CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Advisory

Stays of Removal[1]

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Table of Contents

I. Introduction 3

II. Overview of Stays of Removal 3

III. Overview of Court-Ordered Stays of Removal 5
1. Automatic Stays 6
2. Discretionary Stays 6

IV. Automatic Stays 7

V. Discretionary Stays with the IJ and BIA 8
1. Standard of Review 8
2. Overview of Filing 8
3. Contents of the Motion 9
4. Special Procedures for Filing an Emergency Stay Motion with the BIA 10
5. Checklist for Filing a Motion for a Discretionary Stay with the Immigration Court or BIA 10

VI. Stays of Removal with a U.S. Court of Appeals 11

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1. Overview of Filing 11
2. Standard of Review 11
3. Circuit Court Decisions 13
4. Contents of the Motion 14
5. Checklist for Filing a Motion for a Stay with a U.S. Court of Appeals 15

VII. Administrative Stays with the Department of Homeland Security 15

1. Overview of DHS Stays 15
2. How to Apply for a DHS Stay 16
3. Checklist for Filing a Stay Request with DHS 18

I. Introduction

This practice advisory explains how to seek a stay of removal with the immigration court, the Board of Immigration Appeals (BIA), and the U.S. courts of appeals. 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 (IJs), the BIA, and the U.S. courts of appeals all have the authority to grant stays of removal. If a stay of removal is in effect, DHS should not remove the individual from the United States.

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.

An individual with a removal order can only seek a court-ordered stay when they have a pending case seeking review of the removal order before that adjudicative body.[2] At the immigration court level, this means that an individual may seek a stay only when a motion to reopen or reconsider is pending.[3] At the BIA level, a stay can only be sought while the BIA is reviewing a direct appeal of a

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[2] *See* 8 CFR §§ 1003.2(f), 1003.23(b)(1)(v), 1003.6(a); INA §242(b)(3)(B).

[3] On December 16, 2020, the Executive Office for Immigration Review (EOIR) published a final rule on "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure," which would effectively eliminate IJs' and the BIA's authority to reopen or reconsider cases under their *sua sponte* authority. 85 Fed. Reg. 81588 (Dec. 16, 2020). However, the Northern District of California granted a preliminary injunction on March 10, 2021, preventing the rule from going into effect. *Centro Legal de la Raza v. EOIR*, No. 21-cv-00463-SI, 2021 WL 916804 (N.D. Cal. Mar. 10, 2021). Additionally, on April 4, 2021, the U.S. District Court for D.C. granted a motion to stay the rule. *CLINIC v. EOIR*, No. 21-00094 (unpublished), democracyforward.org/wp-content/uploads/2021/04/CLINIC-et-al-v.-EOIR-Stay-Order-4.4.21.pdf. Furthermore, on August 3, 2020, EOIR published a final rule for a revised fee schedule, which would increase the fee for filing a motion to reopen or reconsider to $145 if the motion is filed with an immigration court, and $895 if it is filed before the BIA. 85 Fed. Reg. 46788 (Aug. 3, 2020). On September 29, 2020, the District Court for the Northern District of California granted a preliminary injunction prohibiting EOIR from implementing some of the fee changes, including the $895 BIA fee. *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520 (N.D. Cal. 2020). The U.S. District Court for D.C. also stayed implementation of the $895 fee. *CLINIC v EOIR*, No. 20-cv-03812, 2021 WL 184359 (D.D.C. Jan. 18, 2021). However, the $145 fee was not enjoined. Therefore, the fee for a motion to reopen or reconsider filed with an immigration court is $145, while a motion filed before the BIA remains $110. On June 7, 2021, EOIR issued a policy memorandum clarifying that no fee in the final rule is being implemented other than, as relevant here, the motion to reopen fee in immigration court. *See* Jean King, *EOIR, PM 21-10,*

removal order or an appeal of a motion to reopen or reconsider, or when the BIA is considering a motion to reopen or reconsider in the first instance. At the federal appellate level, a motion for a stay can only be filed when a petition for review of a removal order 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.[4] 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.[5] On May 27, 2021, John D. Trasviña, Director of DHS Office of the Legal Principal Advisor (OPLA), issued a memo on prosecutorial discretion, reminding OPLA attorneys that "they are both authorized by law and expected to exercise discretion.[6] While the memo makes clear that other law enforcement entities, including other ICE sub-agencies "have tools at their disposal that OPLA does not, including stays of removal,"[7] the memo appears to signal a new openness at ICE and a greater focus on fairness.[8]

If an IJ, the BIA, or a U.S. court of appeals has granted a stay, DHS must take all reasonable steps to comply with that order;[9] compliance is not discretionary. 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 section VII.

Cancellation of Policy Memorandum 21-10 and Information on EOIR Fees and Fee Waivers (June 7, 2021), justice.gov/eoir/book/file/1402161/download.

[4] 8 CFR §§ 241.6(a), 1241.6(a).

[5] 8 CFR § 241.6(a) (noting that the "[t]he Commissioner, Deputy Commissioner, Executive Associate Commissioner for Field Operations, Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, regional directors, or district director, in his or her discretion and in consideration of factors listed in 8 CFR 212.5 and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate").

[6] ICE Memorandum, John D. Trasviña, "Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities," at 2 (May 27, 2021), ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf.

[7] *Id.* at 10.

[8] *Id.* at 2. ("The exercise of prosecutorial discretion, where appropriate, can preserve limited government resources, achieve just and fair outcomes in individual cases, and advance the Department's mission of administering and enforcing the immigration laws of the United States in a smart and sensible way that promotes public confidence.").

[9] 8 CFR §§ 241.6(c); 1241.6(c).

Beyond pursuing a stay of removal before the immigration court, the BIA, or a U.S. court of appeals noncitizens can also seek a stay of removal or temporary restraining order (TRO) from a U.S. district court.[10] Practitioners undertook this strategy increasingly often during the Trump administration.[11] This strategy was often necessary because of the Trump administration's heavy-handed enforcement approach that included executing orders of deportation and removal against individuals who had reported to ICE for years because ICE had been unable to remove them to their countries of origin.[12] However, some federal courts have held that federal district courts lack jurisdiction to grant relief in the form of a stay or TRO for individuals with deportation orders due to section 242(g) of the Immigration and Nationality Act (INA).[13] Practitioners pursuing a stay of removal or TRO from a district court should determine if the relevant district court has granted such relief in the past, and if the petitioner's case satisfies the four factors[14] required to receive a stay.

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.

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[10] Motions for TROs or stays of removal are governed by a four-factor test: 1) a likelihood of success on the merits, (2) that petitioner is are likely to suffer irreparable harm in the absence of such relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *See Winter v. Nat'l Res. Def. Council*, 555 U.S. 7 (2008); *Nken v. Holder*, 556 U.S. 418, 433 (2009).

[11] *See, e.g., Hamama v. Adducci*, 258 F. Supp. 3d. 828 (E.D. Mich. 2017) (granting an injunction against enforcement of the petitioners' orders of removal in order to allow their habeas claims to be heard), overruled by 912 F.3d 869 (6th Cir. 2018) (holding that the district court lacked jurisdiction to enter its preliminary injunction); *Joshua M. v. Barr*, 439 F.Supp.3d 632 (E.D. Va. 2020) (applying the four-factor analysis and granting a stay); *Compere v. Nielsen*, 358 F.Supp.3d 170 (D.N.H. 2019) (same); *Siahaan v. Madrigal*, No. PWG-20-02618, 2020 WL 5893638 (D. Md. Oct. 5, 2020) (same).

[12] *See* Alicia A. Caldwell and Alex Leary, *U.S. Cities Prepare for Federal Immigration Raids*, WALL ST. J. (June 22, 2019), wsj.com/articles/u-s-cities-prepare-for-federal-immigration-raids-11561166739; Agnes Constante, *Cambodian Refugees in Northern California are facing deportation*, NBS NEWS (Mar. 25, 2019), nbcnews.com/news/asian-america/cambodian-refugees-northern-california-are-facing-deportation-n987196; Layla Mahmood, *Deported from the US to a Somali danger zone*, BBC (July 4, 2018), bbc.com/news/world-africa-44551333; Abigail Hauslohner, *Dozens of Iraqi nationals swept up in immigration raids in Michigan, Tennessee*, Wash. Post. (June 12, 2017), washingtonpost.com/national/dozens-of-iraqi-nationals-swept-up-in-immigration-raids-in-michigan-tennessee/2017/06/12/58e0524a-4f97-11e7-be25-3a519335381c_story.html.

[13] *See, e.g., Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018); *Ashqar v. Hott*, No. 1:19-cv-716, 2019 WL 2712276 (E.D. Va. June 5, 2019); *Majano Garcia v. Martin*, 379 F.Supp.3d 1301 (S.D. Fla. 2018); *Adan v. Sessions*, No. 17-5328, 2017 WL 6001740 (D. Minn. Dec. 4, 2017).

[14] *See supra* note 7.

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 U.S. court of appeals. 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 with the BIA;[15]
- If an appeal of an immigration court decision ordering removal is timely filed, removal is stayed pending adjudication of the appeal by the BIA;[16]
- If a motion to reopen and rescind an *in absentia* order is filed pursuant to INA §240(b)(5)(C), removal is stayed pending a decision on that motion;
- 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 Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[17] is filed, removal is stayed pending adjudication of the appeal;[18]
- If a case is certified to the BIA, removal is stayed pending a BIA decision;[19] 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,[20] removal is stayed pending a decision on the motion or appeal.[21]

2. Discretionary Stays

Where a stay is not automatic, practitioners may seek a stay as a matter of discretion. A practitioner may ask the IJ to stay a client's removal during review of a motion to reopen or reconsider that does not qualify for an automatic stay.[22] A practitioner may 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.[23] A practitioner may 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.[24]

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[15] 8 CFR § 1003.6(a).
[16] *Id.*
[17] 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 INA providing for an automatic stay when the denial of a motion to reopen an *in absentia* order is appealed to the BIA.
[18] 8 CFR § 1003.6(a); BIA Practice Manual Ch. 6.2(a) (last updated Dec. 30, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/2.
[19] 8 CFR § 1003.6(a).
[20] *See* Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), Pub. L. No. 106-386, div. B, tit. V, 114 Stat. 1464, 1518-537 (2000).
[21] INA § 240(c)(7)(C)(iv).
[22] 8 CFR § 1003.23(b)(1)(v).
[23] 8 CFR § 1003.2(f).
[24] INA § 242(b)(3)(B); Fed. R. App. P. 8(a)(2).

To obtain a discretionary stay, a practitioner 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.[25] 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 underlying motion to reopen or reconsider, or denies the petition for review. If the practitioner seeks review of the denial of a motion to reopen or reconsider, or asks a U.S. court of appeals to reconsider a denial of a petition for review, the stay will not continue automatically. A practitioner must file a new written request for a discretionary stay with the U.S. court of appeals in which the client is seeking review of the removal order.

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, if a practitioner is filing a motion to reopen that includes an automatic stay, they should 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 they believe the automatic stay applies. Additionally, if the client may be facing imminent removal, practitioners should serve a copy of the motion on the local Immigration and Customs Enforcement (ICE) Field Office, in addition to serving the OPLA.[26] Where a stay is automatic, the IJ or BIA generally will not issue a written order indicating that a stay has been granted.[27] 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 immigration court or the BIA received the motion.

The automatic stay is valid until there is a decision on the appeal or motion to reopen.[28] 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 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.

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[25] There is an exception for motions for stays filed with the U.S. courts of appeals for the Second, Third, and Ninth Circuits. *See infra,* note 48, for more details.

[26] A list of ICE Field Offices is available at ice.gov/contact/field-offices. A list of DHS Offices of the Principal Legal Advisor is available at ice.gov/contact/legal#wcm-survey-target-id.

[27] In 2020, EOIR moved both the Immigration Court Practice Manual and BIA Practice Manual onto a webpage titled EOIR Policy Manual. BIA Practice Manual Ch. 6.2 (last updated Dec. 30, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/2.

[28] *See* 8 CFR § 1003.23(b)(4)(iii)(C); BIA Practice Manual Ch. 6.2(d).

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 section VI.2. below, for guidance.

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[29] or the BIA Practice Manual.[30] 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 a practitioner is unsure who has administrative control over the record, they 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. Practitioners can also check case status on the EOIR website.[31]

There is no fee for filing a motion for a stay with the immigration court or BIA.[32] 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.[33] When a discretionary stay is granted, the court will issue a written order,[34] which may be visible to deportation officers in their records system, but should also be communicated directly to the local ICE Field Office, particularly in an emergency

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[29] In 2020, EOIR moved both the Immigration Court Practice Manual and BIA Practice Manual onto a webpage titled EOIR Policy Manual. The Immigration Court Practice Manual was renamed the OCIJ, or Office of Chief Immigration Judge, Practice Manual. It can be found on the EOIR website at justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual. This advisory will continue to refer to this manual as the Immigration Court Practice Manual, or ICPM.
[30] The BIA Practice Manual can be found on the EOIR website at justice.gov/eoir/eoir-policy-manual/iii.
[31] portal.eoir.justice.gov/InfoSystem/Form?Language=EN.
[32] BIA Practice Manual Ch. 3.4(b) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/3/4.
[33] *Id.* at 6.3(c)(2)(A) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[34] *Id.* at Ch. 6.3(e) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.

situation. The stay is valid until the court or BIA issues a decision on the motion to reopen or reconsider.[35]

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.[36] Practitioners should explain in detail the changed circumstances or new relief available that is the basis for the motion to reopen. The motion for a stay should address, with specificity, the harm that the individual or family members would suffer if the individual is removed. Practitioners can cite directly to the motion to reopen and the supporting exhibits.

If the motion is being filed as an emergency, the motion should explain why removal is imminent.[37] The motion should include as one of the exhibits, a copy of the removal order and the IJ or BIA written decision, if any.[38] If the IJ issued an oral decision ordering removal and there is a transcript available, the practitioner may wish to include the transcript of the decision if it would be helpful to understanding the basis for the motion to reopen. If there is not time to obtain a copy of the decision or a transcript, the practitioner should describe the decision 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."[39] 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."[40] 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.

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[35] *Id.* at Ch. 6.3(f) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[36] *Id.* at Ch. 6.3(c)(1) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[37] *Id.* at Ch. 6.3(c)(2)(A) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[38] *Id.* Ch. 6.3(c)(1) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[39] *Id.* Ch. 6.3(c)(2) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[40] *Id.*

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.[41] 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, there are companies that provide same-day filing at the BIA. The BIA has a specific phone number for handling emergency stay motions: 703-306-0093. Practitioners should confirm receipt of their motion and then contact the BIA Emergency Stay Unit number. A clerk may be able to help get the motion to a BIA member for a quick decision. If the practitioner knows the name and contact information for the individual's ICE deportation officer, the practitioner may share this information with the Emergency Stay Unit. The Unit can then 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 and benefits of having the BIA reach out to the deportation officer prior to the issuance of a decision.

If a practitioner has filed a motion for a stay as a non-emergency motion, but the circumstances have changed 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.[42] 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.[43]

In general, if removal appears imminent and an immediate decision is needed to stay removal, practitioners should prepare a motion and contact the BIA Emergency Stay Unit 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.

[41] *Id.* at Ch. 6.3(c)(2)(A) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[42] *Id.* Ch. 6.3(c)(2)(A) (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/3.
[43] *Id.* Ch. 6.4 (last updated Dec. 22, 2020), justice.gov/eoir/eoir-policy-manual/iii/6/4.

VI. Stays of Removal with a U.S. Court of Appeals[44]

1. *Overview of Filing*

An individual can seek a stay of removal with a U.S. court of appeals if they are filing a petition for review of a BIA removal order or the BIA's denial of a motion to reopen a removal order.[45] There is a 30-day period for filing the petition for review after the BIA's order.[46] However, unlike 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.[47] Additionally, except in the U.S. courts of appeals for the Second, Third, and Ninth Circuits, the mere filing of the petition and motion for a stay does not stay the removal order.[48] Until the court grants a stay, DHS may remove the individual.

The motion for a stay should be filed with the same court where the petition for review is pending, which is the court of appeals that has jurisdiction over the removal order. Practitioners may file the motion for a stay 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 review the court's local rules and 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:

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[44] For a more detailed discussion on seeking stays of removal in the court of appeals, refer to this practice advisory: American Immigration Council, et al., *Seeking a Judicial Stay of Removal in the Court of Appeals* (Jan. 24, 2014), americanimmigrationcouncil.org/sites/default/files/practice_advisory/seeking_a_judicial_stay_of_removal_fin_1-21-14.pdf.

[45] INA § 242(b)(3)(B); F. R. App. P. 8(a)(2).

[46] INA § 242(b)(1).

[47] INA § 242(b)(3)(B).

[48] *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 ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf. The Ninth Circuit General Order 6.4(c), available at cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders.pdf, provides that, "[u]pon 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).

- 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.[49] 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.[50]

For the first factor, the individual cannot merely show that there is some possibility of prevailing in the petition for review.[51] However, the Ninth Circuit has stated that "petitioners need not demonstrate that it is more likely than not that they will win on the merits."[52] The motion should raise serious legal questions, or have a reasonable probability or fair prospect of success.[53] To show that the petitioner has a reasonable probability of success, practitioners filing a stay request for their client must describe the arguments that will be laid out in the brief in support of the petition for review. Although the 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.[54]

On the second factor, a mere showing that the individual will be removed from the United States is not enough to demonstrate irreparable harm.[55] They must explain what individual circumstances will lead to irreparable harm during their 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.[56] The facts and evidence used to demonstrate irreparable harm at the federal court level will be similar to the facts and evidence discussed in section 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. Practitioners therefore may consider arguing that their client could suffer irreparable injury by not being able to attend future immigration proceedings, or by 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.

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[49] *Nken v. Holder*, 556 U.S. 418, 433 (2009).
[50] *Id.* at 434.
[51] *Id.* at 434.
[52] *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).
[53] *Id.* at 971.
[54] *See 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.)
[55] *Nken v. Holder,* 556 U.S. at 434-35.
[56] *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001).

For the third and fourth factors, the Court in *Nken*, noted that the interests of DHS and the public may overlap.[57] 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 their stay in the United States by abusing the appeals process.[58] The Court found, however, that the public also has an interest in preventing noncitizens from being wrongfully removed.[59]

3. *Circuit Court Decisions*

<u>Cases Denying a Stay:</u>

- *Blake v. U.S. Att'y Gen.*, 945 F.3d 1175 (11th Cir. 2019). Stay denied where the petitioner failed to present a strong showing that he was likely to succeed on the merits of his motion to reopen seeking relief under the Convention Against Torture.

- *Slyusar v. Holder*, 740 F.3d 1068 (6th Cir. 2014). Stay denied where petitioner failed to show a likelihood of success on the merits, even though she satisfied the other factors required to grant a stay. The court ultimately denied her petition for review, and therefore denied her stay request as moot.

- *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.

- *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

[57] *Nken v. Holder,* 556 U.S. at 435-36.
[58] *Id.*
[59] *Id.* at 436; *See also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."); *Jordan v. De George*, 341 U.S. 223, 231 (1951) (recognizing the "grave nature of deportation" and that it is a "drastic measure and at times the equivalent of banishment or exile"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); *Dillingham v. INS*, 267 F.3d 996, 1010 (9th Cir. 2001) (noting that "[t]he private liberty interests involved in deportation proceedings are indisputably substantial"), overruled on other grounds by *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011); *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (noting that the Court has "long recognized that deportation is a particularly severe 'penalty'").

granted, he had no substantial family ties in the United States, and he failed to show a likelihood of success on the merits.

- *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.

Cases Granting a Stay:

- *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, staying his removal would not harm DHS or the public interest because his removal was not based on criminal convictions.

- *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.

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. Practitioners may find specific local rules on each U.S. court of appeals' 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 and should be as detailed as possible. If the practitioner is filing the stay before the brief in support of the petition for review, 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 their 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.[60] 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*[61]

- Notice of Appearance
- Motion to Stay Removal
- Exhibits, including a copy of the BIA decision and relevant excerpts of the record

VII. Administrative 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. Practitioners should request a stay 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.[62] But a stay from DHS can also be requested where the individual is not pursuing any legal relief.

It may be 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 depend on the local field office with jurisdiction over the individual. Some individuals receive stays by showing strong ties to the United States and lack of a criminal record. More often, individuals need to present some exceptional medical or humanitarian concern in order to obtain a stay.

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 seeking review of the removal order. However, once a court has denied a motion for a stay, DHS is unlikely to use its discretion to stay removal.

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[60] Contact information for OIL is available at justice.gov/civil/contact-us.

[61] While immigration practitioners may be used to certificates of service, where all parties are being served electronically, no certificates of service are required. *See* Fed. R. App. P. 25(d)(1).

[62] *See ASISTA v. Albence*, No. 3:20-cv-00206-JAM (D. Conn. Mar. 18, 2021) (unpublished) (granting the motion to stay subject to interim conditions, which include prohibiting ICE from denying stay requests for U visa petitioners); ASISTA, "ASISTA Practice Pointer: Assessing Whether to File a U Visa Petition for Victims at Risk of Removal" (Nov. 2019), asistahelp.org/wp-content/uploads/2020/09/ASISTA-Practice-Pointer-Assessing-Whether-to-File-a-U-Visa-Petition-for-Victim-at-Risk-of-Removal-Nov.-2019.pdf; ICE, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sep. 25, 2009), ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf.

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 a client with a final order of removal. 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. Otherwise, practitioners should know that submitting an application for a stay with DHS will highlight the existence of the individual and may place them at greater risk for removal by DHS.

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[63] 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 endpoint 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 section V.3., related to court-ordered stays should be similarly addressed in the cover letter to DHS. These factors include:

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[63] Form I-246 is available on the ICE website at ice.gov/sites/default/files/documents/Document/2017/ice_form_i_246.pdf.

- 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 suggested forms 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[64]
- School records, such as graduation certificates, report cards, or evidence that the applicant is enrolled in school
- Tax returns or other proof that the applicant has complied with tax filing requirements,[65] 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

[64] Practitioners should be aware of and counsel the client on the potential consequences of submitting evidence of unauthorized employment.

[65] Practitioners should be aware of and counsel the client on the potential consequences of submitting evidence of incorrect tax-filings. For example, erroneously filing taxes as "head of household."

- If the individual does not have a passport, evidence that the individual has applied for a passport from their 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 or Representative[66]
- 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

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[66] Form G-28 is available on the USCIS website at uscis.gov/sites/default/files/files/form/g-28.pdf.