] a fair hearing, and the Board exacerbated that problem by denying her motion to remand ..............17

II. Petitioner faces irreparable harm if this court denies a stay of removal. .............................................18

III. Granting a stay in Petitioner’s case will result in minimal harm to the government and instead serves the public interest .......................................................................................................19

CONCLUSION ..................................................................................................................................20

EXHIBITS IN SUPPORT OF EMERGENCY STAY OF REMOVAL .......................................................21
CERTIFICATE OF SERVICE .............................................................................................................22
a transgender Mexican national in the custody of the Department of Homeland Security (DHS), is appealing a removal order by the Board of Immigration Appeals (BIA). In light of her imminent removal and because she meets the test for injunctive relief announced in Nken v. Holder, 556 U.S. 418 (2009), she seeks an emergency stay of removal.

STATEMENT OF FACTS

 has known that she is transgender for most of her life. (Ex. C., Pet’r Decl. ¶5.)\(^1\) She fled Mexico in the summer of 2015 after members of the cartel kidnapped her, beat her, and threatened her life. (IJ Dec. 3.) The judge found her credible but denied relief. (Id. 9.)

Beginning early in life, experienced physical and sexual abuse stemming from her gender identity. (IJ Dec. 16.) A family friend sexually abused her as a child, and her father regularly beat her and called her homophobic slurs. (Id.) This abuse prompted mother to leave her husband and take with her. (Id.) They moved to, Mexico, but continued to suffer because of her gender. She tried to work to help support her mother and siblings, but people refused to hire a transgender woman. (Ex. B., Pet’r Decl.) With no other choice, she resorted to sex work, which exposed her to police

\(^1\) Citations are to the Agency’s decisions (attached to the petition for review) and to other items in the Administrative Record, which are attached to this motion.
abuse—including physical beatings, and extortion. (Id.) Because of this abuse, [name] moved for a second time to [location]. (Id.) There too, it was impossible to find work, and she once again had to turn to survival sex, which again resulted in extortion and physical violence. (Id.)

In 2007, [name] got a job in a salon. (Ex. B.) About two years after the owner passed away, in 2014, [name] opened her own salon. (Id.) Almost immediately, she had problems with the [cartel] cartel, which demanded money for “protection.” (Id.) The cartel extorted other businesses, but [name] testified that—based on their words and actions—she knew that her transgender identity motivated them to target her. (Ex. A., Tr. 40.) (In a motion to remand, which the Board denied, [name] added that she believed that the cartel targeted transgender people because they were less likely to get help from the police. (Ex. C., Pet’r Decl. ¶ 17.)) [name] paid the quota for several months but stopped for about six weeks in December 2014. (Id. ¶30.) The cartel demanded back pay; when she refused, they attacked and kidnapped her. (Id. ¶¶31-32.) They took her to a deserted auto shop where they stripped her naked, bound her hands, covered her naked body with dirty motor oil, and beat her. (Id. ¶32.)

After this ordeal [name] made payments while also resisting the back payment. (Ex. A, Tr. 37-38.) When she refused, the cartel would call her slurs, and one spit in her face. (Id. 38.) Angered by this mistreatment, [name] gathered
evidence to take to the police. (Id. 39.) But before filing her report, the men came
to the salon, saw the folder of evidence, and kidnapped her a second time, again
referring to her as a “fucking faggot.” (Id. 40.)

The men drove to a vacant lot, threw [REDACTED] to the ground, and kicked
her in the face and chest until she lost consciousness. (Ex. A., Tr. 41.) This attack
resulted in significant injuries, including a ruptured breast implant. (Id. 43.) It also
forced [REDACTED] to close her business and flee [REDACTED]. She went to her
family home in [REDACTED], but on the fourth day, she received a phone call from the
cartel at a new cell number. (Id. 40, 45-46.) The caller warned, “Wherever you are,
we’re going to find you and we’re going to kill you.” (Id. 46.) This call terrified
[REDACTED] so she disabled her phone and left her mother’s house. (Id.) She tried
to relocate but when that proved dangerous because of the cartels, [REDACTED]
fled to the United States and requested asylum. (Id. 47-48.)

**PROCEDURAL HISTORY**

[REDACTED] was detained and *pro se* when she appeared before Judge [REDACTED],
who focused on her experiences with the cartel. He repeatedly called [REDACTED]
“sir” and never asked [REDACTED] about her overall experiences in Mexico as a
transgender woman. (Id. 21, 24, 30, 58.) Her gender only came into focus when
she testified about wearing a bra and her punctured implant. (Ex. A, Tr. 41-45.)
In her testimony, explained the facts of what happened with the cartel, while also explaining that she opposed them and that she believed they targeted her because she is transgender. When the judge asked “Do you know why they were beating you,” the first thing she said was that one of her attackers called her a “fucking faggot.” (Ex. A., Tr. 40.) On cross, the trial attorney tried to get to concede that her gender had not motivated the attacks, asking “it’s not just because you’re transgender” and “they wouldn’t extort you just because of your sexual orientation.” (Id. 51.) But in response to both questions, maintained that her gender was one of the reasons she was targeted. (Id.) She also mentioned having been extorted by the police “a good bit of the time” (Id. 58), and commented that the police “work alongside with the cartels” (Id. 55.) She added that transgender women are particularly vulnerable, saying, “the cartels, they’re on us, because nobody gives us support. We can’t count on the authorities.” (Id. 63.)

The judge found credible but denied relief. He framed claim as being based on three separate incidents of past harm: her experiences with the cartel, extortion from the police in, and “other harm” (her childhood abuse), nothing though that “there was not additional testimony” on this subject. (IJ Dec. 9.) The judge found that the cartel violence was by private actors, that it was not “on account of” transgender identity, and that the use of derogatory slurs did not demonstrate nexus. (Id. 13.) The judge also
concluded that, because [Redacted] had prepared to go to the police, she “believed the judicial process would work.” (Id. 11.) Next, the judge found that, based on Mexican government’s efforts to combat cartel violence, [Redacted] failed to “demonstrate that the government was unwilling or unable to control” the cartel. (Id. 12.) Finally, the judge concluded that [Redacted] could evade harm by the [Redacted] cartel through internal relocation because she had “lived in other parts of the country without problems from the [Redacted] cartel.” (Id. 14.)

As for the experiences with the police, the judge acknowledged that [Redacted] had been extorted and beaten but characterized these incidents as being for monetary gain and because [Redacted] was a prostitute. (IJ Dec. 14-15.) The judge ruled, alternatively, that if the beating by the police (which he called isolated) was persecution, it had been rebutted because [Redacted] had relocated to [Redacted]. (Id.) (The judge did not mention the police violence that [Redacted] experienced in [Redacted].) The judge also held that [Redacted] had no future fear of persecution from the police. (Id. at 16.)

The judge mentioned [Redacted] childhood abuse but quickly dismissed it, noting that the harm was a long time ago, that there is no evidence it was reported to the police, and that there is “no evidence that the government of Mexico would condone these actions.” (IJ Dec. 16.) The judge took no testimony on these experiences.
The judge also rejected any claim that [redacted] faces future persecution as a transgender woman. He noted that many crimes against LGBT people in Mexico are “crimes of passion within the community,” suggesting that homophobia did not motivate them. (IJ Dec. 17.) The judge also cited “growing acceptance” and legal advancements on behalf of LGBT people, “including legalization of same sex marriages [and] the inauguration of the first LGBT student association” at a university. (Id. 18, 19.) For the same reasons, the judge denied withholding of removal and relief under the Convention Against Torture.

With respect to CAT, the judge stated that “there’s no evidence to show that any public official was aware” of the extortion or abuse by the cartel. (IJ Dec. 20.) The judge acknowledged that [redacted] once tried to tell the police what had happened and they ignored it, but concluded that this is not acquiescence because the police did not know of the harm in advance and they didn’t disregard planned future harm. (Id.) The judge concluded that the harm by the police in [redacted] did not support a CAT claim because (1) it was not sufficiently serious, (2) it happened a long time ago, (3) [redacted] could relocate, and (4) she had good relations with the police in other places. (Id. 21.)

The Board of Immigration Appeals affirmed, over a dissent. Regarding [redacted] harm from the cartel, it agreed with the judge that (1) “extortion by the cartel did not constitute past persecution because the harm was not on account
failed to show that the government could not or would not control the cartel, and (3) fears were akin to a generalized fear of violence in Mexico. (BIA Dec. 2.) The Board found “no clear error” in the judge’s finding that transgender identity “was not one central reason” for her experiences with the cartel, noting that the cartel harmed her only after she missed a payment and finding the slurs they used insufficient. (Id. 3.)

As to experiences with the police in, the Board agreed with the judge that it “arose from extortion efforts, and was an isolated criminal act.” (BIA Dec. 2.) The Board also adopted the judge’s conclusion that even if had been persecuted by the police, the presumption of future persecution had been rebutted because, according to the judge, “was able to relocate for 15 years without additional adverse encounters with the police.” (Id.) had argued in a motion to remand that the judge reached this conclusion about her “successful” relocation without asking her any questions about her experiences with the police in, which also involved further persecution. (Ex. C, Motion to Remand.) The Board refused to consider this fact, faulting—a pro se litigant—for “failing to present this evidence” and finding itself limited to the record as it existed before the judge. (BIA Dec. 2.)

Finally, the Board denied motion to remand reasoning that she failed to present evidence that “likely would change the result,” and because
the country-conditions evidence that she submitted with her motion was available at the time of the immigration judge’s decision. (BIA Dec. 3.)

ARGUMENT

The test for injunctive relief applies to applications for stays of removal in the immigration context. *Nken v. Holder*, 556 U.S. 418 (2009). As such, courts deciding whether a stay of removal is appropriate should generally weigh: (1) the likelihood of success on the merits; (2) the irreparable harm to the petitioner if a stay is not granted; (3) the potential harm to the government if a stay is granted; and (4) the public interest. *Id.* at 434-35. Under *Nken*, injunctive relief in the immigration removal context requires a showing that a petitioner is “likely to succeed on the merits.” *Id.* at 434. In *Nken*, the Court held that the first two prongs of the stay inquiry (likelihood of success and irreparable harm) are the “most critical.” *Id.*; *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011). In this case, the four factors weigh in favor, so this Court should grant an emergency stay of removal pending a decision on the petition for review.

I. **Petitioner is likely to succeed on the merits of her petition for review.**

identified numerous errors in the judge’s decision, but the Board summarily affirmed those errors or failed to address them. Given the nature of these errors, which go to the heart of case and the Board’s failure to resolve them, can demonstrate that there is a “reasonable
probability” that she will succeed on the merits of her case, as is required by the first prong of *Nken. Leiva-Perez*, 640 F.3d at 967.

A. The Agency erred in finding that [redacted] was not persecuted by the [redacted] Cartel “on account of” her gender identity.

The Agency focused its attention on [redacted] experiences with the [redacted] Cartel. The judge held, and the BIA agreed, that [redacted] was not persecuted on account of her transgender identity but instead because she owned a successful business. This conclusion is wrong for several reasons.

First, the cartel kidnapped, beat, and extorted [redacted] and the Agency’s conclusion that this persecution was not “on account of” her transgender identity, is undermined by the record. The cartel punished [redacted] in a way that emphasized her transgender status and humiliated her because of it. They left her bound, naked and exposed in public, and they beat her on her breasts, causing her to rupture an implant. The use of this gender specific persecution not only adds credence to the conclusion that these punishments are a form of persecution but also to the fact that they occurred on account of [redacted] transgender identity. *See* Musalo & S. Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, 03-12 IMMIGRATION BRIEFINGS 1. The Board completely failed to respond to this point.

The Agency’s decision also eviscerates the possibility of prevailing on an asylum claim when the persecutor had mixed motives. Instead, the BIA would
require a noncitizen to prove that her membership in a protected group is “the only reason” for her persecution, not “one central reason” as the law requires. See Madrigal v. Holder, 716 F.3d 499, 506 (9th Cir. 2013) (“[I]f a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is ‘one central reason’ for his persecution.”). Asylum seekers are not required to go into the minds of their persecutors and pinpoint one and only one reason for their abuse. Instead, they may rely on circumstantial evidence to show that they were harmed on account of their membership in a protected group. See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992). [Redacted] presented such evidence. In addition to the gender-specific nature of her persecution, the cartel referred to her using derogatory terms while targeting her. She also pointed out that transgender people are vulnerable because they do not receive police protection, and she explained that the cartels took advantage of this fact. The Agency improperly dismissed this evidence.

Third, the Agency placed too much weight on the fact that the cartel targets other businesses. That the cartel targets different victims for different reasons does not mean that one person wasn’t targeted for a specific reason. Indeed, courts have held that the fact that general violence exists in a country does not negate the possibility that persecution on account of a protected ground occurs. See, e.g., Eduard v. Ashcroft, 379 F.3d 182, 189-90 (5th Cir. 2004). The same logic applies
here. That the cartels choose different targets for different reasons does not mean they are motivated by money alone. The Agency’s decision ignores this possibility.

B. The Agency ignored the alternative possibility that [redacted] was persecuted based on her membership in another social group. [redacted] presented an alternative argument regarding her experience with the cartel: that she was persecuted on account of her opposition to it. In Henriquez–Rivas v. Holder, this Court held that it was legal error to “fail to consider…the unique vulnerability of people who testify against gang members.” 707 F.3d 1081, 1092 (9th Cir.2013) (en banc). This Court also recognized that those who resist the drug cartels, especially via legal action, are recognizable as a social group. Id.; see Garcia v. U.S. Att’y Gen., 665 F.3d 496, 504 (3d Cir. 2012). Despite this precedent, the judge failed to acknowledge that [redacted] second attack from the cartel was directly related to their discovery of the fact that she was planning to go to the police and report them. The cartel’s punishment intimidated [redacted] until she closed her business and left town; when the threats followed her, she fled the country. The judge erred by failing to address [redacted] claim under this rubric, and the Board failed to acknowledge this argument.

C. The Agency discounted the Cartel violence because they are private actors whom [redacted] could avoid by relocating.

The Agency committed two more errors regarding [redacted]’s experience with the cartel: It improperly found that there was no evidence that the government
of Mexico was unable and unwilling to control cartels and that could avoid future harm by the cartels by relocating.

As to the question of internal relocation, the threats that suffered—particularly the threat she endured after fleeing—did not seem to inform the judge’s decision. He did not mention it when assessing harm that suffered, even though credible threats can be persecution. *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120-21 (9th Cir. 2004). More importantly, he did not consider this fact when he found that could safely relocate.

Regarding the issue of government control, the judge committed a number of significant errors, which the Board adopted. First, the judge misconstrued ’s intent to report a claim as evidence that the police would help her. The act of preparing to file a report says little about ’s belief in the government’s ability to protect her. Second, the judge disregarded an incident when tried to report cartel violence to no avail. The judge excused the officers’ conduct, reasoning that the police could have known about this incident in advance and that did not identify a future form of harm from which she wanted them to protect her. The judge should not have been so quick to give the police a pass when they demonstrated no willingness to follow up on her claim.

Finally, the judge erred by relying on general, largely irrelevant details about the Mexican criminal justice system (like the number of people in jail). These
general facts have nothing to do with [redacted]’s claim, and the judge’s reliance on them was legal error. Afriyie v. Holder, 613 F.3d 924, 933-34 (9th Cir. 2010).

The most that can be said about the situation in Mexico is that the government of Mexico is willing to protect its people, not that it is able to do so. That is what the standard for government control requires, and it is also what this Court has found to be the factual reality. This Court has noted that “violent crime traceable to drug cartels remains high despite the Mexican government’s efforts to quell it.” See Madrigal, 716 F.3d at 506-07 (finding legal error for the Board “to have focused only on the Mexican government’s willingness to control [redacted], not its ability to do so.”)

**D. The Agency committed a number of errors in considering [redacted]’s transgender identity.**

In addition to improperly failing to link [redacted]’s abuse from the cartel to her gender, the Agency committed at least three other errors relating to [redacted]’s status as a transgender woman. First, the judge discounted the abuse that [redacted] experienced by the [redacted] police. The judge held, and the Board agreed, that this abuse was monetary and resulting from the fact that she was a prostitute. This conclusion ignores [redacted]’s status as a transgender sex worker, and failed to account for evidence in the record about how transgender women are forced into survival sex where they are vulnerable to rampant abuse. The Agency also improperly treated this experience as “isolated.” [redacted]
repeatedly testified that she suffered regular police extortion and abuse. This credible testimony belies the notion that this experience was an isolated incident. And, [redacted] tried to explain in her motion to remand that, contrary to the judge’s conclusion, she endured additional abuse in [redacted]. The Board refused to consider this evidence.

Moreover, this Court has rejected similar attempts to frame police abuse of transgender women as “isolated” incidents by corrupt officers. In Avendano-Hernandez v. Lynch, this Court considered a case where a transgender Mexican woman was sexually abused by government officers and “reject[ed] the government’s attempts to characterize these police and military officers as merely rogue or corrupt officials.” 800 F. 3d 1072, 1080 (9th Cir. 2015). As in Avendano, the reason this characterization fails is because it is contrary to country-conditions evidence. The record addresses the difficulty that transgender women have had throughout Mexico, including in [redacted].

The Board acknowledged Avendano but found it distinct, reasoning that the harm that [redacted] endured was “substantially less severe.” (BIA Dec. 2 p.3, n.3.) This logic misses the point: Avendano was a CAT case, but [redacted] is eligible for asylum. The harm needed to support a CAT claim is higher than that needed to support asylum. More importantly, the severity of the harm has nothing to do with the motivation of the police officers inflicting it. In Avendano, this
Court rejected the notion that persecution by police who are “rogue or corrupt” could somehow be discounted. That is exactly what the Agency has done here.

Second, the judge also improperly discounted [redacted]’s testimony about the rape and physical violence that she endured as a child, and the Board ignored these facts entirely. The judge dismissed this harm out of hand, noting that [redacted] did not testify about it, and that there is no evidence to suggest that she reported it or that the government of Mexico would have condoned such conduct. Not only did the judge err in failing to develop a record on this issue before making a conclusion about it, see infra, his decision is also wrong. This Court has repeatedly recognized that victims, especially victims of childhood persecution, need not report private harm to obtain asylum. Afriyie, 613 F.3d at 931; Rahimzadeh, 613 F.3d at 921-22. Taken to its logical end, the judge’s position would have required [redacted] to go to the police as a six year old child, in the 1970s to explain that she had been sexually abused because of her gender identity. Even today and even as an adult, such reporting would be difficult because transgender women face rampant discrimination and abuse by the police directly, making it difficult or impossible for them to report crimes.

Finally, the judge’s decision reflects a serious misunderstanding of the country conditions in Mexico that the Board failed to correct. The judge based his decision on his perceptions of improved conditions in Mexico. Specifically, the
judge noted that Mexico allows same-sex marriage and that the university in Monterrey has an active LGBT group. His reliance on these factors was misplaced. As this Court stated in Avendano top level reforms in Mexico, which may have some benefit for gay men, have done little to reduce the risk of persecution facing transgender women. 800 F. 3d at 1081-82 (noting that in many ways, some of these top-level reforms have actually increased the risk of violence for transgender women); see also Vitug v. Holder, 723 F.3d 1056, 1066 (9th Cir. 2013) (noting that the introduction of an ordinance protecting gay people from employment discrimination “does not indicate that there is any less violence against gay men or that police have become more responsive to reports of antigay hate crimes”). Indeed, though Avendano speaks directly to the harms facing transgender women in Mexico, the judge failed to mention it in his analysis of the country conditions. And, the Board’s effort to distinguish Avendano is unrelated to the relevant country conditions. The judge also deemed it significant that many crimes committed against LGBT victims are labeled as crimes of passion, and suggested that this point supports his conclusion that LGBT people are not specifically targeted for abuse. But the exact opposite is true. The record contains evidence indicating that this label is improperly used as a misnomer by the police to avoid classifying crimes as hate crimes and to undermine the importance of investigation. Overall, the country-conditions evidence shows an increase in crimes motivated by
homophobia and transphobia in cities and towns throughout Mexico and the Agency erred in failing to consider this evidence.

E. The judge denied a fair hearing, and the Board exacerbated that problem by denying her motion to remand.

Along with these substantive errors, the Agency committed three procedural errors that this Court should correct. First, it is well established that claims for protection must be based on the totality of the applicant’s experiences. Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996). Instead of following this mandate, the judge treated each of ’s experiences with the police, the cartels, and her family, as if they happened in a vacuum, treating each as being unrelated. This framing caused the judge to miss the fact that her transgender identity informed all of this abuse and to incorrectly conclude that had a good relationship with the police.

Second, and related, the judge failed to properly develop the record. The judge and the Board faulted for failing to testify about certain matters: the judge pointed to her experience as a child, and the Board her experience with the police in . These shortcomings should not be attributed to her. Noncitizens in removal proceedings have both a constitutional and statutory right to a “full and fair hearing,” which includes a “reasonable opportunity to present evidence.” 8 U.S.C § 1229a(b)(4); Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 681 (9th Cir. 2005). When an applicant appears before the judge without
representation, as did, it is the judge’s responsibility to safeguard this right, and that responsibility is heightened. See, e.g., Jacinto v. INS, 208 F.3d 725, 734-35 (9th Cir. 2000). This responsibility extends to the need to elicit testimony and develop a proper record. Singh v. Ashcroft, 362 F.3d 1164, 1170 (9th Cir. 2004). Here, the judge failed to ask about her gender identity including about her overall experiences living as a transgender woman in Mexico. tried to remedy this problem by filing a motion to remand, which included a detailed declaration of issues that the judge passed over. Instead of considering this document, though, the Board committed a third procedural error: It concluded that it was limited to the record below and denied the motion. But the Board’s decision is internally inconsistent. On the one hand, it denied the motion because it did not contain material information. On the other hand the Board refused to consider evidence about ’s experiences with the police in . That information directly influenced the judge’s finding of past persecution, his assessment of her ability to relocate within Mexico, and his understanding of whether the government was able and willing to control the harm she feared. As such, the Board abused its discretion in denying ’s motion to remand. Velasquez-Escovar v. Holder, 768 F.3d 1000 (9th Cir. 2014).

II. Petitioner faces irreparable harm if this court denies a stay of removal.
“The authority to grant stays has historically been justified by the perceived need ‘to prevent irreparable injury to the parties or to the public pending review.’” Nken, 556 U.S. at 432. Removal to torture or persecution is precisely the sort of irreparable injury that a stay of removal is intended to foreclose. See Id. at 436. (“Of course there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm.”)

The injury that would face in Mexico exceeds “the burden of removal alone” and goes beyond a mere “possibility” of harm. Id. at 435. In Mexico, she was raped, kidnapped, beaten, and consistently abused because of her gender identity, and she has no reason to expect any better treatment if forced to return. In addition to the harm that is present in cases involving a risk of persecution, immigration cases generally involve a risk of irreparable harm because of the difficulty involved in remedying the denial of a stay after the fact. See Leiva-Perez v. Holder, 640 F.3d at 967.

III. Granting a stay in Petitioner’s case will result in minimal harm to the government and instead serves the public interest.

After assessing the applicant’s likelihood of success and the potential for irreparable harm if the stay is not granted, the court must proceed by “assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.” Nken, 556 U.S. at 435. The Supreme Court noted in Nken that the first two factors of the stay inquiry (likelihood of
success and irreparable harm) are the “most critical.” *Id.* at 434. While there is “always a public interest in the prompt execution of removal orders,” there is a countervailing “public interest in preventing aliens from being wrongfully removed.” *Id.* at 427. The public interest in efficient execution of removal orders cannot trump the irreparable harm that [REDACTED] would suffer should this stay be denied. The Supreme Court noted circumstances where the “interest in prompt removal may be heightened” if the “alien is particularly dangerous” or has “substantially prolonged his stay by abusing the processes provided to him.” *Id.* But these examples do not apply here. Indeed, [REDACTED] has no criminal record and she presented herself at the U.S.-Mexico border and immediately expressed her intention to seek asylum. The Government’s interest in the efficient deportation of individuals is considerably outweighed given the Agency’s failure to properly consider her request for asylum. [REDACTED] therefore asks this Court to hold the Agency to its burden of fully considering her applications for relief.

**CONCLUSION**

For the foregoing reasons, Petitioner asks that this court grant the emergency stay of removal and afford her an opportunity to seek protection in this country.

Respectfully Submitted,

Dated: May 24, 2016

/s [REDACTED]
EXHIBITS IN SUPPORT OF EMERGENCY STAY OF REMOVAL

Immigration Court Merits Hearing Transcript .................................Ex. A

Petitioner’s Pro Se Declarations Before the Judge .............................Ex. B

Petitioner’s Motion to Remand filed with the Board ..........................Ex. C

The Motion to Remand, the annotated index of exhibits, and Petitioner’s affidavit in support of remand are attached. The annotated index summarizes the country conditions items and includes extensive quotes. The articles themselves were submitted to the Board and will be part of the administrative record.
CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 24, 2016

/s

[Redacted]
Appendix G
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner,

Jefferson B. SESSIONS III,
Attorney General

Respondent.

PETITIONER’S MOTION TO STAY THE MANDATE
# TABLE OF CONTENTS

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION ........................................................................................................ 1</td>
</tr>
<tr>
<td>II.</td>
<td>BRIEF STATEMENT OF THE CASE .............................................................................. 3</td>
</tr>
<tr>
<td>III.</td>
<td>BRIEF STATEMENT OF THE FACTS .......................................................................... 7</td>
</tr>
<tr>
<td>IV.</td>
<td>ARGUMENT ............................................................................................................. 13</td>
</tr>
<tr>
<td>V.</td>
<td>CONCLUSION .......................................................................................................... 17</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

Petitioner ** ("Petitioner") respectfully moves the Court to grant him a stay of the mandate for 90 days. As described below, Petitioner shows good cause for a stay of the mandate because he filed a Motion to Reopen ("MTR") based on changed country conditions in Turkey in support of Form I-589 and an alternative Motion to Reopen *sua sponte* with the Board of Immigration Appeals ("BIA") on *, 2017. See Att. 1 (Declaration of Katherine M. Lewis); Att. 2 (MTR); Att. 3 (Fed Ex Proof of Delivery). Petitioner filed this MTR based on new and previously unavailable evidence, including country condition evidence and an expert report regarding the escalating persecution of ethnic Kurds and Kurdish political dissidents in Turkey, particularly in the wake of the attempted coup in July 2016, as well as evidence specific to Petitioner and his family, including a recently-issued politically-motivated arrest warrant, all of which demonstrates his *prima facie* eligibility for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). See id. Petitioner’s MTR is currently in the process of being adjudicated. See Att. 1.

Should Petitioner be deported, he faces a high likelihood of persecution and torture as a result of his Kurdish ethnicity, pro-Kurdish beliefs, and his familial association, in light of the current country conditions that demonstrate widespread mistreatment and persecution of Kurds, and those who support Kurdish rights. See
Moreover, Petitioner would likely be arrested and held in custody due to a pretextual warrant for his arrest related to pro-Kurdish political comments that were critical of the current Turkish regime posted on Facebook. See Att. 2 at I.B; IV. As reported by the U.S. State Department Report for Turkey 2016 and human rights organizations, the Turkish government is silencing critical voices, specifically ethnic Kurds and pro-Kurdish critics, through prosecution under Turkey’s “vague and sweeping” anti-terror laws in the aftermath of the attempted coup in July 2016. See Att. 2 at IA; VIII.A.i; VIII.A.ii; VIII.E.ii.

Petitioner’s Turkish attorney reports that as a political dissident, Petitioner would be “subjected to severe torture during the 30 days he is under custody” waiting to appear before a judge and “will encounter treatment that range from solitary confinement to heavy torture” while in prison. See Att. 2 at I.B; see e.g., Att. 2 at VIII.D.ii.

Additionally if removed, Petitioner would be forced to leave his U.S. citizen wife, U.S. citizen and permanent resident step-children, and his U.S. citizen sister and cousins living in the United States and whom would undergo hardship themselves as a result. See Att. 2 at II.A; II.C; II.D; II.E; VI.A; VI.C. Petitioner is the main provider for his family and is instrumental in providing financial assistance to his stepchildren. See Att. II.A; VI.A; VI.B; VI.C.

Based on the pending MTR and the fact that Petitioner’s U.S. citizen and
lawful permanent resident family rely on his guidance, support, and financial
contribution, Petitioner respectfully requests a stay of the mandate. A stay would
allow Petitioner the time necessary to pursue and secure the administrative
remedies available to him.

II. BRIEF STATEMENT OF THE CASE

On **, 2001, Petitioner, a Kurdish native and citizen of Turkey, filed an
affirmative application for asylum with the legacy Immigration and Naturalization
Service ("INS").\textsuperscript{1} Certified Administrative Record ("A.R.") 1209 (Application for
case was referred to the San Francisco Immigration Court, and a Notice to Appear
("NTA") was issued. A.R. 1306. The legacy INS charged Petitioner as being
who is present in the United States without inspection or admission. \textit{Id}. Before the
Immigration Judge ("IJ"), Petitioner renewed his application for asylum and
recanted portions of his prior testimony. \textit{See} A.R. 677-79 (Tr.). Petitioner also
submitted numerous exhibits in support of his asylum case. \textit{See} A.R. 699-1022,

\textsuperscript{1} On March 1, 2003, the functions of the legacy INS were transferred to the
Department of Homeland Security. To the extent that the INS performed the acts at
issue in this case, Petitioner will refer to the legacy agency.
On **, 2002, the IJ issued an oral decision finding that Petitioner was not credible and denying his applications for asylum, withholding of removal, and relief under the CAT. A.R. 547-555 (IJ Decision dated **, 2002). The IJ ordered Petitioner removed to Turkey. Id. Petitioner timely filed a Notice of Appeal before the BIA and, on **, 2004, the BIA issued a decision affirming without opinion the IJ's decision. A.R. 496 (BIA Decision dated **, 2004).

Petitioner timely filed a petition for review with this Court and, on **, 2009, this Court issued a Memorandum Opinion, finding that substantial evidence supported the IJ’s adverse credibility determination, but granting Petitioner’s and the government’s separate requests2 to remand the case to the agency for consideration of the documentary evidence. A.R. 461.

As a result of this Court’s Order, on **, 2009, the BIA issued a decision vacating its **, 2004 decision and remanding the case to the IJ for further proceedings consistent with this Court’s decision of **, 2009. A.R. 450. On **, 2010, Petitioner appeared at his Master Calendar hearing for the remanded proceedings before the San Francisco Immigration Court. A.R. 141 (Tr.). Petitioner

---

2 In Respondent’s brief to this Court in that case, Respondent argued that the case should be remanded to the Board to determine whether the evidence submitted supported his applications for relief. A.R. 490. Respondent cited to Al-Harbi v. INS, 242 F.3d 882 (9th Cir. 2001), noting that “[d]ocumentary evidence alone can independently establish facts sufficient to prove a petitioner’s claim.” Id.
filed additional documentary evidence regarding the treatment of Kurds in Turkey, including a declaration from his cousin, **. A.R. 258, 263-313 (Supporting Documentation). The IJ issued his decision on **, 2010, again denying Petitioner’s applications for relief. A.R. 134. On **6, 2010, Petitioner timely filed with the BIA a notice of appeal of the IJ’s decision. A.R. 115

On **, 2013, the BIA dismissed Petitioner’s appeal. A.R. 3-7. Reviewing Petitioner's asylum claim, the BIA held that Petitioner had failed to establish that there was a “pattern and practice” of persecution against Kurds in Turkey. A.R. 5. The BIA stated that mere discrimination does not amount to persecution, and cited to “positive developments” in Turkey regarding Kurdish freedom of expression. Id. The BIA concluded that “given the lack of objective, direct, and specific evidence to suggest that the Turkish authorities wish to harm ethnic Kurds, or that they cannot control those who wish to harm ethnic Kurds, the [Petitioner] has not demonstrated a well-founded fear of persecution on account of a protected ground.” Id. The BIA also upheld the IJ’s holding that Petitioner did not qualify for CAT relief. A.R. 6. Finally, the BIA held that the IJ had not violated Petitioner’s due process rights. A.R. 7.

Petitioner timely filed a petition for review with this Court on **, 2013. See Docket (“Dkt.”) 1. On **, 2013, Petitioner filed a motion for a stay of removal. Dkt. 5. The Court granted a temporary stay of removal on **, 2013, pursuant to the

On **, 2017, this Court denied Petitioner’s Petition for Review. See ** (memorandum). This Court held that substantial evidence supported the BIA’s conclusion that Petitioner did not show an individualized risk of persecution or a pattern or practice of persecution of ethnic Kurds in Turkey. Id. Furthermore, this Court found that the evidence “did not compel the conclusion that there is systemic persecution” of ethnic Kurds in Turkey nor that Petitioner is more likely than not to be tortured if removed to Turkey. Id. Lastly, this Court agreed with the BIA that Petitioner did not establish that he was denied a fair hearing. Id.

Petitioner moved for an extension of time in order to consider filing a Petition for Rehearing or Rehearing En Banc, which was granted. Dkt. 57-58. The mandate will issue on **, 2017. On **, 2017, Petitioner, through undersigned counsel, filed a MTR based on changed country conditions in Turkey that materially impact Petitioner’s eligibility for asylum, withholding of removal and protection under the CAT and an alternative motion to reopen sua sponte. See Att. 1; 2; 3. Petitioner is now seeking a stay of the mandate in light of his pending MTR.
III. BRIEF STATEMENT OF THE FACTS

Petitioner is a citizen and national of Turkey who has lived in the United States for over 17 years. A.R. 1306. Petitioner was born in ** region in Turkey. See Att. 2 at II.A. He is ethnically Kurdish. AR 137. Petitioner’s family has a history of advocating for Kurdish rights. See Att. 2 at II.C; II.D; II.F. Petitioner first entered the United States on **, 2000. AR 1306. He affirmatively filed an application for asylum and related relief within a year of his entry, and has continued to pursue asylum over the past 17 years because he is afraid to return to Turkey. See AR 1209-1216; Att. 2 at II.A. In 2004, Petitioner married **, a U.S. citizen. See Att. 2 at VI.B. He has supported his wife and his three U.S. citizen and one lawful permanent stepchildren through his work as owner and operator of **, a restaurant he opened in 2007 in **. Att. 2 at II.A; VI.A; VI.C. Moreover, Petitioner participates in Kurdish community events and continues to advocate for Kurdish rights. See Att. 2 at II.A; II.D; III.B; VI.E; VI.F.

While Petitioner’s Petition for Review was pending before this Court, he learned from family and friends and heard on the news that the situation had been deteriorating for Kurdish people in Turkey over the past couple of years, and has gotten particularly dangerous in the last several months. II.C-II.L. In July 2015, the two-and-a-half year ceasefire between the Kurdistan’s Worker Party ("PKK"), an
armed insurgency fighting for greater Kurdish rights and political power, and the Turkish government ended and hostilities returned, resulting in a “spike of violence unprecedented since the 1990s.” See Att. 2 at I.A. (report by Professor Gunes Murat Tezcur). ³ In response to the end of the truce, the Turkish government began conducting security operations in a number of provinces in southeast Turkey, a predominately Kurdish area. See e.g., id.; Att. 2 at VIII.A.i.; VIII.B.vi (noting that Turkey imposed 24-hour curfews, sometimes for weeks and even months at a time, resulting in difficult living conditions including cuts to water, electricity and lack of access to food and medical services). Various human rights organizations have documented and reported on the “serious human rights violations” taking place in southeast Turkey since the reigniting of combat operations in the southeast. See Att. 2 at VIII.B.iv; VIII.A.iii (finding the authorities’ use of “extended round-the-clock curfews, a total ban on people leaving their homes, combined with the presence of heavy weaponry including tanks in populated areas, was a disproportionate and abusive response to a serious security concern and may have amounted to collective punishment”) (emphasis added).

³ Professor Tezcür is the Jalal Talabani Endowed Chair of Kurdish Political Studies, and an Associate Professor of Political Science at the University of Central Florida (“UCF”). Professor Tezcür also directs the Kurdish Political Studies Program at UCF, the only academic program dedicated to the study of Kurdish politics in the United States.
While Turkey continued to battle PKK in the southeast, members of the military attempted to carry out a coup d’état against President Recepp Tayyip Erdogan on July 15, 2016. See Att. 2 at VIII.A.i. In the aftermath of the attempted coup, the Turkish government declared a three-month state of emergency, which has since been extended twice. See Att. 2 at I.A. The state of emergency suspended due process protections for those accused of ties to terrorist organizations. See Att. 2 at VIII.A.i. Furthermore, government decrees under the state of emergency restricted suspects’ access to legal assistance, restrict suspects’ rights to confidential conversations with their lawyers, allowed suspects to be held without a charge for at least 30 days, and in some cases, froze from the assets of suspended civil servants. Id.

In the wake of the coup, the Turkish government has tried to silence anyone seen as a political dissident in any way, and in particular have targeted Kurds. According to the State Department Report, “prosecutors continued to use a broad definition of terrorism and threats to national security to launch criminal charges against a broad range of defendants, including more than 140 journalists and hundreds of mostly pro-Kurdish politicians, party officers, and supporters.” See Att. 2 at VIII.A.i (emphasis added). Governmental decrees resulted in the closure of nearly all-Kurdish language media and Kurdish cultural institutions and previous Kurdish language reforms have been annulled in practice. See Att. 2 at
The Turkish government used “vague and sweeping anti-terrorism laws” to target pro-Kurdish politicians, Kurdish activists and Kurdish individuals voicing pro-Kurdish political speech. See Att. 2 at VIII.A.i (human rights organizations “alleged that many detainees have no substantial ink to terrorism and were detained” to weaker pro-Kurdish political parties or to silence critical voices).

Moreover, the aftermath of the coup resulted in increased reports of torture and ill treatment for suspects of the coup and Kurdish detainees in the southeast of the country. See e.g. Att. 2 at VIII.A.i; VIII.D.i.

In early November 2016, parliamentary members and officials from the pro-Kurdish political party Peoples’ Democratic Party (“HDP”) were arrested. See Att. 2 at I.A; VIII.C.i. In response to the jailing of HDP co-leaders and parliamentary members, Petitioner participated in a protest in ** 2016, in **, organized by the Kurdish community in **. See Att. 2 at II.D; III; Att. II.A (stating that he attended the protest because he “wanted to raise awareness of the arrest and detention of HDP parliamentary members. I protested to show the policy of discriminating against Kurds is not acceptable and that the Turkish government must accept that Kurds have the same rights as Turks.”). According to his cousin, **:

We try to tell people that what Turkey is doing to Kurds is wrong. For example, ** and I attended a protest against the jailing of HDP parliamentary members in November 2016 in **. We are not writers and journalists, but we are individuals and we do what individuals can do.

See Att. 2 at II.D.
In addition, these sweeping changes in Turkey have directly impacted Petitioner and his family. One of Petitioner’s family members, who was studying at a Turkish university was attacked by Turkish students. See Att. 2 at II.C. Petitioner’s sister-in-law was fired as a teacher as a result of her Kurdish ethnicity and one of Petitioner’s brothers is having a hard time practicing as an attorney. Att. 2 at II.C-II.H. Another one of Petitioner’s brothers has recently been arrested on multiple occasions due to his Kurdish ethnicity and membership in the ** family. See Att. 2 at II.A; II.D; II.G-II.H. Furthermore, two of Petitioner’s friends who had traveled to Turkey after the attempted coup had been stopped and questioned about Petitioner by security forces at checkpoints in southeast Turkey. See Att. 2 at II.I; II.K. Moreover, Petitioner’s cousin, ** was killed in an armed attack by Turkish forces in **, Turkey on **, 2016. See Att. 2 at V; II.D; Att. F. While the authorities reported that Mr. ** lost his life as a result of an armed conflict, villagers stated that “there was no mutual confrontation” and “that the victim was killed by one-sided shooting.” See Att. 2 at V. The family’s attorney, **, reported that he was having difficulty in reaching the investigation file and **, Petitioner’s relative and mother of Mr. **, reported that she was threatened by the police after the incident. Id.

In January 2017, Petitioner made a series of electronic posts that challenged Turkey’s opinion of the Democratic Union Party (“PYD”), a Kurdish political
party in Syria, asked that all Kurds support PYD, and commented on Turkey’s oppression of Kurdish citizens. See Att. 2 at I; II.A; IV. Later that week, he learned from his family that ** security forces and civilian police showed up at his family home in Turkey inquiring about him. See Att. 2 at II.B. Petitioner’s family was informed that the ** Chief Public Prosecutor’s Office was investigating Petitioner. Id. Petitioner’s family contacted their family attorney who was able to obtain documents related to the investigation. Id. According to Petitioner’s family attorney, **, Petitioner’s social media posts were being investigated pursuant to Article 7/2 of Anti-Terror Law No. 3713. See Att. 2 at I.B. As reported by 2016 State Department report, Turkey’s anti-terror laws “were broadly used against Kurds, suspected PKK sympathizers, and alleged members of the Gulen movement. Human rights groups alleged that many detainees had no substantial link to terrorism and were detained to weaken the pro-Kurdish HDP and DBP or to silence critical voices.” Att. 2 at VIII.A.i (emphasis added). According to attorney **, Kurdish political dissidents waiting to be brought before the judge for the first time are subjected to “severe torture” and during their time in prison “will encounter treatments that range from solitary confinement to heavy torture. Today no political prisoner has security of life.” See Att. 2 at I.B.

In light of these recently changed country conditions, Petitioner fears for his safety if he is forced to return to Turkey. Att. II.A.
IV. ARGUMENT

Petitioner hereby moves this Court to stay the mandate in his case because he is awaiting the adjudication of the MTR he filed with the BIA on **, 2017, which would allow him to pursue relief from persecution and torture through asylum, withholding of removal, and protection under CAT. See Att. 2

The motion to reopen alleges that Petitioner is eligible for asylum, withholding of removal, and protection under CAT based on the deteriorating changed country conditions for ethnic Kurds and critics in Turkey and presented new and material evidence of the persecution and torture he would face if forced to return. As the basis for Petitioner’s MTR is for asylum, withholding of removal, and protection under CAT and is based on changed country conditions in the country of nationality and he presented new evidence that was unavailable in 2010 at the time of his last hearing, he is exempted from the time and numerical limitations that generally apply when filing a MTR. See INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii) (the time and numerical limitations on motions to reopen shall not apply if the basis of the motion is to apply for asylum and is “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.”); see also Malty v. Ashcroft, 381 F.3d 942, 946 (9th Cir. 2004).
This Court has generally stayed the issuance of the mandate where a petitioner has filed, or plans to file, a meritorious MTR before the BIA, and should do so in this case as well. *See Myers v. Holder*, 661 F.3d 1178 (9th Cir. 2011) (granting petitioner’s motion to stay the mandate pending adjudication of his motion to reopen before the BIA). *See also Aguilar-Escobar v. INS*, 136 F.3d 140 (9th Cir. 1998); *Dhangu v. INS*, 812 F.3d 455 (9th Cir. 1987); *Alvarez-Ruiz v. INS*, 740 F.2d 1314 (9th Cir. 1984); *Khourassany v. I.N.S.*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying the mandate “to allow petitioners the opportunity to file a motion to reopen with the BIA”); *Roque-Carranza v. INS*, 778 F.2d 1372 (9th Cir. 1985).

In each of the above-mentioned cases, despite the fact that petitions for review were denied, this Court still found it appropriate to stay the issuance of the mandate because there were unresolved issues the Court felt that the BIA should address. Petitioner presents an even stronger case for issuance of a stay of the mandate because he is not asking this Court to issue such a stay so that he may, in the future, file a motion to reopen or application for relief to the agency, as was the case in *Alvarez-Ruiz, Khourassany, Roque-Carranza, Aguilar-Escobar* and *Ortiz*. Like the petitioner in *Myers*, Petitioner has *already* filed a motion to reopen to the BIA, here, based on changed country conditions in Turkey. *See* Atts. 1, 2, 3.

In his timely-filed motion, Petitioner presented objective and new evidence
that it is more likely than not that he would be persecuted or and subjected to torture if removed to Turkey. Att. I; III; IV; V; VIII. As stated by Professor Tezcür, “[u]nder the present circumstances, many Turkish citizens with Kurdish ethnicity have an insecure existence and subject to discrimination and mistreatment at the hands of governmental authorities.” Att. 2 at I.A. Similarly, Rod Nordland of the New York Times reported that “Turkey’s crackdown on Kurdish politicians, officials, news outlets, schools, municipalities, think tanks and even charities has been so thoroughgoing that it has left those who remain free expecting arrest at any moment.” Att. 2 at VIII.C.viii; see also Att. 2 at VIII.B.vi (noting that the in the “series of executive decrees issued under the state of emergency, the government, as part of a systematic attack on dissenting voices across the political spectrum, has acted to eliminate all opposition Kurdish voices”) (emphasis added).

Moreover, as explained by expert Professor Tezer, “Kurdish citizens of Turkey with family histories and political views similar to Petitioner” are at a “great risk of being arrested for expressing political views, mistreated in detention including physical beatings, and waiting for indictments for months without taken to court. Petitioner is very likely to face similar mistreatment in his return to Turkey under the current circumstances.” Att. 2 at I.A. Moreover, Petitioner’s Turkish attorney, ** noted that, based on his experience as a practicing attorney in Turkey now, Petitioner would be subject to severe and heavy torture if he were to
return. Att. 2 at I.B. Attorney ** stated that:

Given the practices in Turkey today, the client will be subjected to severe torture during the 30 days he is under custody. Again, during the time he is in prison, he will encounter treatments that range from solitary confinement to heavy torture. [...] The situation is clearly stated by our clients who we visit in prison. We believe under such circumstances it is dangerous for our client to return to the Republic of Turkey.

Id.

As Petitioner’s motion to reopen presents strong claims of changed country conditions and new and material evidence that he would be subject to persecution and torture if removed to Turkey, a stay of the mandate is warranted to allow those claims to be properly considered, in the first instance, by the BIA.

Moreover, to prevent extreme hardship to Petitioner's U.S. citizen wife and stepchildren, Petitioner requests that the mandate be stayed while his Motion to Reopen is pending. Petitioner has longstanding ties in the community, as he has lived in the U.S. for more than 17 years. See Att. 2 at II.A.; VI.A; VI.D. He has owned and operated a restaurant in ** for close to ten years and is active in the ** Community Center located in **. See id.; Att. II.C; II.D; II.E.

Accordingly, Petitioner respectfully requests this Court stay the mandate for 90 days in light of his family ties, the serious persecution and torture he would face if returned to Turkey, and in order to allow time to pursue and secure his administrative remedies through his pending MTR.
V. CONCLUSION

Based on the aforementioned reasons, and the attached evidence, Petitioner respectfully requests the mandate be stayed until at least **, 2017.

Dated: **, 2017

Respectfully submitted,

/s Katherine M. Lewis

Katherine M. Lewis
Marc Van Der Hout

Attorneys for Petitioner
CERTIFICATE OF SERVICE

I, Katherine M. Lewis, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is Van Der Hout, Brigagliano & Nightingale, LLP, 180 Sutter Street, Suite 500, San Francisco, CA 94104.

On **, 2017, I caused to be served the within:

   PETITIONER’S MOTION TO STAY THE MANDATE

with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine M. Lewis
Appendix H
John E. McCarthy  
Assistant Field Office Director  
U.S. Immigration & Customs Enforcement  
Enforcement & Removal Office  
31 Hopkins Plaza, 7th Floor  
Baltimore, MA 21201

March 23, 2017

VIA HAND DELIVERY

Re:  I-246 Application for a Stay of Deportation (Renewal)  
Felipe X – AXXXXXXX

Dear Assistant Director McCarthy:

Catholic Charities of the Archdiocese of Washington represents Felipe X (hereinafter Mr. X), a citizen of Mexico, on his application to renew his stay of removal. Baltimore Immigration and Customs Enforcement (ICE) Enforcement and Removal Office (ERO) granted Mr. X a stay of removal on September 24, 2012. On September 30, 2013, Baltimore ICE ERO extended the stay of removal until March 29, 2014.

Mr. X requests that his removal be stayed again because removing him would be contrary to the public interest due to humanitarian concerns involving his three U.S. citizen children—in particular his permanently disabled nine (9) year-old son whose condition has not improved and requires specialized attention by doctors and teachers. Moreover, his two (2) year-old daughter is currently recovering from a recent surgery.

Since May 11, 2011, Mr. X has diligently reported to your office due to an outstanding order of removal. At his reporting date with Baltimore ICE ERO on September 25, 2013, Mr. X was taken into custody by Deportation Officer (DO) Watson. Mr. X’ detention was not prompted by criminal issues, but rather by his status as a removal priority and a lack of new stay of removal application, according to DO Watson. After he was granted a stay on September 30, 2013, ICE ERO released Mr. X the next day. Following his release, Mr. X has continued to consistently report to your office, the most recent of which occurred on March 5, 2014.

In addition to the enclosed I-246 and a money order for the $155 covering the application fee,
please find documentation in support of Mr. X’ case. Baltimore ICE ERO is already in possession of Mr. X’ valid passport. As such, please see attached a copy of his passport identification page.

Statement of Law and Applicable Regulations

Section 241.6 of the Regulations provide that an alien under a final order of removal may apply for a stay of that order. As required by the Regulations, this application for a stay of removal, along with required fee, is being filed with the district office having jurisdiction over Mr. X’ case.

The Regulations state that in making a determination on the application for stay, ICE should take into account the humanitarian considerations found at Section 241(c) of the Immigration & Nationality Act and at Section 212.5 of the Regulations, which discusses the parole of aliens into the United States. Section 212.5(b)(5) of the Regulations applies to Mr. X’ case because it addresses aliens whose removal is not in the public interest.

Argument

I. MR. X’ REMOVAL SHOULD BE STAYED BECAUSE HIS REMOVAL WOULD BE CONTRARY TO THE PUBLIC INTEREST

A. Mr. X merits a stay of removal because he is the father of three U.S. children and the sole source of financial support for his family.

On balance, Mr. X does not fall within ICE’s enforcement priorities. He is the father of three U.S. citizen children, including one who is permanently hearing impaired in both ears, and provides sole financial support to his children and wife.

In his June 2011 memorandum on prosecutorial discretion, then Director John Morton stated that ICE officers should consider all relevant factors, such as having strong ties to the United States, having U.S. citizen children, and being a primary caretaker of a person with a mental or physical disability.1 Moreover, Acting Director John Sandweg issued a memorandum on parental interests and immigration enforcement on August 23, 2013 that asks ICE officers and personnel to pay close attention to enforcement actions that negatively affect the parental rights of alien parents with minor children and to safeguard these rights.2 That memo further states that if an ICE Field Office learns that an alien in custody is a parent or guardian of a minor child, that office “should reevaluate any custody determination to the extent permitted by law and in accordance with existing ICE policy.”3

1 John Morton, ICE Director, Memorandum on Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens, 4-5 (June 17, 2011) (hereinafter Morton Memo).
2 John Sandweg, ICE Acting Director, Memorandum 11064.1, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013).
3 Id. at ¶5.2(2).

Felipe X – AXXXXXXX
An exercise of prosecutorial discretion should be based on the totality of circumstances. Any decision should be in line with ICE’s four enforcement priorities: (1) individuals who are a national security risk; (2) individuals with lengthy and/or serious criminal records; (3) known gang members or individual who are “a clear danger to public safety”; and (4) individuals with “egregious … immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.”

Though they have been a cohabitating couple for longer than they have been married, Mr. X married his wife X on March 15, 2011. Together they live with their two sons, and one daughter: nine (9) year-old X, four (4) year-old X, and two (2) year-old X, all born in the United States.

Mr. X is in fact X’s stepfather. The Immigration and Nationality Act defines a stepchild as fitting the “parent” and “child” relationship “provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred.” X was only four (4) years-old when Mr. X met his wife, X’s mother, and the two married when X was six (6) years-old. X’s biological father has been wholly absent from X’s life. Since X was 4-years-old, Mr. X has been the parent who put him to bed and fed him when he was hungry, and at times asked for Mr. X more than his mother. Thus, Mr. X has been X’s only father and X’s reactions to Mr. X’ detention by ICE reflect this sentiment. During Mr. X’ detention, X has been the child most visibly affected by his father’s absence.

In addition to his hearing-impaired son, Mr. X’ infant daughter X also significantly relies on her father’s care and financial support. On January 8, 2014, she underwent surgery for hypertrophy of the tonsils and requires home care and follow-up appointments.

Since June 2012, Mr. X has been a Packing Supervisor at X in Hyattsville MD, and because his wife is a stay at home mom, he is the sole breadwinner for his family. X, the owner of X, attests that Mr. X is not only an invaluable employee who has earned a management position through hard work, but he is also a person of solid character. According to him, without Mr. X, “the business at X will suffer as will the many employees currently

---

4 Morton Memo 5.
5 X Declaration, ¶ 1.
6 INA § 101(b)(1)(B); See Matter of Morales, 25 I&N Dec. 186 (BIA 2010) (citing Matter of G-, 8 I&N Dec. 355, 359 (BIA 1959)). This reasoning has also been followed for purposes of determining hardship to family members in the context of considering eligibility for discretionary relief.
7 X Declaration, ¶ 14.
8 Id. at ¶ 16.
9 Id. at ¶ 17.
10 Id. at ¶ 19.
11 Id. at ¶ 20; see also X Declaration, ¶ 6.
12 See Documents from Children’s National Medical Center regarding X’s surgery for hypertrophy of tonsils (Jan. 8, 2014) and detailing care instructions (Jan. 22, 2014).
13 X Declaration, ¶ 2; see also Letter from X, General Manager of X (Sept. 25, 2013).
14 Letter from X, Owner of X (Mar. 4, 2014).
The Director of Logistics describes Mr. X as having a “tireless work ethic,” has helped the company to “grow exponentially” during his time there, and is “both a vocal leader and a leader by example.” In addition, the Vice President of Operations confirms that Mr. X’s leadership qualities and skills has “quickly set him apart” and supports granting him a visa that would “allow him to remain a valuable employee at ________.” Fifty-two (52) employees at ________ have signed a petition in support of Mr. X’s stay request.

B. Mr. X’s 9-year-old son ________ has a permanent hearing disability.

_______ has sensorineural hearing loss in both ears requiring the permanent use of hearing aid. Sensorineural hearing loss involves malformation, dysfunction, or damage to the inner ear (cochlea). It often exists at birth and the hearing loss is usually permanent. Sometimes the loss is progressive and therefore requires the administration of repeat audiologic testing.

It is well-known that in the first few years of life, “hearing is a critical part of a kids’ social, emotional, and cognitive development. Even a mild or partial hearing loss can affect a child’s ability to speak and understand language.” Unfortunately, because ________ was diagnosed at the age of four and he did not receive early intervention means, he now must receive close monitoring to determine the full extent of his needs and how best to serve them to allow him to succeed in life despite his disability.

In addition to the hearing aid that ________ will need to use for the rest of his life, ________ also needs speech language therapy and special education accommodations. ________ attends Andrew Jackson Academy, where he is a student of the Deaf and Hard of Hearing Program. ________ wears a hearing device during school hours for all instruction and is making progress with his academic goals while managing his disability. He receives audiological and direct support services from a teacher of the deaf/hard of hearing in order to ensure he is accessing the

15 Id.
16 Letter from X, Director of Logistics at ________ (Mar. 6, 2014).
18 See Signed Petition by 52 employees of ________ in support of ________ and asking DHS to approve his application for a stay of removal.
21 Id.
22 Id.
23 Id.
24 ________ X Declaration, ¶ 22-24.
25 ________ X Declaration, ¶ 4.
26 Id.
general education curriculum. The school audiologist stays in contact with his outside audiologist to monitor ’s hearing levels.

A team of doctors and specialists treat and monitor ’s disability at the Children’s Hearing and Speech Center at Washington, DC Children’s Hospital. continues to visit for audiological and hearing aid evaluations. According to his doctor, his hearing loss requires frequent monitoring and medical appointments. Mr. X is listed as ’s primary caregiver on medical records. He is also the parent who takes to his doctor’s appointments and follows up with medical recommendations, because ’s mother does not drive and Mr. X is the parent that best understands the doctors’ treatment and care instructions. If Mr. X is removed to Mexico, has two options neither of which will serve his best interests nor support his disability treatment.

C. If Mr. X is removed to Mexico, his family, especially his disabled son, would suffer extreme hardship.

If Mr. X is removed to Mexico, he and his family would face two difficult options: either (1) to move the entire family to Mexico; or (2) to have his wife and children stay in the United States without him. Both options would result in extreme hardship his family, especially his disabled stepson .

1. To move to Mexico with Mr. X would lead to ’s hearing disability deteriorating and potential institutionalization where he would be mistreated and at risk of being trafficked.

If Mr. X were not granted a stay of removal, he would have to return to Mexico, specifically to the small town of Teutla in the State of Puebla, where he grew up and the rest of his family resides. Teutla is home for 564 inhabitants with the median education being about 5 years of school and approximately 68 inhabitants are still illiterate. That means that would have to move to a country he has never known and that does not provide the specialized treatment and therapy he requires.

is currently enrolled in a program at Andrew Jackson Academy that is specifically designed to meet the needs of students with hearing disabilities. According to , the

---

28 Letter from X, Chairperson, Andrew Jackson Academy (Feb. 19, 2014).
29 Id.
30 X Declaration, ¶ 4.
31 See Audiological Evaluation conducted by , Ph.D. C.C.C.-A., Children’s Hearing and Speech Center, Children’s Hospital, Washington DC (Jan. 6, 2014).
33 See Children’s National Medical Center, Hearing and Speech Center Receipt (Dec. 12, 2013).
34 See Letter from X, Ph.D., C.C.C.-A., Children’s Hearing and Speech Center, Children’s Hospital, Washington DC (Mar. 12, 2014); see also Declaration, ¶ 7.
35 Felipe X Declaration, ¶ 8.

Felipe X – ABBBBBB
chairperson of his program, the school provides direct support services and without such
continued services, is unlikely to reach his full capabilities as an adult. His teacher describes
him as a very focused student who is willing to maximize his learning opportunities. Among other listed strengths, attends class every day, comes prepared with materials, gets along with other students, has a positive attitude, participates in class, and thinks creatively. He also received a 3.214 GPA during the first quarter of the 2013-2014 school year with A’s in Math, Art, Music, Physical Education, Social Skills, and Work Habits. On February 28, 2014, received Certificates of Citizenship for Outstanding Social Skills, Exceptional Performance in Mathematics, Superb Science Skills, and a 3.0 GPA or above. continues to thrive at his new school in Maryland.

On the other hand, will not receive the necessary support that he needs in Mexico. The prevalence of sensorineural hearing loss across different age groups in developing countries has been studied very little and in Mexico, no study on the prevalence of sensorineural hearing loss in children has been carried out. Moreover, the reach of the special education services in Mexico compared to the entire school-aged population is not far or deep. According to the Mexican Education Department only 8% of all schools provide special education services through middle school, and the majority of the locations offering special education services are in urban areas or densely populated counties. The data also shows a clear bias towards providing services to wealthier cities than rural communities. Being a small rural community, Teutla is definitely not the place where would be able to receive the services he needs to cope with his hearing disability, and any services he may be able to access would not compare to those he currently receives in the United States.

According to doctor, “it is in ’s best medical and developmental interests to remain in the United States in his current family structure.” requires frequent monitoring and Mexico may lack the pediatric audiologists and financial help that he currently receives in Maryland. Even if services are available in Mexico, Mr. X would not be able to have receive the specialized treatment, therapy, and special education he needs because

37 See Letter from X, Chairperson, Andrew Jackson Academy (Feb. 19, 2014).
38 See Comments from X, ESOL teacher, Parent/Teacher Conference Form (Nov. 11, 2013).
39 See id.
40 See Report Card from Prince George’s County Public Schools, Andrew Jackson Academy (Nov. 4, 2013).
41 Dr. X, Principal, Andrew Jackson Academy, Certificates of Citizenship for Outstanding Social Skills, Exceptional Performance in Mathematics, Superb Science Skills, and a 3.0 GPA or above (Feb. 28, 2014).
44 John P. Tuman et al., Autism and Special Education in Mexico, 2 GLOBAL HEALTH GOVERNANCE 7 (2008).
46 See id.
those services are available in another part of the country—in urban areas—and Mr. X would not have the necessary economic resources to travel.\textsuperscript{47} Mr. X will lack the resources because his age combined with his six years of schooling and previous work as a subsistence farm worker will subject him to few limited job opportunities.\textsuperscript{48}

Furthermore, even in urban areas where these services are provided, they are far from adequate to attend to the needs of special education students. In Mexico, there are two methods of providing special education to children with disabilities: Unit of Support Services for Regular Education (USAER) and Center of Multiple Attention (CAM).\textsuperscript{49} USAERs are multidisciplinary special education support groups for children with disabilities, who can be in regular classrooms, and these groups are supposed to work in coordination with the regular teachers. CAMs are centers for children with more severe disabilities, who cannot be integrated into the regular classrooms.\textsuperscript{50}

At first, Mr. X would presumably be placed in the general education classes with USAER support group. This system is far from even being adequate to meet the needs of all Mexican children with disabilities. Regular teachers do not have the necessary training, and as a result, they have no idea how to proceed with special needs children.\textsuperscript{51} Each USAER team is responsible for five schools within their district and thus cannot provide the time or resources expected by the regular classroom teachers and their special needs students.\textsuperscript{52}

Moreover, each school is assigned two-resource special education teachers, but they work on a different schedule than the regular teachers, and the specialists (i.e. psychologists, speech and language pathologist, and social worker) provide assistance only one day a week to each school in their sector.\textsuperscript{53} This sporadic schedule does not allow these professionals to adequately coordinate the students’ needs let alone provide the time to coordinate and educate parents on how best to work with the school in meeting the special needs of their child, which is crucial for these special needs students to become productive members of society. Finally, not every school is assigned a team due to shortage of prepared personnel.\textsuperscript{54}

If Mr. X’s condition deteriorates, as is expected, he would probably have to attend a CAM Center, particularly a Deaf/Hard of Hearing School. This does not present a better prospect for either. Owing to lack of personnel, teachers at the CAM who were trained in one special education discipline are required to work with children whose disability requires specific training that these teachers do not possess. Thus, specialists in visual impairment work with children with hearing impairment; teachers accustomed to working with children with mental

\begin{itemize}
\item[47] Teutla, Puebla is located 204 km from Mexico City, which requires three hours of travel by car.\textsuperscript{47}
\item[48] Felipe X Declaration, ¶ 11.\textsuperscript{48}
\item[49] Todd Fletcher et al., \textit{The Changing Paradigm of Special Education in Mexico}, 27 BILINGUAL RES. J. 409, 411 (2003).\textsuperscript{49}
\item[50] See id.\textsuperscript{50}
\item[51] Id. at 424.\textsuperscript{51}
\item[52] Id. at 420.\textsuperscript{52}
\item[53] Id.\textsuperscript{53}
\item[54] Id. at 421.\textsuperscript{54}
\end{itemize}
retardation suddenly face the need to give speech therapy. Therefore, even if [redacted] were able to attend one of these schools, it is unlikely that he will receive the services that he needs for his condition.

Finally, because he will not receive the educational and medical services he needs and his parents will not have the financial and community support to help him, [redacted] may end up institutionalized. This is a common fate for children and adults with disabilities. Often “what is considered a ‘severe’ disability justifying institutionalization in Mexico may be an extremely minor disability that would require very limited support to families to enable them to keep their children in the community.” However, in Mexico there is little to no community support to help persons with disabilities and their families solely manage the disability.

In its November 2011 report on Mexico’s treatment of persons with disabilities, Disability Rights International (DRI) discovered that the institutionalized care of persons with disabilities was degrading, unsafe, unsanitary, and abusive. Institutional staff frequently restrained non-compliant and/or aggressive patients; also lobotomies and psychosurgery are performed on patients even though these practices have been discredited in other developed countries. Even more alarming, children with disabilities at these institutions were at a higher risk of being trafficked. Children have literally disappeared from these facilities, and the Mexican government could not give DRI the number of children, nor a simple list of the names of the disappeared children, placed in its institutions. For example, one six-year-old girl was placed in an institution though her grandmother had custody. When her parents and grandmother went to look for her, the girl had disappeared from the institution; it is believed that she was trafficked. If [redacted] had to move to Teutla, Puebla, Mexico, his disability could deteriorate due to a lack of access to the necessary treatments and educational programs. This deterioration may cause him to be unable to function, and he may be placed in a notorious inhumane and degrading institution. Placement in such an institution puts him at risk of being trafficked, a tragic and preventable outcome.

In conclusion, the special education system in Mexico will not meet [redacted]’s special education needs, speech language therapy and medical monitoring that he requires to become a productive U.S. citizen. Furthermore, [redacted] faces a significant risk that his disability will deteriorate, causing him to be placed in an institution, where he will suffer inhumane and degrading treatment and may be possibly trafficked. If [redacted] returns to the United States at some point in his future, it is in the United States’ public interest to invest in [redacted] while he is still young and his disability can be tempered. Otherwise, [redacted] is likely to come back to the United States requiring more care and resources, perhaps even life-long psychological services, especially if he

---

55 Id. at 419.
57 Id.
58 Id. at 7-10.
59 Id. at 10-13, 17.
60 Id. at 18-19, 23-24.

Felipe X – AXXXXXXXXX
is institutionalized in Mexico.

2. Remaining in the United States without Mr. X, the sole breadwinner and family coordinator, will affect the family psychologically and transform the family into a single-parent family that lacks a source of income and someone to drive *him* to his medical appointments.

The only other option remaining for *him* would be to stay in the United States with his mother and siblings and face a financially precarious future because Mr. X is the breadwinner of the family. Either option will be very detrimental to *his* development as a productive member of society in spite of his disability. His mother already has her hands full taking care of his 4-year-old brother and 2-year-old sister, who is currently recovering from surgery. His mother readily admits that she relies on Mr. X to help care for all the children and to take *him* to his frequent doctors’ appointments.62 Mr. X’s doctor describes Mr. X as primarily responsible for *his* appointments and is very consistent with following through with medical recommendations.63 Mr. X is also the primary contact for *his* school matters, and according to the chairperson of *his* program, Mr. X has gone to the school many times over the past year to talk with the staff and find out how *he* is doing.64 According to her, it is obvious how attached *he* is to his father and how essential Mr. X is to *his* progress.65

Though *his* school helps him with his learning and communication skills, it is largely his family who helps him not only adjust to the different hearing devices he will need as he grows into adulthood, but also to emotionally and psychologically accept his disability and to help him cope with the social and emotional challenges he will face throughout his life. Removing *his* father from the country would mean that his mother would have to focus on providing for the basic needs of her children, even though *his* disability requires much more than just the provision of his basic needs. This lack of adequate care would negatively affect his well-being because he would have to mostly cope with his disability on his own; an unreasonable expectation of a 9-year-old boy.

Furthermore, *he* and his younger siblings, *he* and *she*, would suffer psychologically if Mr. X is removed to Mexico. As stated above, *he* developed a close psychological and emotional bond with Mr. X early on in their relationship; he considers Mr. X his father perhaps because he was old enough to feel abandoned by his biological father. *He* has a unique, special relationship with his father. *His* diagnosis has brought him even closer to his father because it has been Mr. X who has coordinated *his* medical care. A study by the Urban Institute found that children, especially young children, have behavioral problems after the separation from and the deportation of a parent due to immigration enforcement.66 Emotional responses included increased anxiety, fear, anger, and withdrawal, and

---

62 X Declaration, ¶ 7.
64 See Letter from X, Chairperson, Andrew Jackson Academy (Feb. 19, 2014).
65 Id.
66 See Ajay Chaudry et al., Facing Our Future: Children in the Aftermath of Immigration Enforcement.
these changes were exhibited in very young children and persisted in longer separations. Because of Mr. X’ recent detention, has been the most affected by his absence. During Mr. X’ prior detention, ’s teachers at Beacon Heights Elementary School noticed that he was withdrawn. If Mr. X is removed, and his siblings would continue to experience behavioral changes, but is most at risk because this will be his second encounter with feelings of abandonment and the loss of his father.

In addition, Mr. X’ family would suffer financial hardship if ICE ERO removes him. Because Ms. X is a stay at home mother, she could not financially support their three children without Mr. X. Mr. X is an active parent and is the primary parent responsible for ’s hearing treatments. Ms. X would be unable to take to his frequent doctor’s appointments because she does not drive and would have to care for her younger children. Future financial difficulties due to Mr. X’ removal would affect the family’s food security, causing the children to experience hunger and loss of basic care.

 needs not only the economic support of his father but also the stability and guidance that only a complete family can provide to a child. says he loves his father and does not want to leave him. His family will not be complete if Mr. X is deported.

CONCLUSION

It would be contrary to the public interest to remove a man who is a loving husband, responsible father of three U.S. citizen children—including one who is permanently hearing impaired—the sole breadwinner for his family, needed and respected by his employer and employees, and is not a danger to society or a threat to anyone.

Thank you for your time and consideration of this application. Catholic Charities understands and respects that ICE ERO has the important task of removing unauthorized aliens from the United States. Catholic Charities also appreciates that exceptions to removal priorities exist and we respectfully request that Mr. X be considered an exception for the benefit of his U.S. children, especially who is permanently disabled.

Please do not hesitate to contact me if you have any questions about Mr. X’ case.

Respectfully submitted,

The Urban Institute, 41-48, Feb. 2010.

67 Id.
68 Letter from , Principal of Beacon Heights Elementary School (Mar. 10, 2011).
69 X Declaration, ¶ 7.
71 See Letter from X, Mr. S’ son.
Michelle Mendez, Attorney for X
Catholic Charities of the Archdiocese of Washington
Immigration Legal Services
924 G Street, NW, Washington, DC 20001
## EXHIBIT LIST FOR MR. X’ STAY OF REMOVAL APPLICATION

<table>
<thead>
<tr>
<th>EXH.</th>
<th>NAME</th>
</tr>
</thead>
</table>

### Declarations & Biographic Documents

| A. | Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. |
| B. | Form I-246, Application for a Stay of Deportation or Removal. |
| C. | Copy of Felipe X’ Mexican Passport. |

### Evidence of Hardship to U.S. Citizen Family Members

| D. | Declaration of Felipe X. |
| E. | Declaration of X, Mr. X’ Wife. |

| F. | Proof of Family Relationships:  
* Marriage Certificate for Felipe X and X  
* Birth Certificate of X  
* Birth Certificate of X  
* Birth Certificate of X  
* Family photos |


| H. | Letter from X, Ph.D., C.C.C.-A., Children’s Hearing and Speech Center, Children’s Hospital, Washington DC (Mar. 12, 2014), stating that it is in [Redacted]’s best medical and developmental interests to remain in the U.S. and describing Mr. X’ responsibilities in [Redacted]’s medical care. |

| I. | Audiological Evaluation conducted by X, Ph.D. C.C.C.-A., Hearing and Speech Center, Children’s Hospital, Washington DC (Jan. 6, 2014), stating that [Redacted] continues to be monitored for his sensorineural hearing loss and testing of hearing aids. |

| J. | Progress Report on Individualized Education Program Goals from Maryland State Department of Education (Apr. 16, 2013), showing [Redacted] must use his hearing devices during school hours and is making progress on his academic goals. |

| K. | Children’s National Medical Center, Hearing and Speech Center Receipt (Dec. 12, 2013), listing Mr. X as [Redacted] caregiver. |

| L. | Letter from Andrew Jackson Academy, [Redacted]’s Elementary School (Aug. 5, 2013), stating it has a new Deaf and Hard of Hearing Program. |
**Letter from X, Chairperson of the hearing impaired program, Andrew Jackson Academy, describing the educational support services that receives at the school and his attachment to Mr. X (Feb. 19, 2014).**

**Comments from Dr. X, ESOL teacher, Parent/Teacher Conference Form (Nov. 11, 2013), noting ’s many academic strengths and his strong focus in school.**

**Report Card from Prince George’s County Public Schools, Andrew Jackson Academy (Nov. 4, 2013), showing ’s GPA and grades.**

**Certificates of Citizenship for Outstanding Social Skills, Exceptional Performance in Mathematics, Superb Science Skills, and a 3.0 GPA or above earned by and signed by Dr. , Principal, Andrew Jackson Academy (Feb. 28, 2014).**

**Letter from X, Principal of Beacon Heights Elementary School (Mar. 10, 2011), which is ’s prior elementary school and states that ’s behavior changed during Mr. X’ previous detention.**

**Letter from X, describing how he loves Mr. X and does not want him to go to Mexico**

**Photographs of X wearing his required hearing aids.**

**Documents from Children’s National Medical Center regarding s surgery for hypertrophy of tonsils (Jan. 8, 2014) and detailing care instructions (Jan. 22, 2014).**

**Documents of Support from Employers and Colleagues**

**Letter from X, General Manager of (Sept. 25, 2013), stating that Mr. X has been employed by since June 6, 2012 and works there as a Packing Supervisor.**

**Letter from X, Owner of (Mar. 4, 2014), in support of Mr. X’ request to stay in the U.S. and describing him as an invaluable employee with solid character.**

**Letter from X, Director of Logistics at (Mar. 6, 2014), in support of Mr. X and describing his work ethic, leadership skills, and dedication to his family.**

**Letter from X, VP of Operations at (Mar. 4, 2014), in support of Mr. X and describing his leadership qualities and importance to the business.**

**Signed Petition by 52 employees of in support of X and asking DHS to approve his application for a stay of removal.**

**US ICE Policy Memos**

**Acting Director John Sandweg, ICE Memo 11064.1, Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013).**

**Director John Morton, ICE Memo on Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens (June 17, 2011).**

**Updated Evidence on Lack of Special Education in Mexico & the Treatment of Persons with Disabilities**

Felipe X – AXXXXXXX
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
Appendix I
I, [NAME], swear that the following is true and correct to the best of my knowledge:

1. My name is [NAME]. My date of birth is [DATE].
2. I am asking that DHS stay my removal so that I can continue to pursue my dream of being a nurse.
3. For the last 15 years, while working full time cleaning houses, I have also been working to complete my undergraduate degree. I started taking English as a second language classes in 2002 in order to better prepare myself for college. In 2006 I started taking college level courses at a two year educational institution and in 2011, I transferred to a four year institution. This year, I graduated from Fitchburg State University magna cum laude with a Bachelor of Science in Biology and a minor in Chemistry.
4. I decided to move forward with my education by applying for a post baccalaureate program. To my surprise, I was accepted at the Massachusetts College of Pharmacy and Health Sciences accelerated Nursing program. The program will take 16 months to complete and I will earn a Bachelor of Science in Nursing. I am currently in my second semester of the program, and expect to graduate in May of 2017.
5. I am eager to complete this program and begin working as a Registered Nurse. I really enjoy learning about health and science, especially how disease affects people.
6. I became interested in health and wellness through seminars given by my Seventh Day Adventists Church. As a nurse, I will be able to volunteer at a variety of community programs such as health fairs and community outreach events.
7. The possibilities are endless for a person who has a nursing degree. I hope that after gaining experience as a nurse, I can become a Nurse Practitioner. This will allow me to do even more for my patients.
8. If I am deported, a lot of my hard work will go to waste because my schooling will not transfer to Brazil. I will need to start over, and I cannot afford to pay for additional school. Even if I took out a loan for school, I would never be able to pay it off. The economy in Brazil is very bad. A lot of my family in Brazil is unemployed. It will be difficult to get a job as a nurse and it will not pay me enough money to pay back the loans I will need to take out to continue school.
9. Right now, I live with my husband of 15 years in a home that we purchased about ten years ago. We work together as house cleaners to support ourselves. If I am deported, it will be devastating for me and my husband. I can’t imagine being separated from him. If he stays in the U.S., he will not be able to make the mortgage payments on our house by himself. We will lose the home that we have been working to own for over 10 years.
10. I know that I can do more in the United States and live up to my fullest potential. I am kindly asking for a chance to build a better future for myself and to contribute with my skills, talents, and creativity to the country. That is why I am asking for a stay of removal.

________________________________ ______________________
[Signature]
[Name]
[Date]
I, Maria Leticia Lapop, swear that the following is true and correct to the best of my knowledge:

1. My name is Maria Leticia Lapop. I was born on August 30, 1987 in Boston, Massachusetts. I am a United States citizen.

2. I met my husband, Wilmar Lapop, around the end of 2008, when we were co-workers at Adam's Furniture in Everett, Massachusetts. I was working as a sales representative and Wilmar worked in the warehouse. We became friends there and then began dating.

3. Wilmar was so great to me from the minute we met. I have two daughters from prior relationships, Victoria (13 years old) and Saraiey (7 years old). Neither of their fathers are involved in their lives; we are not in contact with either of them. I receive child support from the father of my oldest daughter, which is automatically sent through the court. I believe the father of my youngest daughter has left the United States. We do not receive any support from him.

4. My daughters consider Wilmar to be their father. Especially the youngest one, who has known him all of her life.

5. Wilmar and I moved in together around June of 2012, when I got pregnant with our son.

6. I work at Massachusetts General Hospital as an Operating Resource Specialist. I set up the instruments that the doctors will be using in their surgeries. I have been doing this for about five years. After taxes and health insurance are taken out of my paycheck, I only take home about $420 per week.

7. If Wilmar is deported, it will be devastating for me and my children. We have already experienced losing him once, and is caused us a lot of pain and suffering, including becoming homeless.

8. In 2013, Wilmar was arrested for a DUI and driving without a license. I was about 8 months pregnant with our son when he stepped into jail, and then he stayed there for the next 17 months because of the immigration hold. Suddenly, I was the only one supporting our family and I could not do it on my own.

9. It was hard to keep up with our bills and rent with just one income. I worked until the day before I gave birth and, afterward, I used up all the paid time off that I had, but it wasn’t enough. I had to take some maternity leave without pay because I couldn’t leave my newborn.

10. Without any income, I couldn’t support myself and my three kids. I tried to seek government assistance, but I was turned down because I was still technically employed. I got really behind on paying our rent. Soon, I got a notice that the landlord wanted to evict us. I went to so many programs that try to help people avoid eviction, but none of them could help me. To them, it looked like I had income because I was employed, but I wasn’t earning any money on maternity leave.

11. In December of 2013, the sheriff came and took all of our stuff, put it in storage, and said that I couldn’t get it back until I paid the past due rent. I was able to grab a few clothes, but that’s it. We had nothing. My kids and I moved in with a friend for a few weeks, until the Department of Homeless Services put us in a Motel 6.
12. Living in the motel was difficult. We had a curfew of 7pm. I went back to work as soon as my maternity leave was up, but I had to adjust my hours so that I could make it back to the motel in time for curfew.

13. After a few months of living in the motel, we were moved to a shelter. It was filled with rats and cockroaches, so I begged to be moved as soon as possible because I had a baby there; I didn’t think it was safe. We were moved to another shelter, which was cleaner but even more strict. Even though I was working full time, I had to do chores for the shelter twice a day.

14. My daughter [redacted] suffered the most from our time without a stable home. She was always good in school, but I started getting calls that her grades were going down and she wasn’t concentrating during class. We’re still trying to catch her up from that time. I feel so guilty that this affected her so much. Luckily, the little ones didn’t understand as much about what was going on.

15. Finally, [redacted] was released from jail and we were able to move into an apartment. [redacted] was able to get his job back at [redacted], so that is how we can afford our expenses.

16. Without [redacted]’s income, I could not afford rent, babysitting, groceries, and everything else for myself and my children. [redacted]’s income is very important to our family. If [redacted] were not in the United States, I am afraid that my children and I could end up homeless again.

17. [redacted] has been a huge support for me since I met him. I was raped when I was 15 years old and that’s how my first daughter was conceived. It was a very traumatic event that still affects me to this day. Having him here lets me feel more secure.

18. My children are very emotionally attached to [redacted]. My oldest daughter feels abandoned by her biological father. She really suffered when [redacted] was in jail. As a mother, it was hard to watch her suffer and to not be able to do anything about it. If [redacted] has to go back to Guatemala, I know she will feel abandoned again.

19. I need [redacted] here to help me take care of our kids. He provides so much support to us during the day, including walking our daughters to school and cooking dinner. We really work together as a team.

20. The thought of moving to Guatemala with [redacted] is terrifying. My children and I have never been to Guatemala and it does not sound like a safe place for us, especially for me and my daughters. I know there is a lot of violence against women there. My children and I have only ever lived in the United States and it would be a shock for us to have to adapt to living in a foreign, violent country.

21. Additionally, my son has sleep apnea and suffers seizures. He’s had one surgery and is under observation now. Living in Guatemala would be dangerous for him. His life would be at stake if an ambulance couldn’t get to him in time, if he were suffering a seizure. I can’t imagine how stressful this would be for me and our family, worrying about whether he could get the medical care that he needs.

22. I know that if [redacted] is allowed to stay in the United States, he won’t get arrested again. After the hardship our family went through and him missing the first year and a half of his son’s life, he doesn’t drink at all anymore. He’s very responsible. If he’s not at work, he’s taking care of our kids.

23. For these reasons, I am asking that you please not deport [redacted].

__________________________  ______________________
Name                                           Date