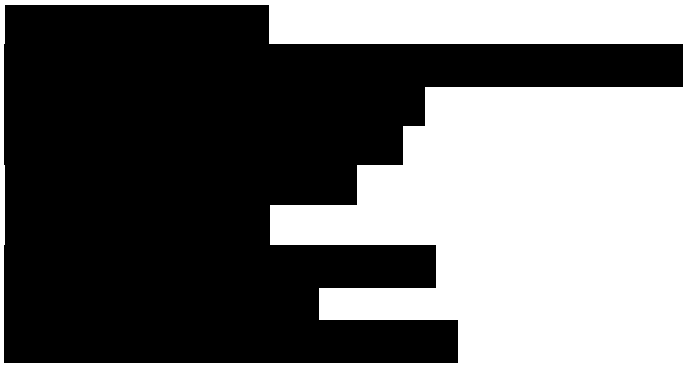

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE BOARD FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

FALLS CHURCH, VIRGINIA

In the Matter of:

[redacted]

Respondent,

In Removal Proceedings.

[redacted]

RESPONDENT'S EMERGENCY MOTION FOR STAY OF REMOVAL PENDING DECISION ON MOTION TO REOPEN

I. INTRODUCTION

Respondent, [redacted] ("[redacted]" or "Respondent"), hereby respectfully moves this Board of Immigration Appeals ("BIA") to stay his removal pending the outcome of his Motion to Reopen Based on U.S. Citizenship Claim, Ineffective Assistance of Prior Counsel, and Alternative Motion to Reopen *Sua Sponte* that was filed on April 2, 2019, and is currently pending. *See* Exhibit 1 (Proof of MTR Filing).[1] [redacted] is in Immigration and Customs Enforcement ("ICE") custody and is facing imminent removal to Liberia, a country he has not been to in almost 30 years.

With his motion to reopen, [redacted] presented evidence that he is a U.S. citizen. "To deport one who so claims to be a citizen obviously deprives him of liberty." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Moreover, to deport a U.S. citizen would "raise serious constitutional concerns." *Dessouki v. Attorney Gen. of United States*, 915 F.3d 964, 967 (3d Cir. 2019). Therefore, to deport [redacted] who has a compelling U.S. citizenship claim that has never before been considered by the BIA, would cause not only substantial and immediate irreparable harm to [redacted] but also would be contrary to the government's interest and the public interest.

[redacted] has a strong likelihood of prevailing on the merits of his motion to reopen. The evidence submitted with his motion to reopen establishes that [redacted] derived U.S. citizenship under former Immigration and Nationality Act (INA) § 321(a). On August 10, 1995, [redacted] who was 16 years old at the time, entered the United States as a lawful permanent resident based on a petition filed by his U.S. citizen father. He immediately began residing in the physical and

[1] The Attachments referenced in this Motion for a Stay of Removal are the attachments to the Motion to Reopen that is pending with the BIA. *See* Exhibit 1 (Proof of MTR Filing).

legal custody of his U.S. citizen father. [redacted] parents were in a presumed marriage, which is the equivalent of a common-law marriage, and is recognized under Liberian law. *See* Att. K (Liberia Codes of Law Revised, Title 1, Civil Procedure Law, Section 25:3). They subsequently separated, and [redacted] father married a U.S. citizen in 1987, constituting a "legal separation" from [redacted] mother. *See Morgan v. Attorney Gen. of U.S.*, 432 F.3d 226, 234 (3d Cir. 2005); *Montes de Oca-Montero v. Attorney Gen. of the U.S.,* 205 F. App'x 67, 70 (3d Cir. 2006). In addition, [redacted] warrants reopening due to ineffective assistance of counsel by his prior attorney Mr. [redacted], who failed to investigate or present the critical legal argument and evidence related to [redacted] citizenship claim. [redacted] also requested that the BIA reopen his case *sua sponte.*

[redacted] faces deportation to Liberia, a country he has no close family relationships. All of his family is here in the United States, including his three U.S. citizen children, U.S. citizen father, U.S. citizen step-siblings, and U.S. citizen partner. He requests a stay to have his claim to U.S. citizenship considered and to prevent separation from his U.S. citizen family.

[redacted] clearly warrants a stay of removal pending full review of the merits of his pending motion to reopen.

II. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

[redacted] was born in Lower Buchanan, Grand Bassa County, Liberia on June 24, 1979. Attachment ("Att.") A (Declaration of [redacted] Att. B ([redacted] Birth Certificate). [redacted] was born to his father [redacted] (hereinafter [redacted] and his mother [redacted] (hereinafter [redacted] Att. B ([redacted] Birth Certificate). Even though they did not have a formal marriage ceremony, [redacted].

[redacted] father and mother considered themselves to be married. Att. H (Declaration of [redacted] ("Father's Decl.")); *see also* Att. I (Declaration of [redacted] ("Uncle's Decl.")) ("my brother and [redacted] were in a common law union."); *see also* Att. K (Liberia Codes of Law Revised, Title 1, Civil Procedure Law, Section 25:3) (stating "Persons who live together as husband and wife and hold themselves out as such are presumed to be married."); Att. J (Declaration of Liberian Attorney [redacted] ("[redacted] Decl.")). Both of their parents were supportive of the relationship. Att. H (Father's Decl.). The couple's union was well-known in the community and they were considered married by those who knew them. *Id.*; Att. I (Uncle's Decl.) (everyone in the community "knew that [redacted] and my brother were a couple and everyone saw them as being in love and married.").

Meanwhile, in April 1980, there was a coup in Liberia, led by Samuel Doe, and a period of political unrest followed. Att. H (Father's Decl.); *see also* Atts. QQ-TT (Country Conditions Evidence). Doe created a regime call the People's Redemption Council (PRC), which began actively recruiting young men into the military. *See* Att. H (Father's Decl.). In 1981, [redacted] father and his brother "moved to Monrovia, the bigger city, where it was easier to hide and avoid being recruited into the PRC." *Id.* Because [redacted] father knew he may be in danger even in Monrovia, he could not take [redacted] with him. Att. H (Father's Decl.). [redacted] mother needed to stay in Buchanan and "live with her parents, as it was culturally important for her to care for them, especially given what was going on politically." *Id.* [redacted] parents "both decided and agreed that [redacted] would be in [[redacted] father's] custody," but would continue living in Buchanan with his paternal grandparents for the time being. *Id.*

When [redacted] father moved to Monrovia, he hoped to be reunited with his wife, but as time passed, the country continued to be unstable, and it proved nearly impossible for [redacted]

[redacted] parents to communicate. Att. H (Father's Decl.). Around 1984, the couple formally separated. *Id.*

[redacted] father came to the United States around 1986, and [redacted] remained in Liberia with his paternal grandparents. Att. A ([redacted] Decl.). [redacted] and his grandparents then moved to the Ivory Coast around 1989, when Liberia entered a civil war. *Id.* Meanwhile, [redacted] father met and later married a U.S. citizen, [redacted], on March 19, 1987 in Toledo, Ohio. *See* Att. H (Father's Decl.); Att. F (Marriage Certificate).[2] [redacted] father became a lawful permanent resident. *Id.* After several years, he grew apart from [redacted] and they divorced in 1991. *Id.* [redacted] father naturalized and became a U.S. citizen on January 19, 1995, when [redacted] was 15 years old. Att. H (Father's Decl.); Att. D (Naturalization Certificate of [redacted] Father); Att. E (Passport Copy of [redacted] Father).

[redacted] father filed a visa petition on [redacted] behalf, which was approved. Att. H (Father's Decl.); Att. C ([redacted] Immigrant Visa and Alien Registration). [redacted] entered the United States as a lawful permanent resident at Chicago, Illinois on or about August 10, 1995, when he was 16 years old. Att. A ([redacted] Decl.); Att. CC (NTA). After entering the United States, [redacted] lived with his father in Michigan until he was about 19 years old. Att. A ([redacted] Decl.). [redacted] mother, who was still residing in Liberia, had long ago ended her relationship with [redacted] and consented that [redacted] father would have sole legal custody of [redacted] Att. H (Father's Decl.); Att. A [redacted] Decl.).

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[2] When [redacted] father married [redacted] in 1987, his legal name was [redacted] *See* Att. F (Marriage Certificate). However, in February 1991, [redacted] father legally changed his name in a Michigan state court from [redacted] to [redacted] Att. H (Father's Decl.); Att. G (Name Change Order).

On April 19, 2006, [redacted] was convicted in the U.S. District Court for the Western District of North Carolina for violation of 18 U.S.C. § 371, conspiracy to commit offenses against the United States, and he was sentenced to 40 months in prison. Att. CC (NTA); Att. A [redacted] has "learned from [his] past," and is "remorseful for [his] actions." Att. A [redacted] This conviction led to the initiation of removal proceedings in 2007. *Id.*

On or about May 3, 2007, the Department of Homeland Security (DHS) issued a Notice to Appear ("NTA"), alleging that [redacted] was not a citizen of the United States, was a citizen of Liberia, had entered the United States at Chicago, Illinois on August 10, 1995 as a lawful permanent resident, and had been convicted of 18 U.S.C. § 371 and sentenced to 40 months in prison. *See* Att. CC (NTA). DHS charged [redacted] as removable under INA § 237(a)(2)(A)(iii) for being convicted of an aggravated felony, as defined under four separate subsections of the INA. *Id.*

[redacted] retained an attorney, [redacted] to represent him in his removal proceedings before the Immigration Court in York, Pennsylvania. Att. A ([redacted] Decl.). At a master calendar hearing on November 29, 2007, Mr. [redacted] denied the factual allegation that [redacted] was not a U.S. citizen,[3] but conceded the other factual allegations. Att. DD (Transcript ("Tr.")) at 6-7. Mr. [redacted] indicated that [redacted] may be a derivative citizen. *Id.* At this point, the Immigration Judge ("IJ") interrupted the pleadings and indicated that Mr. [redacted] should pursue the N-600 because, if it were granted, then the IJ would no longer have

[3] In the written pleadings that Mr. [redacted] filed with the Immigration Court, he admitted that [redacted] was not a U.S. citizen, but orally in court indicated that this allegation was contested. *See* Att. EE (Written Pleadings); Att. DD (Tr.) at 6-7.

jurisdiction over the removal proceedings. *Id.* at 6-9. Accordingly, the IJ reset the case. *Id.* at 8-11.

Mr. [redacted] prepared and filed the N-600 for [redacted] with U.S. Citizenship and Immigration Service ("USCIS"). *See* Att. AA (N-600). On March 28, 2008, USCIS denied the N-600, finding that [redacted] was not eligible for derivative citizenship because only his father naturalized, and he had "not presented any evidence that [his] biological parents were ever married to one another." Att. BB (N-600 Denial).

[redacted] represented by Mr. [redacted], again appeared before the IJ on April 9, 2008. *See* Att. DD (Tr.) at 21. At that hearing, Mr. [redacted] notified the Immigration Court that USCIS had denied the N-600 on March 28, 2008. *See id.* at 22; *see also* Att. BB (N-600 Denial). Mr. [redacted] then submitted written pleadings, denying the conviction was an aggravated felony, and confirmed that he was still denying that [redacted] was not a U.S. citizen. *See* Att. DD (Tr.) at 23-24; *see also* Att. EE (Written Pleadings). [redacted] orally explained with respect to the citizenship claim, "the only argument, I think we would have is that the parents are legally separated, even though there was never a marriage, but it's a narrow, very narrow issue." Att. DD (Tr.) at 28. The IJ indicted it was "most highly remote" that [redacted] was going to convince him on this legal argument, but gave [redacted] an opportunity to brief the issue. *Id.* at 32-34.

On May 21, 2008, the IJ indicated he was expecting a brief regarding the derivative citizenship claim, and [redacted] stated that he was "going to address the issue of citizenship … and [] kind of an unequal protection argument, but ultimately, in the research I did, that really is not supported." *See* Att. DD (Tr.) at 37-38. [redacted] then made an argument that [redacted] conviction was not an aggravated felony. *Id.* at 38-40.

On June 24, 2008, the IJ issued an oral decision ordering [redacted] removed to Liberia. *See* Att. FF (IJ Decision). The IJ stated, "the Court has reviewed the Agency's denial of the N-600 and essentially believes it's accurate for the reasons stated therein." *Id.* The IJ also found [redacted] removable pursuant to INA § 237(a)(2)(A)(iii) for being convicted of an aggravated felony. *Id.* [redacted] through counsel, reserved appeal. *Id.*

[redacted] expressed to Mr. [redacted] that he wanted to appeal the decision. Att. A [redacted] Decl.). "When [they] discussed filing an appeal, Mr. [redacted] told [redacted] that there were no viable legal arguments that [he] was a U.S. citizen and the arguments that [he] was not deportable based on my conviction had almost no chance of winning." *Id.* Mr. [redacted] also advised [redacted] that if he appealed, he "would remain detained throughout the appeal process, which could take many months and would have to pay $3000 - $4000 more." *Id.* Accordingly, because he thought there was no chance of prevailing legally based on [redacted] advice, which he trusted, [redacted] did not hire [redacted] to represent him before the BIA. *Id.*

On July 16, 2008, unbeknownst to [redacted] [redacted] filed a notice of appeal to the BIA on [redacted] behalf. *See* Att. GG (Notice of Appeal). In the notice of appeal, [redacted] argued that the elements of the statute of conviction did not support the aggravated felony charge, and therefore the IJ erred in finding [redacted] removable. *Id.* The notice of appeal lacked an argument challenging the IJ's finding that [redacted] was not a derivative citizen. *Id.* The BIA dismissed [redacted] appeal on October 9, 2008 finding that his conviction was an aggravated felony. Att. HH (BIA Dec).

ICE ultimately released [redacted] from custody because the government could not obtain a travel document. *See* Att. A ([redacted] Decl.). ICE required that [redacted] check in

periodically, which he did. *Id.* [redacted] understood from Mr. [redacted] that he had no claim to citizenship and no other options available, and relied on that information. *Id.*

In the meantime, [redacted] went about his life and raising his family. Att. A [redacted] Decl.). He has "a good relationship with [his] U.S. citizen father and [his] step-siblings and foster sister . . . who all reside in the United States." *Id.*; *see* also Att. U (Declaration of [redacted]; Att. V (Declaration of [redacted] married [redacted] a U.S. citizen, about 13 years ago, and though they separated after 5 years, they are still married and maintain a respectful relationship. Att. A ([redacted] *see also* Att. T (Declaration of [redacted] ([redacted] Decl.")). Together, they have a U.S. citizen son, [redacted] now 13 years old, whom they both care about very much. Att. A ([redacted] Att. Q (Birth Certificate of [redacted]). [redacted] and [redacted] now live in Charlotte, North Carolina, but communicate with [redacted] regularly. Att. A ([redacted] Other than the time when he has been in custody, [redacted] was able to help support [redacted] financially. Att. A ([redacted] has very bad asthma that forces him to go to the doctor at least once a month, and [redacted] worries about his son. Att. A ([redacted] Decl.). [redacted] explains how [redacted] really "needs his father in his life, a male figure to look up to." Att. T ([redacted] Decl.).

[redacted] is currently in a relationship with [redacted] who is a U.S. citizen. Att. A [redacted] Decl.). Together, they have two U.S. citizen children, [redacted], who is 8 years old, and [redacted], who is 3 years old. *Id.*; Att. R (Birth Certificate of [redacted]); Att. S (Birth Certificate of [redacted]). Prior to his recent immigration detention, [redacted] lived with his partner and two children in Atlanta. Att. A [redacted] Decl.). [redacted] is a loving, caring father. *Id.* He has also helped to provide for his children financially. *Id.* Most recently, and for several years, he has

worked for his friend [redacted] who owns a business, Carolina Auto Sales. *Id.* [redacted] "life is here in the United States." *Id.*

In July 2018, [redacted] was visiting a friend in New Mexico, when a police officer pulled him over for speeding, and he was arrested because his license was suspended. Att. A ([redacted] Decl.). While detained, he was told there was an ICE warrant on his behalf. *Id.* While the traffic charges were dismissed, [redacted] was transferred into ICE custody, where he remains at this time. *Id.*

While detained and facing imminent deportation, [redacted] spoke to a guard at the facility and explained his situation. Att. A ([redacted] Decl.). The guard suggested that [redacted] seek another opinion on whether he had any legal options available. *Id.* [redacted] connected with [redacted] at the non-profit Annunciation House. *Id.* Through [redacted] eventually connected to his current counsel. *Id.* Undersigned counsel received an email from a colleague, and agreed to conduct a phone consultation with [redacted] Att. Z [redacted] Decl.).

On February 14, 2019, [redacted] spoke to current counsel, attorney [redacted] who works at the non-profit organization, [redacted]. Att. Z [redacted] Decl.). Undersigned counsel asked [redacted] some questions about his immigration history, and indicated she believed he may have derived citizenship, but she needed to do further research and obtain and review a copy of his immigration file. Att. Z ([redacted] Decl.); *see also* Att. A ([redacted] Decl.). Undersigned counsel requested a copy of his immigration file from prior counsel the next day and also conducted legal research and additional fact-finding. Att. Z ([redacted] Decl.).

After several calls and emails from undersigned counsel, [redacted] produced the file on March 4, 2019. Att. Z ([redacted] Decl.).[4] On March 5, 2019, after having reviewed the file from [redacted] undersigned counsel discussed with [redacted] the results of the investigation into his immigration case. *Id.* As Mr[redacted] explains, "[redacted] informed me that there was a legal argument that I did derive citizenship through my father that my prior attorney had not raised." Att. A [redacted] Decl.). [redacted] explained that though [redacted] had told USCIS and the Immigration Judge that [redacted] that his biological parents had never married, he had not explored whether they were considered married under Liberian common law. *Id.* [redacted] came to understand from [redacted] that in fact Liberia does recognize presumed marriages, which are the equivalent of a common law marriage, and that his parents had legally separated, as recognized by his father's subsequent marriage. *Id.* Thus, under the law, there is a good argument that [redacted] did in fact derive citizenship through his father. Only on March 5, 2019, during his conversation with [redacted] did [redacted] learn that his prior attorney had ineffectively represented him, and therefore he had basis to file a motion to reopen. Att. A ([redacted] Decl.).

On March 29, 2019, undersigned counsel notified [redacted] of the basis for this motion and the right to respond. *See* Att. X (Email to [redacted] Att. Z ([redacted] Decl.). Undersigned counsel also notified the Disciplinary Board of the Supreme Court of Pennsylvania, the relevant State Bar authority, of this complaint by online submission filed on April 1, 2019. *See* Att. Y (Letter to PA board); Att. Z (Mendez Decl.). On April 2, 2019, [redacted] through

[4] The file from [redacted] appears to be incomplete. *See* Att. Z ([redacted] Decl.). The file lacks the documents that were attached to the N-600 application that [redacted] filed, including at a minimum, [redacted] father's Naturalization Certificate. *Id.*

undersigned counsel, file a Motion to Reopen Based on U.S. Citizenship Claim, Ineffective Assistance of Prior Counsel, and Alternative Motion to Reopen *Sua Sponte* with the BIA.

III. ARGUMENT

Pursuant to 8 C.F.R. § 1003.2(f), Respondent respectfully requests that the BIA issue a stay of removal pending the adjudication of this motion to reopen. 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 U.S. Supreme Court in *Nken v. Holder,* 556 U.S. 418, 434 (2009) identified four factors that should be considered: "(1) whether the stay applicant has made a strong showing that he 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." (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). When weighed against the latter two factors, "[t]he first two factors of the traditional standard are the *most critical*." *Id.* (emphasis added). Moreover, factors (3) and (4) "merge when the Government is the opposing party." *Id.*

A. Respondent Is Likely to Succeed on the Merits of His Motion to Reopen.

The first factor for granting a temporary stay of removal requires that the respondent make a strong showing of a likelihood of success on the merits of his motion. *Nken*, 129 S. Ct. at 1761. Here, [redacted] has an extremely high likelihood of prevailing in his motion to reopen.

[redacted] has sought reopening on three bases, and has compelling arguments and evidence to reopen on each basis. First, [redacted] presented compelling evidence that he is a U.S. citizen. Because it would "raise serious constitutional concerns" to deport a citizen, the BIA

must reopen and terminate his proceedings. *Dessouki*, 915 F.3d at 967. Second, [redacted] presented evidence that his case must be reopened due to ineffective assistance of prior counsel, [redacted] which prejudiced this case. [redacted] failed to raise the argument that [redacted] was a derivative citizen under former INA § 321(a) because his parents were in a presumed marriage under Liberian law that was terminated through a subsequent marriage, constituting a legal separation. Had [redacted] raised this argument and submitted evidence in support of this argument before USCIS, the Immigration Court, or the BIA, there is a reasonable likelihood the outcome of this case would have been different. Finally, [redacted] argued that the BIA should reopen his case *sua sponte* because he presented truly exceptional circumstances [redacted] has submitted evidence he is a U.S. citizen and is facing deportation to an unfamiliar country, a country he has not seen since he was a child.

i. [redacted] Motion to Reopen Presented Evidence He is a U.S. Citizen, Which Requires the BIA to Reopen His Case.

Respondent derived citizenship under former INA § 321(a). [redacted] entered the United States as a lawful permanent resident more than 20 years ago, when he was 16 years old, and resided in the physical and legal custody of his U.S. citizen father until he was 19 years old. Att. A ([redacted] Decl.). The evidence [redacted] submitted with the motion to reopen demonstrates that (1) [redacted] parents were married under Liberian law; (2) his parents' marriage was terminated, thereby qualifying as a "legal separation," and (3) his father had "legal custody," all requirements under former INA § 321(a). *See* Atts. A-P.

M[redacted] parents were in a presumed marriage, the equivalent of a common law marriage, recognized under Liberian law. "The civil law of Liberia provides for three types of marriage — civil, customary and presumed." Att. P (USAID, "Women's Land Rights in Liberia in Law, Practice, and Future Reforms: LGSA Women's Land Rights Study" (Mar. 2018),

https://land-links.org/wp-content/uploads/2018/03/USAID_Land_Tenure_LGSA_WLR_Study_Mar-16-2018.pdf [hereinafter "USAID Study"]). Liberia Codes of Law Revised, Title 1, Civil Procedure Law, Section 25:3 states: "Persons who live together as husband and wife and hold themselves out as such are presumed to be married." Att. K; *see also* Att. L (*Memeh v Nahto* [1908] LRSC 4; 2 LLR 7 (1908) (12 February 1908), http://liberlii.org/lr/cases/LRSC/1908/4.html (finding in the case at issue that it did not "appear from the records that the court below could have presumed marriage."); Att. M (*Twe et al v Twe-paye et al* [1999] LRSC 15; 39 LLR 474 (1999) (3 June 1999), http://liberlii.org/lr/cases/LRSC/1999/15.html) (acknowledging that the couple at issue had a "common law marriage."). As Liberian attorney [redacted] explains, in Liberia, a couple is considered to be in a presumed marriage "[b]ased on the couple's actions of holding themselves out as married, including actions such as procreating and raising children." Att. J ([redacted] Decl.).

In this case, the evidence attached to the motion to reopen demonstrates that [redacted] parents had a presumed marriage, which is equivalent to a "common law" marriage. [redacted] father [redacted] and mother [redacted] were in a relationship starting in the late 1970s in Liberia. Att. H (Father's Decl.). During their relationship, the couple lived together mostly at his parents' home, and both their parents were supportive of the relationship. *Id.*; Att. I (Uncle's Decl.). Together, they had one son, [redacted] born on June 24, 1979, who they "helped to raise [] together." Att. H (Father's Decl.). Moreover, as [redacted] uncle explains, everyone in the community "knew that Esther and my brother were a couple and everyone saw them as being in love and married." Att. I (Uncle's Decl.). In sum, the evidence attached to the motion to reopen demonstrates that [redacted] parents were in a presumed

marriage recognizable under Liberian law.

The evidence submitted with the motion to reopen also shows that [redacted] parents were legally separated. What constitutes a legal separation depends on the jurisdiction where the marriage took place or where one resides. In *Morgan v. Att'y Gen. of U.S.*, 432 F.3d 226, 234 (3d Cir. 2005), the Third Circuit held that "a legal separation for purposes of [former INA § 321(a)] occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, *alters the marital relationship of the parties*." (emphasis added).

"Liberian law provides no court-based mechanism to divorce or terminate a presumed marriage." Att. J ([redacted] Decl.); Att. N ([redacted] Paper) ("there is no established ground for divorce in a presumed marriage as provided for in a civil marriage. Therefore, *a couple in this relationship is free to separate at will*; they do not need any reason to terminate the relationship." (emphasis added)).

Here, [redacted] parents physically separated in 1981 due to the coup and instability in the country, and considered their marriage to be over in 1984. *See* Att. H (Father's Decl.); *see also* Att. I (Uncle's Decl.) ("The only reason they did not remain together as a couple was my brother's need to move to Monrovia for his own safety after the coup."). Because under Liberian law the couple was free to separate at will, this forced separation should constitute a "legal separation" for purposes of derivative citizenship.

As Liberian attorney [redacted] explains, presumed marriages can be also "be deemed terminated under Liberian law if the husband marries another woman in a subsequent presumed marriage, civil marriage or traditional marriage." Att. J [redacted] Decl.). [redacted] father entered into a civil marriage with [redacted] in the United States in 1987. *See* Att.

F (Marriage Certificate). A civil marriage to [redacted] is a formal government action.; *see Morgan*, 432 F.3d at 234n.4. *Montes de Oca-Montero v. Att'y Gen. of the U.S.,* 205 F. App'x 67, 70 (3d Cir. 2006) (observing that when one party to a common law marriage remarries someone else, it "certainly altered the former marital relationship of the parties."). Here, the civil marriage to [redacted] operated to terminate [redacted] parents' presumed marriage, and thus constitutes a "legal separation" for purposes of derivative citizenship. Att. J ([redacted] Decl.). [redacted] was only 7 years old when this "legal separation" occurred. *See* Att. B ([redacted] Birth Certificate); Att. F (Marriage Certificate).

The evidence also shows that [redacted] father had "actual uncontested custody," which constitutes "legal custody" for purposes of former INA § 321(a). Att. A ([redacted] Decl.); Att. H (Father's Decl.); *Bagot v. Ashcroft,* 398 F.3d 252, 260-66 (3d Cir. 2005). [redacted] resided in his father's custody from the time he entered the United States at the age of 16 until he was 19 years old. Att. A ([redacted] Decl.); Att. H (Father's Decl.). [redacted] mother was in Liberia during this period, but had consented to [redacted] father having custody over him, the respondent. Att. A ([redacted] Decl.); Att. H (Father's Decl.). Accordingly, [redacted] has shown through the attached evidence that [redacted] was in his father's "legal custody" for purposes of former INA § 321(a).

Because Respondent, who faces imminent deportation, submits compelling evidence that demonstrates he is a U.S. citizen, the BIA must review his claim to derivative citizenship, and should find him to be a U.S. citizen and terminate proceedings. The Third Circuit has noted that "the Executive cannot deport a citizen." *Dessouki v. Attorney Gen. of United States*, 915 F.3d 964, 966-67 (3d Cir. 2019); *see also Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) ("[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien.

The claim of citizenship is thus a denial of an essential jurisdictional fact."). The Executive Office for Immigration Review in fact does not have jurisdiction over U.S. citizens, and it would raise constitutional concerns if a U.S. citizen was prevented from presenting their citizenship claim merely because 90 days passed to file a motion to reopen. *See Ng Fung Ho*, 259 U.S. at 284. In the alternative, and at a minimum, the BIA should remand the case to the IJ to consider the new evidence and arguments.

[redacted] has submitted compelling evidence that he is a U.S. citizen, and therefore is very likely to succeed in his Motion to Reopen.

ii. In His Motion to Reopen, [redacted] Presented Evidence His Prior Attorney Ineffectively Represented Him, and Prejudiced His Case, Warranting Reopening.

The Due Process Clause of the Fifth Amendment protects noncitizens in immigration proceedings and includes the right to a full and fair hearing. U.S. Const. Amend. V.; *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Chin Yow v. United States*, 208 U.S. 8 (1908). The right to a full and fair hearing further encompasses the right to effective assistance of counsel. *See Borges v. Gonzales*, 402 F.3d 398, 408 (3d Cir. 2005). Specifically, "'[i]neffective assistance of counsel exists where, as a result of counsel's actions (or lack thereof), 'the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.'" *Id.* (quoting *Saakian v. INS,* 252 F.3d 21, 25 (1st Cir.2001) (quoting *Bernal–Vallejo v. INS,* 195 F.3d 56, 63 (1st Cir.1999)); *see also Matter of Lozada*, 19 I&N 637 (BIA 1988).

To evaluate the merits of an ineffectiveness claim, the BIA must apply a "two-part error-and-prejudice test." *Fadiga v. Attorney Gen. of U.S.*, 488 F.3d 142, 157 (3d Cir. 2007). The first step of analysis for a claim of ineffective of assistance of counsel is "whether 'competent counsel would have acted otherwise.'" *Fadiga*, 488 F.3d at 157 (citing *Iavorski v. INS*, 232 F.3d 124, 129

(2d Cir. 2000)). The second step is to determine "whether the alien 'was prejudiced by counsel's poor performance.'" *Id.* (citing *Zheng v. Gonzales,* 422 F.3d 98, 107 (3d Cir. 2005)).

While representing Respondent, [redacted] failed to investigate the nature of Respondent's parents' relationship or research Liberian law. [redacted] indicated on the N-600 and informed the IJ that Respondent's parents were not married, despite the fact that they were in a presumed marriage. Throughout his representation before USCIS and the IJ, Mr. [redacted] failed to present any evidence or raise any argument to that Respondent derived citizenship because his parents had a presumed marriage that was valid under Liberian law that subsequently terminated when [redacted] father remarried, which constituted a legal separation. In the notice of appeal to the BIA, Mr. [redacted] did not challenge the IJ's determination on derivative citizenship at all. These failures by Mr. [redacted] constitute ineffective assistance of counsel.

The errors by [redacted] prejudiced Respondent's case. Had [redacted] raised these key legal arguments and submitted evidence to support them, evidence that [redacted] now submits with this motion, the IJ should have found that Respondent derived citizenship under former INA § 321(a). At a minimum, there is a "reasonable likelihood" that outcome of his case would have been different had [redacted] raised these compelling legal arguments and submitted the supporting evidence for the IJ's and the BIA's consideration. *Fadiga v. Attorney Gen. U.S.*, 488 F.3d 142, 159 (3d Cir. 2007); *Matter of L-O-G-*, 21 I&N Dec. 413, 419 (BIA 1996).

iii. <u>The Motion to Reopen Also Presents Exceptional Circumstances That Warrant *Sua Sponte* Reopening by the BIA.</u>

In his Motion to Reopen, Respondent alternatively requested that the BIA reopen his case *sua sponte*. In this case, the prior attorney failed to raise a critical legal argument and supporting evidence regarding [redacted] derivative citizenship claim before USCIS, the IJ, or the BIA. In

light of the evidence that [redacted] is in fact a U.S. citizen and is facing deportation and separation from his family, justice and fairness require that the BIA reopen this case *sua sponte*.

As set forth in detail in the motion to reopen, and summarized above, Respondent has shown he is likely succeed on the merits of his motion.

B. Respondent Will Suffer Substantial and Immediate Irreparable Harm in the Absence of Preliminary Relief.

The second factor for granting a stay requires the respondent to demonstrate whether will face irreparable injury absent a stay. *Nken*, 129 S. Ct. at 1761. The respondent must demonstrate more than "some 'possibility of irreparable injury'" in order to satisfy the second factor. *Id.* (citing and rejecting *Abbassi v. INS*, 143 F.3d 513, 514 (9th 1998)). In other words, the respondent "must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

In the present case, Respondent has established that he will clearly suffer more than a possibility of irreparable harm if a stay is not granted. As discussed in detail above, [redacted] has a compelling claim that he is a U.S. citizen. *See supra* Sec. III.A.i. As the U.S. Supreme Court has explained, "[t]o deport one who so claims to be a citizen obviously deprives him of liberty." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Moreover, a denial of his stay request raises the possibility that Respondent will be unable to secure consideration of his claim.

Moreover, Respondent would suffer irreparable harm as his removal would cause non-compensable injuries. He will be separated from his three U.S. citizen children, U.S. citizen partner, U.S. citizen father, and U.S. citizen step-siblings. *See* Att. A ([redacted] Decl.). [redacted] is

very close with his family here in the United States. *See id.* He has been a good and caring father for his three U.S. citizen children, helping them to develop emotionally and supporting them financially. *Id.*; *see also* Att. Q (Birth Certificate of [redacted]); Att. R (Birth Certificate of [redacted]); Att. S (Birth Certificate of [redacted]); Att. H (Father's Decl.); Att. T ([redacted] Decl.); Att. U (Declaration of [redacted] Att. V (Declaration of [redacted] Att. W (Photos of Respondent with his U.S. Citizen Family Members). [redacted] describes how much he misses his children since he has been in immigration custody and cries every day. *See* Att. A ([redacted] Decl.). Now faced with imminent deportation, he "can't bear having to leave my children behind without a father and for a country where I have no idea how I will work and help provide for them." *Id.* He also remains married, but separated from [redacted] a U.S. citizen, with whom he co-parents [redacted], his 13-year-old son. *Id.* [redacted] suffers from asthma and [redacted] worries about him a lot. *Id.* [redacted] really "needs his father in his life, a male figure to look up to." Att. T [redacted] Decl.). [redacted] younger two children, [redacted] who is 8 years old, and [redacted] who is 3 years old, whom he is raising with his U.S. citizen partner [redacted] also suffer while their father remains detained and would suffer tremendously if their father is deported. *See* Att. A [redacted] Decl.).

[redacted] also has "a good relationship with [his] U.S. citizen father and [his] step-siblings and foster sister ([his] father raised her) who all reside in the United States." Att. A [redacted] Decl.)*; see also* Att. H (Father's Decl.); Att. U (Declaration of [redacted] Att. V (Declaration of [redacted] [redacted] step-brother [redacted] explains that he "truly love[s] [his] brother and appreciate[s] all of the lessons he has taught [him] and all the happy times [thye] have had together. He needs to be with our family so that [they] can create many more memories with all of us, his children included." Att. V (Declaration of [redacted]

As [redacted] father notes, "Our family is all here in the United States. My parents have passed away and there is no one in Liberia for [redacted]." Att. H (Father's Decl.) [redacted] who left Liberia as young boy has "no one left in Liberia." Att. A ([redacted] Decl.). His "life is here in the United States." *Id.*

For these reasons, Respondent has shown that he would clearly suffer more than a possibility of irreparable harm if the BIA does not grant his request for a temporary stay.

C. The Issuance of a Stay Will Not Substantially Injure the U.S. Government and Is In the Public Interest.

The last two factors of the *Nken* standard may "merge when the Government is the opposing party." *Nken*, 129 S. Ct. at 1762. This is a unique case where there is in fact a compelling government and public interest in granting a stay. As the Third Circuit has noted, it "would raise serious constitutional concerns" for the executive to deport a citizen. *Dessouki v. Attorney Gen. of United States*, 915 F.3d 964, 967 (3d Cir. 2019). It is critical that the "[e]xecutive does not overstep its bounds and deport citizens." *Id*. Here, a stay favors the government and public interest where [redacted] asks the BIA to consider his U.S. citizen claim. The BIA has never considered [redacted] U.S. citizenship claim or the extensive evidence of U.S. citizenship submitted with the motion to reopen.

Notably, in *Nken*, 129 S. Ct. at 1762, the Supreme Court did not identify any other potential injury that the Government could suffer in holding a petitioner's removal in abeyance during the pendency of appeal, other than its inability to execute removal orders as expeditiously as it might desire. Here, Mr. [redacted] citizenship claim calls into question the IJ's jurisdiction to enter a removal. The government and the public interest will face injury if the government negligently removes a U.S. citizen without proper review. Thus, the government and the public

interest favors granting a stay for an alleged U.S. citizen.

Moreover, removing [redacted] to Liberia would directly undermine what numerous U.S. Courts of Appeal have recognized as "the prevailing purpose of the INA:" "'the preservation of the family unit.'" *Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013). If the BIA denies [redacted] request for a stay of removal, the government will separate him from his extensive U.S. citizen family in the United States. The public has an interest in seeking the emotional, physical, and financial wellbeing of this country's citizens and lawful residents. Thus, here, where [redacted] has a citizenship claim, and has three U.S. citizen children, a U.S. citizen father, U.S. citizen step-siblings, and a U.S. citizen partner, the public interest plainly lies in granting a stay of removal.

For all of these reasons, granting a temporary stay of removal in Respondent's case is in both the government and public interest.

IV. CONCLUSION

This BIA should grant Respondent a temporary stay of removal pending full review of the merits of his motion to reopen.

Dated: April [redacted], 2019

Respectfully submitted,

[redacted]