PRACTICE ADVISORY[1]

May 25, 2012

SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS: STANDARD, IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISPRESENTATION TO THE SUPREME COURT, AND SAMPLE STAY MOTION

I. INTRODUCTION

Filing a petition for review of a removal order does not automatically stay the petitioner's removal from the United States. INA § 242(b)(3), 8 U.S.C. § 1252(b)(3). However, the courts of appeals may issue a judicial stay of removal to prevent U.S. Immigration and Customs Enforcement (ICE) officers from deporting a person while his/her petition for review is pending before the court. In *Nken v. Holder*, 556 U.S. 418, 434 (2009), the Supreme Court instructed courts to adjudicate stay motions by applying the "traditional" standard for a stay.

This advisory begins with background information regarding stay requests, including when an immigration agency order becomes final and how to file a stay motion. *See* pages 2-5. Next, it discusses the legal standard for stay motions as set forth in *Nken*. *See* pages 5-7. Lastly, it addresses the implications on stay motions of the U.S. Immigration and Customs Enforcement (ICE) return policy and of the Office of the Solicitor General's (OSG) misrepresentations to the Supreme Court regarding the government's ability to return successful litigants. *See* pages 8-14.

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This practice advisory is intended for lawyers and is *not* a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

The advisory also includes a sample stay motion containing legal arguments for litigants in stay litigation. It also contains a template declaration in support of a stay motion. *See* pages 36-38. Finally, the advisory contains an appendix detailing local rules and procedures of circuit courts.

This practice advisory does not address stay requests submitted to the immigration agencies or to a district court, nor does it address requests under the All Writs Act.

Please contact us: The authors of this advisory would like to hear about how the courts are deciding stay motions and the government's position on the return policy. Please email trina@nationalimmigrationproject.org and jessica.chicco@bc.edu with information about your cases. Also, the sample stay motion and sample declaration are available as Word documents upon request.

II. BACKGROUND INFORMATION

A. When to File a Stay Motion with a Court of Appeals

Once an order of removal becomes administratively final, the Department of Homeland Security (DHS), acting through its component agency U.S. Immigration and Customs Enforcement (ICE), immediately may remove the individual. Significantly, there is no automatic stay of removal during the 30-day period for filing a petition for review. Moreover, the mere filing of a stay motion does not temporarily stay removal until the court adjudicates the motion except in the *Ninth and Second Circuits*. In these circuits, the filing of a stay motion temporarily stays removal until the motion is adjudicated.[2] (Similarly, filing a petition for review or stay motion does not toll the period for a motion to reopen or reconsider with the BIA.[3])

Even though a person may be removed immediately after the order becomes final, it may not always be advisable to file a stay motion right away. For example, if the individual is not detained, filing a stay motion may prompt ICE to arrest and detain him or her. Of course, ICE could arrest and detain a noncitizen with a final order at any time, even if a stay motion is not filed. Counsel must consider this risk as well as local ICE practices when deciding whether and when to file a stay motion.

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[2] In the Ninth Circuit, the filing of a stay motion automatically confers a temporary stay by operation of law. *Deleon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997); General Order 6.4(c)(1) (General Orders of the Ninth Circuit Court of Appeals).

The Second Circuit has entered into an *informal* agreement with DHS: upon notification by the court that a stay motion has been filed, DHS will not remove the noncitizen until the court adjudicates the stay motion. *See* Matthew L. Guadagno, Nuts and Bolts in Presenting Petitions for Review to the U.S. Court of Appeals for the Second Circuit, p. 12, New York County Lawyers' Association, *Litigating Immigration Cases in the Second Circuit* (Feb. 9, 2011). Significantly, however, this agreement *is not in writing* and, therefore, its enforceability is questionable. See additional information in Appendix.

[3] *See Keo Chan v. Gonzales*, 413 F.3d 161, 162 (1st Cir. 2005) (issuance of a stay of removal does not toll motion to reopen deadline); *Randhawa v. Gonzales*, 474 F.3d 918, 922 (6th Cir. 2007) (filing of petition for review does not toll motion to reopen deadline).

In deciding when to file the stay motion, it is important to consult the statutory and regulatory provisions that specify when a removal order becomes final. Keep in mind that both DHS and the Executive Office for Immigration Review (EOIR) – which includes immigration judges and the Board of Immigration Appeals (BIA) – have authority to issue orders of removal, depending on the circumstances.

Relevant here, an *EOIR-issued order of removal* becomes final upon the BIA's dismissal of the appeal or upon overstaying the voluntary departure period granted by the BIA.[4] When a *DHS-issued order* becomes final depends on the type of order and whether the person has a fear of return to his or her country of origin. The following DHS removal orders generally are reviewable in the courts of appeals.[5]

Reinstatement Order. DHS may remove an individual following the entry of a *reinstatement order* pursuant to INA § 241(a)(5), 8 U.S.C. § 1231(a)(5), unless the person is referred for a reasonable fear interview, *see* 8 C.F.R. §§ 241.8(e), 208.31. If an asylum officer, or an immigration judge reviewing the asylum officer's decision at the noncitizen's request, determines that the person has a reasonable fear of persecution or torture, DHS may not remove the person until the conclusion of proceedings to determine whether removal must be withheld or deferred, including any appeal of the immigration judge's decision to the BIA. 8 C.F.R. §§ 208.31(e)-(g); 1208.31(e)-(g); 8 C.F.R. §§ 208.2(c)(2), 1208.2(c)(2). If the asylum officer, or an immigration judge reviewing the asylum officer's decision at the noncitizen's request, determines the person has not established a reasonable fear of persecution or torture, DHS may then remove the person. 8 C.F.R. §§ 208.31(f), (g)(1); 1208.31(f), (g)(1).

Removal Orders Against Non LPRS with Aggravated Felonies. DHS may issue a removal order against *non-lawful permanent residents with aggravated felony convictions* pursuant to INA § 238(b), 8 U.S.C. § 1228(b). In this situation, however, DHS is prevented from physically deporting the person "until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the alien has an opportunity to apply for judicial review . . . ." INA § 238(b)(3), 8 U.S.C. § 1228(b)(3); 8 C.F.R. § 238.1(f)(1). Further, if the

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[4] The regulations address final orders of removal and provide an order of removal shall become final: (1) upon an immigration judge's order if the noncitizen waives his or her right to appeal to BIA (including a stipulated order of removal by which the noncitizen automatically waives appeal pursuant to 8 C.F.R. § 1003.25(b)); (2) upon expiration of the 30-day period for filing a BIA appeal if the right to appeal is reserved but no appeal is timely filed; (3) upon the BIA's dismissal of the appeal; (4) if the case is certified to the BIA or the Attorney General, upon the subsequent order; (5) upon an immigration judge's order of removal in absentia; (6) where the immigration judge grants voluntary departure, upon overstay of the voluntary departure period or failure to timely post the required bond; or (7) where the immigration judge grants voluntary departure and the noncitizen appeals to the BIA, upon the BIA's order of removal or overstay of the voluntary departure period granted by the BIA. 8 C.F.R. §§ 241.1; 1241.1.

[5] DHS also may issue an *expedited removal order* pursuant to INA § 235(b), 8 U.S.C. § 1225(b). However, the statute precludes judicial review of these orders in the courts of appeal so a stay motion generally is not appropriate. INA § 242(e)(1), 8 U.S.C. § 1242(e)(1).

individual requests withholding of removal, DHS must refer the case for a reasonable fear interview. 8 C.F.R. §§ 238.1(f)(3); 208.31. See paragraph above discussing when DHS may deport someone who has a reasonable fear interview.

Removal Order under the Visa Waiver Program. DHS also may issue and execute a removal order against an individual who entered on *the visa waiver program* unless the individual requests an asylum-only hearing before an immigration judge. INA § 217(b), 8 U.S.C. § 1187(b), 8 C.F.R. § 217.4(b).

B. How to File a Stay Motion

A stay motion is filed with the court of appeals with jurisdiction over the petition for review of the removal order. INA § 242(b)(2); 8 U.S.C. § 1252(b)(2). Practitioners may file the motion concurrently with a petition for review or after a petition for review has been filed.[6] There is no fee for filing a motion for stay of removal (however, the filing fee for a petition for review is $ 450 unless the court waives it). A sample stay motion is provided at the end of this advisory.

The procedural vehicle for a stay request is a motion. Motions are governed by Federal Rule of Appellate Procedure (FRAP) 27 and corresponding local rules and internal operating procedures.[7] Unless otherwise set forth by local rules, the government has 10 days to file an opposition to the motion, and the movant has 7 days to file a reply. FRAP 27(a)(3), (4). Given the importance of obtaining a stay for an individual and his/her family, counsel generally should not forego reply briefing.

Some circuits' local rules require that the motion inform the court of the position of opposing counsel (see the Appendix for more information about local rules). Even where it is not required, attorneys should contact the Department of Justice, Office of Immigration Litigation (OIL) to obtain the Attorney General's position on the stay motion. Often the OIL attorney will not take a position on the motion. If an OIL attorney has not entered an appearance yet, counsel can contact the OIL appellate division at (202) 616-4900. A court of appeals is more likely to grant an unopposed stay motion.

In general, stay motions should be detailed and well documented and should brief all the relevant factors, as explained more in the sample motion. If an attorney did not represent the noncitizen below and is preparing the stay motion in the absence of a complete administrative record, he or she may consider filing a skeletal stay motion and informing the court that he or she intends to supplement the motion with additional information and supporting documentation as soon as it is

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[6] *See* American Immigration Council, *How to File a Petition for Review* (February 2011), available at www.legalactioncenter.org/sites/default/files/lac_pa_041706.pdf.

[7] Although FRAP 18 says "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order," some courts already have held that doing so is not required in immigration cases. *See, e.g.*, *Alimi v. Ashcroft*, 391 F.3d 888, 893 (7th Cir. 2004) (finding that there is no obligation to request a stay with the BIA); *Sofinet v. DHS*, 188 F.3d 703, 706-07 (7th Cir. 1999) (same). Requesting an agency stay often is not logistically possible and generally is impracticable.

possible to obtain the record. Check local rules for time limitations and procedure for submitting supplementary information. ***Attorneys may wish to create template skeletal motions for use in an emergency before the need to file a stay request arises.***

The Appendix at the end of this advisory sets forth relevant local rules and procedures with regard to stay motions, including emergency stay motions, and provides contact information for the courts of appeals. A detailed discussion of specific local rules and procedures is beyond the scope of this advisory.

C. Stay Adjudications and Violations

If the court of appeals grants a stay motion, the stay is valid until the mandate issues. *See, e.g.*, *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004). Note that 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).

If the court of appeals denies the stay and DHS deports the person, the court still has authority to adjudicate the petition for review. In other words, neither the stay denial nor the person's deportation cuts off the circuit court's jurisdiction to adjudicate the petition.[8] If the court of appeals denies the stay, an individual could ask the Supreme Court for a stay.[9] However, the Court rarely grants such requests.

If the court grants a stay and DHS nevertheless deports the person, ICE generally is more willing to facilitate and pay for return and, if not, counsel could pursue federal court remedies to compel return. Even if ICE returns the person, counsel may consider remedies under the Federal Tort Claims Act or *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

III. LEGAL STANDARD FOR STAY MOTIONS

The Supreme Court's decision in *Nken v. Holder* governs stay motions. 556 U.S. 418 (2009). As discussed below, DHS' brief in *Nken* and the Supreme Court's opinion rely on the existence of a return policy for noncitizens who successfully litigate their petitions for review. Subsequent developments about the alleged return policy and DHS' new return policy, as well as their implications on stay motions are discussed in the next section and incorporated in the sample stay motion.

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[8] In 1996, Congress repealed the post-departure bar to petitions for review, formerly found at INA § 106(a), 8 U.S.C. § 1005a. Section 306(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546.

[9] In *Nken*, the Court treated Mr. Nken's stay request as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 10. *Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting certiorari). *See also* Supreme Court Rule 11 (allowing for petitions for writ of certiorari to review cases in which a court has not yet entered a final judgment).

A. The Solicitor General's Representations to the Supreme Court in *Nken*

The Supreme Court granted certiorari in *Nken v. Holder* to determine whether a court of appeals should adjudicate stay requests by weighing "traditional" stay standards or requiring "clear and convincing evidence" that the removal order "is prohibited as a matter of law" pursuant to INA § 242(f)(2), 8 U.S.C. § 1252(f)(2). At the time of the decision, eight circuits applied the "traditional" stay criteria and two circuits applied the more stringent "clear and convincing" standard.[10]

To assist the Court in evaluating the issue, a group of organizations filed a brief as amici curiae in support of the petitioner in *Nken*.[11] The amici brief explained that "in practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders."[12]

In its responsive briefing, the Office of the Solicitor General (OSG) claimed that "[b]y policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal."[13]

Based on this representation, the OSG's brief argued that courts should apply the "clear and convincing evidence" standard in adjudicating stays since individuals could pursue their immigration cases from abroad and would be able to return to the United States if they prevailed.

B. The Supreme Court's Decision in *Nken* and the Standard for a Stay

The Court in *Nken* rejected the OSG argument that the "clear and convincing evidence" standard of 8 U.S.C. § 1252(f)(2) applies to stay motions. Rather, the Court instructed courts to apply the

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[10] *Compare Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) *with Weng v. U.S. Att'y General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002); *Ngarurih v. Ashcroft*, 371 F.3d 182, 195 (4th Cir. 2004).

[11] *See* Amicus Brief of American Immigration Lawyers Association, Catholic Legal Services, Florida Immigrant Advocacy Center, Hebrew Immigrant Aid Society, National Immigrant Justice Center, National Immigration Law Center, Public Counsel, and World Relief for Petitioner in *Nken v. Holder*, 556 U.S. 418 (2009) (hereinafter Amici Brief), located at 2008 WL 5409461 (U.S.) (Appellate Brief), also available at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_681_PetitionerAmCu8ImmigrantAidOrgs.authcheckdam.pdf.

[12] Amici Brief at 28-29.

[13] Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009).

"traditional" standard for a stay. Under this standard, the court considers the following four factors:

> (1) whether the stay applicant has made a strong showing that he/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, 566 U.S. at 434. The Supreme Court went on to discuss the traditional stay factors in greater detail.[14] The *Nken* Court explained that "[t]he first two factors are most critical." *Id*. With respect to the first factor—likelihood of success on the merits—the chance of success must be "better than negligible," and more than a "mere possibility of relief" is required. *Id.* (internal quotations and citations omitted).

With respect to the second factor, the Court acknowledged that removal is a "serious burden" but concluded "it is not categorically irreparable." *Nken*, 566 U.S. at 435. Significantly, in reaching this conclusion, the Court credited, cited and relied on the OSG's representation that the government had a "policy and practice" of facilitating the return of previously removed noncitizens.

> It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury. Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal. See Brief for Respondent 44.

Nken, 556 U.S. at 435.

The Court in *Nken* found that the 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 public interest representative. Although the Court recognized a public interest "in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm," the Court also recognized a public interest "in prompt execution of removal orders." *Nken*, 556 U.S. at 436. The Court further stated that courts "cannot simply assume that '[o]rdinarily, the balance of hardships will weigh heavily in the applicant's favor.'" *Id.* (citation omitted).

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[14] The Court granted certiorari to address the appropriate stay standard, and thus, the *application* of this standard was outside the scope of the question presented. As such, the parties did not provide substantive briefing on how courts should apply the "traditional" test in the removal, and arguably, the Supreme Court's discussion of the application of the stay factors is dicta.

IV. IMPLICATIONS OF ICE'S RETURN POLICY AND THE OSG'S MISPRESENTATION TO THE SUPREME COURT ON STAY MOTIONS

Prior to the Supreme Court's decision in *Nken*, practitioners reported that there appeared to be no policy for bringing their clients back to the United States after prevailing on a petition for review. Many practitioners encountered practical and legal difficulties in arranging for a client's return, which, in many cases, took months to facilitate.

Since the Supreme Court's decision in *Nken*, various lower courts have relied on the language in the Court's decision that persons who prevail on their petition for review "can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." *Nken*, 556 U.S. at 435. Among other things, courts have cited this language to deny stay motions.[15]

In May 2011, immigrant rights advocates filed a Freedom of Information Act lawsuit against DHS, the Department of Justice (DOJ) and the Department of State (DOS) alleging that the agencies failed to adequately respond to a request for records related to the government's asserted "policy and practice" of facilitating the return of individuals who successfully challenge their removal orders from outside the country. The case is *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y. filed May 12, 2011).[16]

This litigation triggered the developments detailed below, including the OSG's admission to the Supreme Court that it misrepresented the existence of a return policy and DHS' simultaneous effort to minimize the impact of this error by belatedly issuing a return directive. These developments are significant to stay motions because the courts of appeals may continue to rely on the Supreme Court's statement that deportation is not "categorically irreparable" harm, which was largely based on the OSG's misrepresentation that the government can redress wrongful removal through return. Accordingly, through stay motion litigation, counsel can inform the court of these post-*Nken* developments, discuss their legal implications, and address the limitations of DHS' new return policy and its implication in the particular client's case.

(The following information detailing these developments and the sample stay motion at the end of this advisory are intended to assist counsel with satisfying the second stay factor, i.e., showing that deportation will result in irreparable harm.

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[15] *See, e.g.*, *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-38 (9th Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz., May 26, 2009). *See also Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (granting stay, but noting that "[*Nken*] rais[ed] the irreparable harm threshold"); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011) (denying stay and citing *Nken* for the proposition that removal is not "categorically irreparable").

[16] The plaintiffs are: the National Immigration Project of the National Lawyers Guild, the American Civil Liberties Union, the Immigrant Defense Project, the Boston College Post-Deportation Human Rights Project, and Professor Rachel Rosenbloom. The New York University School of Law Immigrant Rights Clinic represents plaintiffs.

Case documents, case updates, and the documents the government disclosed through the litigation and to the Supreme Court in *Nken* are located at: http://nationalimmigrationproject.org/legalresources.htm#nipnlg.

A. ICE's Return "Policy" Directive and FAQ

On February 24, 2012, ICE issued a directive (ICE Policy Directive Number 11061.1) addressing the return of certain individuals who prevail on a petition for review,[17] including lawful permanent residents and others whose presence ICE considers "necessary." Although the directive claims to "describe[] existing ICE policy," it does not reference any pre-existing policies or indicate that it is superseding any other directive.

On April 23, 2012, ICE posted to its website a "Frequently Asked Questions" (FAQ) page regarding the new policy directive. Importantly, the FAQ provides that ICE will restore people to their pre-removal status and will not charge people as "arriving aliens" unless they were charged as such prior to their removal. In addition, the FAQ designates the ICE Public Advocate as the first point of contact in initiating return.

The FAQ also reveals significant limitations and problems with the policy, including:

- **DHS has unfettered discretion over the return of non-LPRs.** ICE will facilitate only the return of persons who were previously lawful permanent residents or whose "presence is necessary for continued administrative removal proceedings." Thus, unless the court's order restores the person to lawful permanent resident status, ICE has absolute discretion to determine whether and how to facilitate return. As such, it will leave scores of individuals without access to return, including those who have their asylum or other status restored. Further, if not returned, the individual risks having the immigration judge administratively close proceedings or order removal in absentia under INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5), thereby effectively rendering judicial review meaningless and denying all relief.[18]

- **Teleconferencing/videoconferencing is not a workable solution.** The FAQ also states that return may not be necessary because U.S. embassies and most courts have videoconferencing equipment, and therefore, a person may participate in an immigration court hearing by video or by phone. This is not a workable solution for a variety of reasons, including, but not limited to, little or no ability for individuals to communicate with their counsel, problems presenting and reviewing evidence, and

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[17] The "policy" does not extend to noncitizens who prevail on administrative motions to reopen or reconsider before an immigration judge or the Board of Immigration Appeals.

[18] For example, in the case of Sergio Omar Beldorati (A97-927-591), after the Eleventh Circuit remanded the case for consideration of whether Mr. Beldorati suffered past persecution (*Beldorati v. U.S. Atty. Gen.*, 228 Fed. Appx. 952 (11th Cir. 2007)), the immigration judge stated that further action "is meaningless as respondent's stay of removal was denied by 11th Circuit and the respondent has been removed," and administratively closed the proceedings. *See* p. 19 of OSG and DHS email communications.

technological malfunctions and/or failure.[19] There also is no indication that a system is in place to facilitate the use of videoconferencing or teleconferencing from abroad. An April 24, 2012 cable from DHS to the Department of State requests that consular officers process parole notifications for individuals whom DHS determines merit return.[20] Notably, however, the cable does not contain any information on facilitating teleconferencing or videoconferencing.

- **Insufficient notice of return policy.** Individuals abroad have no way of knowing about the return policy. To date, the State Department has not posted information about the policy on U.S. embassy and consulate websites.[21] DHS has developed a form letter notifying individuals who are being removed that ICE may facilitate their return if they prevail on a petition for review and providing contact information for the Public Advocate.[22] However, this notification mechanism does not reach those who already have been removed and may be seeking to return. It also is written only in English and, therefore, people with limited English proficiency may not understand it.

- **Lack of agency coordination.** The April 24, 2012 cable from DHS to the Department of State only informs consular officers whom to notify if contacted by a lawful permanent resident or noncitizen seeking to return. It remains unclear whether people must pay a processing fee or how the person would arrange to meet with a consular officer. Also, the FAQ provides that ICE will arrange for issuance of appropriate transportation documents, including a transportation/boarding letter for individuals returning by air. However, even if ICE provides parole and the State Department provides a transportation letter, there is no guarantee that Customs and Border Protection (CBP) will admit the person back into the United States. CBP instructions on parole clearly provide that border officials can override a prior decision to grant parole. CBP Directive No. 3340-043, at 5 (The Exercise of Discretionary Authority) (Sept. 3, 2008).[23]

- **Financially and practically burdensome.** Noncitizens generally must cover transportation and associated return costs. In the past, ICE has required individuals to

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[19] A 2005 report by the Legal Assistance Foundation of Metropolitan Chicago and Appleseed highlighted these technological problems. The report is available at: http://chicagoappleseed.org/uploads/view/49/download:1/videoconfreport_080205.pdf.

[20] The cable is attached as appendix E to the OSG's letter to the Supreme Court in *Nken*, available at: http://nationalimmigrationproject.org/legalresources.htm#nipnlg.

[21] *See, e.g.*, website of the U.S. Embassy in Santo Domingo, Dominican Republic, located at http://santodomingo.usembassy.gov/.

[22] The form letter is attached as appendix C to the OSG's letter to the Supreme Court, available at http://nationalimmigrationproject.org/legalresources.htm#nipnlg.

[23] Counsel may cite the directive as Exhibit FF to Plaintiffs' Third Motion for Summary Judgment (filed May 11, 2012) in *National Immigration Project v. DHS*, No. 11-CV-3235 (S.D.N.Y.). It is located at: http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf.

purchase expensive open-date airline tickets to accommodate uncertainties about when ICE might obtain the documents authorizing travel and entry. Furthermore, the FAQ says that persons returning by air or sea must have "a valid passport or equivalent documentation" and that persons returning by land must have "appropriate identity documentation, which could include a passport or other government-issued documents." For lower income and indigent individuals and those who fear persecution in their countries of origin, the expense of returning and/or documentation requirements may prohibit return altogether.

The significant problems with the new and untested return policy highlight the fact that removal will continue to result in irreparable harm. Therefore, practitioners should argue in their stay motion that this flawed return policy does not provide any new or additional reasons to deny a stay motion.

B. The OSG's Misrepresentation to the Supreme Court

1. The OSG and DHS Email Communications

Through FOIA litigation, the court ordered the government to release emails between OSG and DHS attorneys written and exchanged in the course of drafting the government's brief and preparing for oral argument in *Nken*. *See Nat'l Imm. Project v. U.S. Dep't of Homeland Sec.*, ___ F. Supp.2d ___, 2012 WL 375515 (S.D.N.Y. Feb. 7, 2012; Feb. 24, 2012). These emails discuss the basis for the government's alleged "policy and practice" of returning noncitizens who win their petitions for review.

The emails make it clear that the government's then current procedures for facilitating return were informal and incomplete and a far cry from a "policy and practice" of returning all individuals, as the OSG asserted in its Supreme Court brief. The emails identify serious limitations that would pose challenges for individuals who seek to return, as reflected in the following statements:

- "[W]e generally handle [these cases] on a by-request basis. But, anytime the BIA decision is vacated, I would believe the alien could ask to come back to the US to have the former status restored." OSG and DHS Emails, at 6.

- "As we all know there is no statute that directly addresses the issue, and given that CBP [Customs and Border Protection] will not simply let the person pass through inspection based upon the pfr [Petition for Review] grant, we have relied on parole under section 212(d)(5). I don't believe that ICE has established a 'procedure' per se, but has handled them on a case by case basis. The process is generally that ICE grants the parole and sends a cable to the consulate or embassy nearest to the alien with instructions to issue a travel document/boarding letter to the alien. The alien must supply his/her own transportation to the U.S., and if the alien was in detention prior to deportation, the alien is returned to detention upon arrival at the POE [Port of Entry]." OSG and DHS Emails, at 7.

In addition, the emails reveal that DHS had expressed, and the OSG had been made aware, that there were circumstances in which DHS "would not contemplate return" of an individual for further proceedings after prevailing on a petition for review. These circumstances included the case of Mr. Nken.[24] The emails also included a chart appearing to list cases of petitioners outside the United States who were successful in litigation. The chart demonstrates that DHS was not facilitating the return of successful litigants to the United States even where their cases were remanded to the immigration courts for hearings. In at least one instance, an immigration judge closed the proceedings rather than hold a new hearing on the merits, even where the case had been remanded for a determination of whether the noncitizen had suffered past persecution. In another case, the immigration judge proceeded without the individual present, determining that further testimony was not needed. In a third case, ICE had not returned the individual even though more than a year had passed since the case was remanded to the immigration judge. Indeed, the chart DHS provided to the Solicitor General's Office did not identify *any* case in which the person deported already had been returned to attend the proceedings on remand.

Although one OSG attorney expressed some doubts about the accuracy of the intended statement to the Supreme Court, noting "we don't want to open ourselves up to trouble," the final representation in its brief did not reflect the qualifications or reservations expressed by DHS. OSG and DHS Emails, at 8.

2. The OSG's Letter to the Supreme Court

On April 24, 2012, the OSG submitted to the Supreme Court a six-page letter with six attachments "in order to clarify and correct" the misleading statement in its brief in *Nken*. Pointing to declarations attached to the complaint in *National Immigration Project et al. v. DHS*, as well as various agency documents obtained during the course of that lawsuit, the OSG admitted the following:

- "In light of those materials, the government is not confident that the process for returning removed aliens, either at the time the brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in Nken implied. The government therefore believes that it is appropriate both to correct its prior statement to this Court and to take steps going forward to ensure that aliens who prevail on judicial review are able to timely return to the United States."

- "[W]ithout providing additional detail about the government's approach to effectuating return and restoring status, the statement that relief was accorded '[b]y policy and practice' suggested a more formal and structured process than existed at the time. The government should have provided a more complete and precise explanation."

- "[Significant impediments in returning] stemmed in part from the absence of a written, standardized process for facilitating return; the resulting uncertainty in how to achieve that objective in field offices, U.S. embassies and consulates, and other

[24] *See* OSG and DHS Emails, at 1 (email from DHS setting forth circumstances in which DHS would not return Mr. Nken even if he prevailed on his petition for review).

> agencies involved in the process; and the lack of clear or publicly accessible information for removed aliens to use in seeking to return if they received favorable judicial rulings."

Despite the OSG's admission that it may have fallen short in its "special obligation to provide this Court with reliable and accurate information at all times," the OSG continued to represent that the problem only was the regularity of its practices and not the gap between the policy stated in the e-mails and the policy as described to the Court. In fact, the emails on their face included many exceptions to return, including possibly the return of Mr. Nken.

3. Amici Curiae Letter to the Supreme Court

In response to the OSG's April 24, 2012 letter to the Supreme Court, the amici curiae in *Nken* submitted a letter on May 4, 2012, asking the Court to modify the *Nken* opinion to correct the flaw in its analysis. Specifically, amici asked the Court to "consider amending its *Nken* opinion to delete the sections that relied on the government's now-withdrawn representations regarding its support for the return of previously removed noncitizens." Amici Letter at 3. The letter states that action by the Court is necessary to adequately remedy the prior misrepresentation, explaining that lower courts have relied on the incorrect statements in *Nken* to deny stay motion and identifying problems with ICE's discretion over the policy. The letter further points out that the OSG's assurances are not binding on future administrations and do not purport to commit to a legally binding policy.

C. Implications on the "Irreparable Harm" Factor for Stay Motions

In *Nken*, the Court stated that the first two factors in the "traditional" test for a stay matter most. *Nken*, 566 U.S. at 434. Thus, the second factor, whether the person will suffer "irreparable harm" if deported, is critical to stay motions. In addressing this factor, counsel may wish to make the following arguments in the stay motion.

1. Circuit Courts Cannot Rely on the Supreme Court's Language on Irreparable Harm

The *Nken* Court stated that deportation "is not categorically irreparable." *Nken*, 566 U.S. at 435. In making this statement, the Court credited the OSG's representation that the government may remedy wrongful deportation through return and restoration of status. *Id.* We now know that the Supreme Court's statement was based on incorrect information. Therefore, regardless whether the Supreme Court amends its decision, circuit courts should not rely on this statement and should evaluate irreparable harm without regard to it. Further, the Supreme Court's more detailed discussion of the "traditional" stay factors (see Part IV of the opinion, 556 U.S. at 434-36), may constitute dicta because application of the test was outside the scope of the question presented, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (granting certiorari), and the parties did not brief application of the "traditional" test.

Counsel may wish to cite any pre-*Nken* case law relevant to the irreparable harm analysis.

2. Circuit Courts Should Not Rely on DHS' Return Policy in Assessing Irreparable Harm

The new ICE policy directive on return is untested, non-binding, dependent on cooperation and coordination with other agencies, imposes costs on the winning party and, on its own terms, does not assure that ICE will return the person and restore prior status. For these reasons, among others, the circuit courts should not rely on the policy in assessing irreparable harm.

Further, ICE's post-*Nken* return "policy" *does not* provide any *new or additional* reason to deny a stay motion. Because courts already were deciding some stay motions based on the representation made to the Supreme Court in *Nken*, even if ICE's return policy were adequate, it does not require the circuit court to give the government's position any additional weight when assessing the second factor for a stay.

D. Supplemental Authorities in Ongoing Litigation

Counsel should be aware that in cases where the stay motion and response already have been submitted to the court, the Office of Immigration Litigation (OIL) is filing letters pursuant to Federal Rule of Appellate Procedure 28(j). The letters suggest that the new return policy eliminates prior obstacles to return. A sample 28(j) letter response is available at: http://nationalimmigrationproject.org/legalresources.htm#nipnlg.

SAMPLE STAY MOTION

Attorneys are advised to research applicable circuit court case law and understand local ICE practices in order to modify this sample motion accordingly.

If the person is not detained, filing a stay motion may prompt ICE to arrest the person. Of course, ICE could arrest the person even if a stay motion is not filed. Counsel must consider these possibilities as well as local ICE practices.

No. XX-XXXX

IN THE UNITED STATES COURT OF APPEALS
FOR THE _____CIRCUIT

ALICIA LEE
A 123-456-789,

Petitioner,

v.

ERIC H. HOLDER, JR.
U.S. Attorney General,

Respondent.

PETITIONER'S MOTION FOR [EMERGENCY] STAY OF REMOVAL

CUSTODY STATUS: [DETAINED or NOT DETAINED]

Attorney Name
Organization/Law Firm
Street Address
City, State Zip
Tel. (XXX) XXX-XXXX

Attorney for Petitioner

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule ___, Petitioner, Alicia Lee ("Ms. Lee"), through her undersigned counsel, moves the Court to stay her removal during the pendency of her petition for review.

[Insert suggested text A or B as applicable]

[Suggested text A] Ms. Lee is subject to deportation at any time. Officials of Immigration and Customs Enforcement (ICE) has not disclosed the date or time of her deportation.

[Suggested text B] According to officials of Immigration and Customs Enforcement (ICE), unless this Court grants the instant motion, ICE will deport Ms. Lee to ____ on or about _____.

Ms. Lee seeks an emergency stay to permit her to remain in the country while the Court considers her petition for review of the decision of the [insert as applicable: Board of Immigration Appeals or Department of Homeland Security] [insert applicable text: finding her removable under § __ of the Immigration and Nationality Act (INA), 8 U.S.C. § __, denying her applications for _____ and ordering her removed]. ICE is detaining Ms. Lee at _____.

POSITION OF RESPONDENT

Petitioner, through counsel, contacted the Office of Immigration Litigation, counsel for Respondent in immigration-related petitions for review. Respondent through counsel, _____, indicated that he [insert applicable text: takes no position on this motion; opposes this motion; does not oppose this motion].

STATEMENT OF FACTS AND OF THE CASE[25]

NOTE TO COUNSEL: As the Court does not have any information about the case other than the agency's decision, **we strongly advise counsel to attach key exhibits to support the facts and procedural history.** Examples of key documentation may include: the relevant relief application/s and any accompanying declarations, the immigration judge's decision, the Board's decision, the hearing transcript, Notice of Appeal to the Board, Notice to Appear.

Where possible, we also strongly advise attaching a new client declaration addressing the *Nken* factors (see Sample Declaration) and letters of support from U.S. citizen or lawful permanent resident family, friends, religious and community leaders, etc.

The more evidence that supports or corroborates the arguments in the stay motion, the better the chance the court will rule favorably on the stay.

Statements of facts and procedural history are highly individualized. Counsel is advised to include a detailed recitation of facts along with a citation to the attachment that supports each statement. This section generally should conclude with a brief synopsis of the agency's decision. Two examples follow.

Example A:

On _____, 2012, Ms. Lee filed a motion to reopen, alleging that the ineffective assistance of two previous attorneys prevented her from reasonably

[25] Respondent has not yet filed the Administrative Record in this case. Federal Rules of Appellate Procedure 16 and 17. Therefore, the citations in this section are to the Record before [insert as applicable: the Immigration Court and the Board of Immigration Appeals and/or the Department of Homeland Security] and the Petitioner's Declaration, attached hereto as Exhibit A.

presenting her claim for asylum, withholding of removal, and protection under the Convention Against Torture. On ____, 2012, the Board denied Ms. Lee's motion to reopen. *See* Exhibit ___ (BIA Decision). The Board held that Ms. Lee failed to demonstrate that prior counsel's assistance was ineffective. *Id*. On ____, 2012, Ms. Lee timely petitioned this Court for review of the Board's decision and herein requests that the Court stay her removal during the pendency of that petition.

Example B:

On ____, ICE issued a Notice of Intent to Reinstate Prior Order against Ms. Lee. Exhibit ___ (Form I-861). The notice charged her with removability under 8 U.S.C. § 1231(a)(5) for allegedly having been deported in 1998 based on an order of removal and allegedly having illegally reentering the United States on or after September 1, 1999. Exhibit ___ (Form I-861). Ms. Lee contested the charges. *Id*. The ICE officer refused to reconsider his determination and ICE issued a final reinstatement order against Ms. Lee on _____. Ms. Lee timely petitioned this Court for review of ICE's decision and herein requests that the Court stay her removal during the pendency of that petition.

ARGUMENT

Adjudication of a motion for stay of removal requires the Court to consider four factors: (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. *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See also* [insert relevant pre-*Nken* or post-*Nken* circuit court decision].[26] While "not a matter of right," courts may grant stays in the "exercise of judicial discretion" based on "the circumstances of the particular case." *Nken*, 556 U.S. *at* 433 (internal quotations and citation omitted). Ms. Lee satisfies these requirements.

I. MS. LEE IS LIKELY TO SUCCEED ON THE MERITS OF HER PETITION FOR REVIEW.

Counsel should make concise and well-supported legal arguments as to why the court is likely to grant the petition for review. This requires analyzing the agency's decision and making arguments (supported by case law) to show why the agency's decision was erroneous.

This task is more challenging where the attorney did not represent the person below and does not have the complete record. In this situation, counsel could

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[26] [Pre-*Nken* cases adopting the traditional stay criteria include: *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc).]

Post-*Nken*, most circuit court stay decisions available online are unfavorable, with the notable exception of the Ninth Circuit's decision in *Leiva-Perez v. Holder*. 640 F.3d 962 (9th Cir. 2011). In *Leiva-Perez*, the Ninth Circuit granted the stay but noted that "[*Nken*] rais[ed] the irreparable harm threshold." *Id.* at 965. The Second Circuit published a decision denying a stay and citing *Nken* for the proposition that removal is not "categorically irreparable." *Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011). Counsel should research applicable circuit court case law as the law in this area is developing].

inform the court that he/she intends to supplement the stay motion after receipt of additional parts of the record.

If another circuit court favorably decided the issues in the case, this is a strong argument that the petition has satisfied this factor, even if other circuits have disagreed.

The absence of a published circuit court decision on a novel issue of law, however, does not suggest that success on the merits of the petition is unlikely. Such an implication would conflict with the need for "individualized judgments" in stay adjudications, *Nken*, 556 U.S. at 434-35, by categorically preventing noncitizens who raise novel legal claims from ever satisfying the first stay factor.

Counsel should consider making the headings in this section represent each of the arguments for granting the petition for review. Some heading examples follow:

- ***** Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Failed to Follow Its Precedent.

- *. The BIA Erred in Finding that *Matter of* _____Applies Retroactively to Ms. Lee's Case.

- *. The Failure of Prior Counsel to Investigate the Reasons Ms. Lee Feared Return to ____ Falls Far Below the Standards of Competent Representation.

- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Erred When It Failed to Consider Petitioner's Argument that that the IJ Had Not Made a Clear Credibility Determination.

- * The BIA Erred in Finding Ms. Lee's Motion Untimely Because the Ineffective Assistance of Ms. Lee's Prior Counsel Equitably Tolls the 90-Day Filing Deadline for a Motion to Reopen.

- * Petitioner Has Made a Strong Showing of Likely Success on the Merits Because the BIA Erred As a Matter of Law By Failing to Consider All Relevant Evidence of _____**.**

* Petitioner Has Made a Strong Showing of Likely Success on the Merits Because Substantial Evidence Does Not Support the Adverse Credibility Finding.

* Petitioner Has Made a Strong Showing of Likely Success on the Merits Because 8 U.S.C. § 1231(a)(5) Does Not Apply Retroactively to Individuals Who Filed Adjustment Applications Before April 1, 1997.

II. MS. LEE WILL BE IRREPARABLY INJURED ABSENT A STAY.

A. Forced Deportation to _____ Would Irreparably Harm Ms. Lee's [insert as applicable: Mental and Physical Health, Separate Her from Her U.S. Citizen / Lawful Permanent Resident Family, and Subject Her to Further Persecution / Torture by ____].

[Note to counsel: the content of this section may vary depending on the types of claims raised in the petition and the types of potential harm.]

A showing of irreparable injury is "dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (internal quotations and citation omitted). Ms. Lee would suffer irreparable injury if forced to return to _____, [insert as applicable: where she previously suffered persecution, where she has not lived since the age of __ and has no family members, where she will be separated from her U.S. citizen / lawful permanent resident husband and [#] of U.S. citizen children]. If Ms. Lee is deported, she faces further [persecution / torture] at the hands of _____, which clearly amounts to irreparable harm. Exhibit __ (Declaration of Alicia Lee). Moreover, Ms. Lee, who suffers from _____ and takes _____ medicine daily, and has been hospitalized in the past, will suffer

greatly if she is removed to ____where quality medical care is less accessible. *See id.*

B. The Court Should Not Rely on the Supreme Court's Statement that Deportation is Not "Categorically Irreparable" Harm Because the Court's Statement Was Based On a Misrepresentation Provided By the Office of the Solicitor General.

If Ms. Lee is deported prematurely, any eventual victory on the merits of her petition likely will ring hollow because ICE has no reliable, fair, or binding policy to ensure Ms. Lee's return to the United States if this Court ultimately grants her petition for review. In *Nken*, the Supreme Court stated that the burden of wrongful removal—while "serious"—is not "categorically irreparable" as a matter of law. *Nken*, 566 U.S. at 435. At least one court has interpreted this language to as "raising the irreparable harm threshold." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). *Accord Maldonado-Padilla v. Holder*, 651 F.3d 325, 327 (2d Cir. 2011) (denying stay and citing *Nken* for the proposition that removal is not "categorically irreparable").

In making this statement, however, the Court credited, cited and relied on the Solicitor General's 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." *Id. citing* Brief for Respondent 44.[27]

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[27] The Solicitor General's Brief states:

The Supreme Court reasoned that any wrongful removal could be and would be properly redressed—making the average litigant fully whole.

Recent developments demonstrate that the Supreme Court was misled by the Solicitor General's representation. On February 7, 2012 and February 24, 2012, U.S. District Court Judge Jed S. Rakoff ordered the release of the email communications that formed the basis for this statement. *See Nat'l Imm. Project v. U.S. Dep't of Homeland Sec.*, ___ F. Supp. 2d ___, 2012 WL 375515, at *1 (S.D.N.Y. Feb. 7, 2012; Feb. 24, 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"); at *9 ("Like a flatworm cut in half that returns as two flatworms, this case just gets curiouser and curiouser"). These emails evidence opinions about an informal, incomplete and inconsistent procedure for facilitating return of only some individuals, a far cry from a "policy and practice" of returning all individuals who prevail on a petition for review. *See* Exhibit ___ (Email communications between OSG and DHS attorneys). To coincide with the ordered release of the

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> By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, inter alia, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.

2009 WL 45980, *44 (U.S.) (Appellate Brief).

emails, on April 24, 2012, the Office of the Solicitor General submitted to the Supreme Court a six-page letter with attachments "in order to clarify and correct" misleading statement in its brief in *Nken*. *See* Exhibit ___ at 1 (OSG Letter to the Supreme Court).

Despite the OSG's admissions that its brief implied the existence of an actual return policy and that it may have fallen short in its "special obligation to provide [the] Court with reliable and accurate information at all times," the OSG informed the Supreme Court that it need not take any action because, following U.S. District Court Judge's Rakoff's decision in *Nat'l Imm. Project v. U.S. Dep't of Homeland Sec.*, on February 24, 2012, DHS issued a "policy" regarding returns. *See* ICE Policy Directive 11061.1, appendix B to Exhibit __ (OSG Letter to the Supreme Court).[28] The OSG's letter asserted, "In stay litigation going forward, where the government contends that removal alone does not constitute irreparable harm, it will submit to the lower courts the procedures to facilitate return described above." Exhibit ___ at 5 (OSG Letter to the Supreme Court). Ms. Lee submits that this new policy is untested and, on its face, is inadequate to avoid irreparable harm. *See* § B.2, *infra*. However, even if it were adequate, the Supreme Court's

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[28] On April 23, 2012, a day before the Solicitor General's Office alerted the Supreme Court to its misrepresentation, ICE posted to its website a "Frequently Asked Questions" (FAQ) page on return of individuals pursuant to the directive. The FAQ is located at: http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm.

prior conclusion (that removal is not "categorically irreparable") is not binding because the Court credited, cited and relied on false information in reaching it.

In response to the OSG's April 24, 2012 letter, the group of organizations that filed a brief as amici curiae in support of Mr. Nken asked the Court to correct the relevant passage in its opinion. *See* Exhibit ___ (Amici Letter to the Supreme Court). The letter states that action by the Court is necessary to adequately remedy the prior representation, explaining that lower courts – [insert if applicable: including this Court[29]] – have relied, and other courts may well rely in the future, on the incorrect statements in *Nken*, and identifying problems with ICE's discretion over the policy. *See* Exhibit ___ (Amici Letter to the Supreme Court). The letter also states that the OSG's assurances are not binding on future administrations and do not purport to commit a binding policy, and the emails evidence that ICE does not facilitate return of all noncitizens who are successful in their removal proceedings. *Id*.

Given the Solicitor General's prior misrepresentation, and for all the reasons set forth herein and in the attached letter from Amici Curiae in *Nken*, Ms. Lee urges this Court not to rely on the Supreme Court's statement that deportation is

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[29] [Case examples include: *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-538 (9th Cir. 2011); *Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010); *Dhillon v. Mayorkas*, No. C-10-0723, 2010 WL 1338132, at *11 (N.D.Cal., Apr. 5, 2010); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz., May 26, 2009).]

not a "categorically irreparable" harm. As Respondent must acknowledge, this part of the *Nken* decision is based on a misleading statement. Therefore, this Court should evaluate the facts of the irreparable harm Ms. Lee faces if deported without regard to the Supreme Court's discussion of this factor.

C. THE COURT SHOULD NOT RELY ON ICE'S RETURN "POLICY" IN ASSESSING IRREPARABLE HARM

1. ICE's New "Policy" Is Untested, Non-Binding, Dependent on the Acquiescence of Other Agencies, and Imposes Costs On Successful Litigants.

Respondent cannot assert that the government has an effective practice in place for returning immigrants who succeed on their petitions for review. *See* Exhibit ___ at 3-4 (OSG Letter to the Supreme Court) (admitting of lack of a return practice). Instead, the government has taken the position that a new policy, announced together with the admission of the lack of any tested prior practice, now obviates the need for a stay of removal to prevent irreparable harm. Exhibit ___ at 5 (OSG Letter to the Supreme Court). In essence, Respondent asks this Court to trust the government to do what it clearly has not done in the past. But courts have long recognized that they should be wary of claims that a new policy removes a past problem. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 n.10 (1982) (finding that mere voluntary cessation of activities does not moot a case because the defendant is free to return to his old ways); *U.S. v. W.T. Grant*,

345 U.S. 629, 632 n.5 (1953) (noting that courts should "beware of efforts to defeat injunctive relief by protestations of repentance and reform").

The new practices are not formal, are untested, depend on coordination among many agencies, and require Ms. Lee to bear the cost of removal even if she wins. Moreover, the new "policy" is not binding. It was not issued via regulations and does not have the force of law. There is nothing to stop the current administration or a future administration from changing this new policy in a way that would leave Ms. Lee stranded abroad after she wins her case.

The new practices have yet to be tested in any meaningful way. ICE only announced the new policy in a February 24, 2012 directive and did not publicly announce its plan for implementing until filing the letter with the Supreme Court in *Nken* on April 24, 2012. *See* Appendix B to Exhibit __ (OSG Letter to the Supreme Court). Furthermore, the new practices pertain primarily to ICE, a single unit of the Department of Homeland Security. Actual return, however, will depend on coordination with several agencies, any one of which could effectively defeat the promise of return. For example, Customs and Border Protection (CBP) has the power, at the border, to override a prior grant of parole. Exhibit __ (CBP Directive No. 3340-043, at 5) (The Exercise of Discretionary Authority) (Sept. 3, 2008). To Petitioner's knowledge, nothing in any CBP materials actually contemplates return

following a successful petition for review. Instead parole procedures are designed for other types of cases, making problems in return all the more likely.

Similarly, return for anyone who lives in a noncontiguous country requires a transportation boarding letter issued by the Department of State. FAQ about ICE Policy Directive Number 11061.1, appendix D to Exhibit __ (OSG Letter to the Supreme Court). But other than a cable indicating that there may now be people seeking return, there is nothing currently in the Foreign Affairs Manual (FAM), the guidebook for State Department employees, that contemplates issuing a transportation boarding letter to a person who succeeds on an appeal of a removal order. Furthermore, to date, the State Department has not posted information about the policy on U.S. embassy and consulate websites.[30] It also remains unclear whether people must pay a processing fee or how the person would arrange to meet with a consular officer.

[Modify text as appropriate] ICE's new "policy" also puts the monetary cost of removal on the winning party. Such monetary costs are in themselves a form of irreparable harm, especially for immigrants who have been detained, kept form working, have expended resources on an appeal, and have been deported to a country where their earnings are limited. These costs can be especially high where individuals may be forced to purchase an open-date ticket because of uncertainties

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[30] *See*, *e.g.*, website of the U.S. Embassy in Santo Domingo, Dominican Republic, located at http://santodomingo.usembassy.gov/.

related to when they may be able to obtain the documents authorizing travel and entry. In Ms. Lee's case, the estimated cost is $ ____. See Exhibit ___ (airline pricing information from expedia.com).

2. On its Own Terms, ICE's "Policy" Does Not Assure that ICE Will Return Petitioner to this Country and Restore Her Status If She is Deported.

[Note to counsel: If Petitioner was an LPR, and the court's order may restore LPR status, counsel may need to modify the paragraphs indicated below because ICE's "policy" does confer discretionary authority to deny returning LPRs unless there are "exceptional circumstances" (including, but not limited to, individuals who present serious national security or adverse foreign policy considerations)].

That ICE now has a return "policy" does not ensure that Ms. Lee can return to the United States if this Court grants her petition for review. [This paragraph is not applicable to LPRs] The post-*Nken* return "policy" does not ensure that ICE would facilitate Ms. Lee's return to the United States if she prevails on her petition. Under the "policy," ICE facilitates *only* the return of persons who were previously lawful permanent residents or whose "presence is necessary for continued administrative removal proceedings," and for only those who can afford to pay. Appendix B to Exhibit ___ (OSG Letter to the Supreme Court). Thus, as Ms. Lee was not previously a lawful permanent resident, ICE will have absolute, unfettered discretion to determine whether and how to facilitate her return. For Ms. Lee, and many individuals like [insert: her / him], this discretion ultimately renders return dependent on a favorable ICE determination that presence is

necessary, not on a favorable court outcome. As such, Ms. Lee's return rests in the hands of ICE. Further, if Ms. Lee's case is remanded and she is not returned, she risks having the immigration judge administratively close proceedings or order removal in absentia order pursuant to 8 U.S.C. § 1229a(b)(5), thereby effectively rendering this Court's review meaningless and denying her all relief.

[This paragraph is not applicable to LPRs] Additionally, ICE's suggested use of teleconferencing and videoconferencing from U.S. embassies and consulates abroad is not a workable solution for a variety of due process reasons, including, but not limited to, little or no ability for individuals to communicate with their counsel, problematic presentation of evidence, and technological malfunctions and/or failure, as highlighted in a 2005 report by the Legal Assistance Foundation of Metropolitan Chicago and Appleseed.[31] There also is no indication that a system is in place to facilitate the use of videoconferencing or teleconferencing from abroad. An April 24, 2012 cable from DHS to the Department of State requests that consular officers process parole notifications for individuals who DHS determines merit return. Appendix E to Exhibit ___(Office of the Solicitor General Letter to the Supreme Court). However, the cable lacks any information on facilitating teleconferencing or videoconferencing.

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[31] The report is available at: http://chicagoappleseed.org/uploads/view/49/download:1/videoconfreport_080205.pdf.

The "policy" also conditions return on possession of a valid foreign passport without exception. For Ms. Lee, and other lower income and indigent individuals, as well as others including asylum seekers in hiding in their countries of origin, those who have fled to another country, or those who lack the language skills to work in the country to which they have been removed, these requirements may financially and practically prohibit her return altogether. See Exhibit __ (Declaration of Ms. Lee) and Exhibits __-__ [cite and attach evidence of financial hardship].

In sum, if Ms. Lee is removed prior to adjudication of her petition for review, ICE's "policy" provides *zero guarantee* that ICE would facilitate her return, that CBP will permit her to enter the country, that her [or his] family could afford return, or that she can even obtain the requisite passport and travel documentation to return. The supposed remedy of "facilitation of return" is a chimera. A merits decision in Ms. Lee's favor will be empty if Ms. Lee has no means to return to the United States.

III. THE ISSUANCE OF A STAY WILL NOT SUBSTANTIALLY INJURE RESPONDENT NOR BE CONTRARY TO THE PUBLIC INTEREST.

The Court in *Nken* found that the last two stay 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 public interest representative. *Nken*,

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 heightened where "'the alien is particularly dangerous,'" or "has substantially prolonged his stay by abusing the process provided to him." *Nken*, 566 U.S. at 436 (citations omitted). Here, neither these factors nor any other factors exist to suggest the government has any interest in Ms. Lee's removal beyond the general interest noted in *Nken*.

Explain here why client is not a threat to the community and/or not particularly dangerous, including, as applicable, such information as: client's age; employment; health; medical infirmities; adherence to conditions of release; nature of crime (if non-violent); tax payments; religious attendance; community service; close relationship with family members; etc. **Attach and cite to exhibits that show the petitioner's character as not dangerous and highlight his or her positive qualities.**

The *Nken* Court also recognized the "public interest in preventing aliens from being wrongfully removed," which must weigh heavily in the Court's consideration. *See Nken*, 566 U.S. at 436. Respondent cannot make any particularized showing that granting Ms. Lee a stay of removal would substantially injure the government or conflict with the public interest preventing a wrongful removal, such that the third and fourth *Nken* factors would outweigh the hardship Ms. Lee would face if removed.

CONCLUSION

Based on the foregoing, Ms. Lee respectfully requests that the Court grant this motion for a stay of removal pending resolution of the instant petition for review.

Dated: _____

Respectfully Submitted,

/s/ Attorney Name
Attorney Name
Organization/Law Firm
Street Address
City, State Zip
Tel. (XXX) XXX-XXXX

Attorney for Petitioner

SAMPLE, NON-EXHAUSTIVE LIST OF EXHIBITS

A. Declaration of Petitioner, Alicia Lee. See Sample Motion.

B. BIA [or DHS] Decision, dated _____.

C. Notice to Appear, dated _____.

D. Immigration Judge Decision, dated _____.

E. Transcript of Removal Proceedings Before the Immigration Court.

F. Application for _____, dated _____.

G. Letter from Jonathan Lee, Petitioner's U.S. citizen husband, dated _____.

H. Naturalization Certificate of Jonathan Lee, evidencing U.S. citizenship.

I. Letter from Shelia Lee, Petitioner's U.S. citizen daughter, age 9, dated ____.

J. Copy of Birth Certificate of Shelia Lee, evidencing birth in the United States.

N. Information from expedia.com indicating estimated cost of return airline ticket from _____ to ____ as $ ____.

O. Letter from _____, Supervisor at Made-Up Company, Petitioner's employer, dated _____.

P. Letter from Reverend Pierre Dubois, St. Joseph's Parish, dated _____.

Q. Letter from Christine Shepard, Petitioner's friend, dated _____.

R. Email communications between the Office of the Solicitor General and Department of Homeland Security attorneys about the government's alleged "policy and practice" of returning noncitizens who win their petitions for review.

S. April 24, 2012 letter with and accompanying appendixes, from the Office of the Solicitor General to the Supreme Court in *Nken v. Holder*, 566 U.S. 418 (2009), informing the Court of misrepresentation regarding the

government's policy and practice of returning noncitizens to the United States. Appendices include:

(A) *Nken* Supreme Court decision;

(B) ICE's February 24, 2012 Policy Directive;

(C) Notice to Removed Aliens Who May Be Seeking Judicial Review;

(D) April 24, 2012 ICE FAQ;

(E) April 24, 2012 Department of State cable to consular posts;

(F) Second Circuit's order, dated April 5, 2012 in *Li v. Holder*, Case No. 12-120-ag.

T. May 4, 2012 letter from Amici Curiae in *Nken v. Holder*, asking the Court to modify the *Nken* opinion to correct the flaws in its analysis based on the government's misrepresentation.

U. CBP Directive No. 3340-043 (The Exercise of Discretionary Authority) (Sept. 3, 2008), providing that border officials can override a prior decision to grant parole.

[SAMPLE DECLARTAION IN SUPPORT OF STAY MOTION]

DECLARATION OF _____

I, _____, submit this declaration in support of my Motion for Stay of Removal and hereby affirm and state:

1. My name is _____. [PROVIDE BRIEF HISTORY OF CASE, TYPE OF RELIEF SOUGHT, AND OVERVIEW OF EQUITIES (FAMILY IN THE U.S., U.S. CITIZEN CHILDREN/SPOUSE, ETC.)].
2. It is my understanding that because the Board of Immigration Appeals has dismissed my appeal, Immigration and Customs Enforcement can try to deport me at any time even though I have filed an appeal with this Court. [IF CURRENTLY IN CUSTODY OR IF REMOVAL HAS BEEN SCHEDULED OR IS IMMINENT, PROVIDE THAT INFORMATION].
3. [IF INDIVIDUAL IS AN ASYLUM SEEKER, DISCUSS IN MORE DETAIL THE ONGOING RISKS OF PERSECUTION IF REMOVED].
4. My deportation would cause significant hardship to me and my family. [WHAT IS FAMILY'S CURRENT FINANCIAL SITUATION? HOW WOULD IT BE AFFECTED BY INDIVIDUAL'S REMOVAL? IS INDIVIDUAL PRIMARY BREADWINNER OR CARETAKER? HISTORY OF STEADY EMPLOYMENT? INDICATE IF REPRESENTED PRO BONO].
5. If deported to _____, I would not be able to work, or if I found work the pay would not be enough to allow me to continue supporting my family. [WOULD INDIVIDUAL BE ABLE TO WORK? IF ASYLUM SEEKER, WOULD BE FORCED TO REMAIN IN HIDING AND THEREFORE UNABLE TO WORK? HIGH UNEMPLOYMENT RATE

IN COUNTRY OF REMOVAL? NO NETWORK? NO JOB OPPORTUNITIES IN TRAINED FIELD? DOES INDIVIDUAL HAVE FAMILY IN COUNTRY OF REMOVAL THAT S/HE CAN RELY ON? WOULD FAMILY IN THE U.S. BE FORCED INTO POSITION TO REQUEST BENEFITS?]

6. [DISCUSS FACTS RELEVANT TO SEPARATION FROM FAMILY – DO ANY CHILDREN HAVE SPECIAL NEEDS? HOW WILL SEPARATION DURING APPEAL AFFECT ANY CHILDREN INVOLVED?
7. My attorney informed me that the government has stated that if I win my appeal after I have been deported I would be responsible for securing a passport and would also be financially responsible for my travel to the United States. Because of my financial situation, this would make it extremely difficult, if not impossible, for me to return even after I win my appeal.
8. If deported, I would not have the financial means to arrange for my return to the United States and to pay for a plane ticket back to the United States. [HOW FAR WOULD INDIVIDUAL BE FROM U.S. EMBASSY? HOW DIFFICULT/EXPENSIVE WOULD IT BE TO TRAVEL TO THE EMBASSY TO OBTAIN NECESSARY DOCUMENTS?] The average cost of a one way ticket from _____ to _____ is $_____. Further, if immigration will not be able to give me significant advance notice of the exact date on which I will be allowed to travel, I will have to purchase an open-ended ticket. These kinds of tickets are even more expensive, costing about $_____.
9. It would also be difficult for me to obtain a new passport. [IF ASYLUM SEEKER, EXPLAIN ANY RISKS ASSOCIATED WITH SEEKING

TRAVEL DOCUMENT FROM THE GOVERNMENT. WOULD IT BE LOGISTICALLY DIFFICULT OR PROHIBITIVELY EXPENSIVE?]

10. If allowed to remain in the United States during the pendency of my appeal, I will continue to be a productive member of society. [DISCUSS STRENGTH OF FAMILY TIES, EMPLOYMENT, COMMUNITY TIES, LACK OF CRIMINAL HISTORY OR RECORD OF REHABILITATION IF APPLICABLE. IF NOT IN CUSTODY, POINT OUT THAT CONTINUED PRESENCE IS AT NO COST TO THE GOVERNMENT].

I declare under the penalties of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____ _____

NAME

CERTIFICATE OF SERVICE

I hereby certify that on _____ (1) I electronically filed the foregoing Motion for [Emergency] Stay and Supporting Exhibits with the United States Court of Appeals for the _____ Circuit by using the appellate CM/ECF system; and (2) mailed the same by Federal Express to the Office of Immigration Litigation, U.S. Department of Justice, P.O. Box 878, Ben Franklin Station, Washington D.C. 20044.

This Motion for [Emergency] Stay and Supporting Exhibits also will be transmitted to the Office of Immigration Litigation by facsimile or email on _____.

Dated: _____

Respectfully Submitted,

/s/ Attorney Name
Attorney Name
Organization/Law Firm
Street Address
City, State Zip
Tel. (XXX) XXX-XXXX

Attorney for Petitioner

APPENDIX

CIRCUIT SPECIFIC INFORMATION

Practitioners should become familiar with the Federal Rules of Appellate Procedure, corresponding local circuit court rules, and local internal operating procedures. In particular, practitioners should review Rules 27, 18, and 8, and corresponding local rules and practices. These are posted on each circuit court's website.

First Circuit Court of Appeals

Jurisdiction: Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico
Mailing Address: 1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210
(617) 748-9057
Website: www.ca1.uscourts.gov
Relevant Local Rule: Local Rule 27.0(b) sets forth procedures for emergency stay motions.
Emergency Stay Information: Counsel should contact Clerk's office at earliest opportunity to make special arrangements, and would likely be referred to attorney who is reviewing cases for the day. Clerk can be reached Mondays through Fridays from 8:30am to 5:00pm at (617) 748-9057.

Second Circuit Court of Appeals

Jurisdiction: Connecticut, Vermont, New York
Mailing Address: Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007
(212) 857-8500
Website: www.ca2.uscourts.gov
Relevant Local Rule: Motion must state party has notified opposing counsel, opposing counsel's position, and whether opposing counsel intends to file a response. (Local Rule 27.1(b)).
Emergency Stay Information: Emergency motion must be preceded by as much advance notice as possible to the clerk and opposing counsel; be labeled "Emergency Motion"; state the nature of the emergency and the harm that will be suffered if the motion is not granted; and state the date by which the court must act. (Local Rule 27.1(d)).
Additional Information: The Second Circuit has entered into an informal and unwritten agreement with DHS, known as the Forbearance Policy, by which the government agrees that once it is informed by the court that a stay motion has been filed, the noncitizen will not be removed until the stay motion is adjudicated. Counsel should contact the court to verify whether the agreement is still in place.

Third Circuit Court of Appeals

Jurisdiction: Pennsylvania, New Jersey and Delaware
Mailing Address: 21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790
(215) 597-2995
Website: www.ca3.uscourts.gov
Relevant Local Rule: IJ opinion should be included, and failure to do so is ground for dismissal of the motion. (Local Rule 18.1). Uncontested motions must be certified as uncontested by counsel, and are not automatically granted. (Local Rule 27.3).
Emergency Stay Information: Where motion requires expedited consideration, a response will be due within 7 days, with 3 days for a reply. To the extent possible, clerk must be given advance notice by phone that an emergency motion will be filed. (Local Rule 27.2).

Fourth Circuit Court of Appeals

Jurisdiction: Maryland, North Carolina, South Carolina, Virginia, and West Virginia
Mailing Address: 1100 East Main Street
Richmond, VA 23219
(804) 916-2700
Website: www.ca4.uscourts.gov
Relevant Local Rule: Motion should include statement that counsel for other party has been informed of intended filing and indicate whether motion is opposed and whether other party intends to file a response. (Local Rule 27(a)).
Emergency Stay Information: Must file motion electronically after petition for review has been filed. If this is not possible, call the clerk's office for special arrangements.

Fifth Circuit Court of Appeals

Jurisdiction: Louisiana, Texas and Mississippi
Mailing Address: 600 S. Maestri Place
New Orleans, LA 70130-3408
(504) 310-7700
Website: www.ca5.uscourts.gov
Relevant Local Rule: Party must contact other party and state in the motion whether an opposition will be filed. (Local Rule 27.4).
Emergency Stay Information: Emergency motions must be preceded by a call to the clerk's office and to opposing counsel. Fax or electronic submission may be permitted by the clerk, but if so, a copy also must be filed either by hand delivery or by mail. Emergency motions should be labeled "Emergency Motion," state the nature of the emergency and irreparable harm, and provide the date by which action is believed to be necessary. (Local Rule 27.3). The court will consider an emergency stay motion only where there is a scheduled removal date and the noncitizen is in custody. (Local Rule 27.3.1).

Sixth Circuit Court of Appeals

Jurisdiction: Michigan, Ohio, Kentucky and Tennessee
Mailing Address: 540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202
(513) 564-7000
Website: www.ca6.uscourts.gov
Relevant Local Rule: Counsel may file a paper copy of the motion if the motion accompanies a petition for review. (Local Rule 18).
Emergency Stay Information: All motions, including emergency motions, must be filed with clerk's office in Cincinnati. If regular filing procedures cannot be followed, counsel should contact clerk's office by phone to seek guidance. (Local Rule 27). Counsel should notify clerk at earliest possible time that an emergency motion may be filed. (I.O.P. 27).

Seventh Circuit Court of Appeals

Jurisdiction: Illinois, Indiana, and Wisconsin
Mailing Address: U.S. Court of Appeals
Room 2722
219 S. Dearborn Street
Chicago, IL 60604
(312) 435-5850
Website: www.ca7.uscourts.gov
Emergency Stay Information: Counsel should notify clerk during business hours that an emergency motion may be filed. Electronic filings may not be read and acted on outside business hours unless arrangements have been made. (Circuit Rule 27).

Eighth Circuit Court of Appeals

Jurisdiction: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota
Mailing Address: Thomas F. Eagleton Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102
(314) 244-2400
OR
Room 500 Federal Court Building
316 North Robert Street
St. Paul, MN 55101
(651) 848-1300
Website: www.ca8.uscourts.gov
Emergency Stay Information: Internal Operating Procedures state that counsel should call the clerk for emergency motions, and that a conference call can sometimes be used to present an emergency stay request.

Ninth Circuit Court of Appeals

Jurisdiction: California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands

Mailing Address: P.O. Box 193939
San Francisco, CA 94119-3939
Overnight mailing: 95 Seventh Street
San Francisco, CA 94103
(415) 355-8000

Website: www.ca9.uscourts.gov

Emergency Stay Information: Practitioners may leave a message at the emergency 24-hour phone number (415) 355-8000. Calls are recorded and monitored by the motions attorney. (Circuit Advisory Committee Note to Rule 27-3(2)). If action on motion is needed within 21 days, notify clerk and opposing counsel of emergency motion and label motion "Emergency Motion Under Circuit Rule 27-3" (Circuit Rule 27-3. See rule for additional requirements.) When it is necessary to notify the court of an emergency outside of standard office hours, practitioners should call (415) 355-8509. (General Order 6.4(c)(1)).

Additional Information: The filing of a stay motion temporarily stays removal until further order of the court. *Deleon v. INS*, 115 F.3d 643 (9th Cir. 1997); General Order 6.4(c)(1) (General Orders of the Ninth Circuit Court of Appeals). A stay motion may be supplemented within 14 days of filing the initial motion. (General Order 6.4(c)(2))

Tenth Circuit Court of Appeals

Jurisdiction: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming

Mailing Address: The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
(303) 844-3157

Website: www.ca10.uscourts.gov

Relevant Local Rule: Stay motion also must include a copy of the transcript from the IJ's ruling and copies of IJ and BIA decisions. (Local Rule 8.2(A)(5)). Motion must state opposing party's position or explain why party was unable to obtain opposing party's position. (Local Rule 17.3(C)).

Emergency Stay Information: A motion requiring a ruling within 48 hours must be marked "EMERGENCY" and must state reason it was not filed earlier, date of underlying order with time and date it becomes effective, and phone numbers and emails for all counsel of record.

Eleventh Circuit Court of Appeals

Jurisdiction: Alabama, Florida and Georgia

Mailing Address: 56 Forsyth St.
Atlanta, GA 30303
(404) 335-6100

Website: www.ca11.uscourts.gov

Relevant Local Rule: Motion should include copy of orders below (Circuit Rule 8-1, 18-1, 27-1)a)(3)), and must include proof of service on all parties, including those appearing below (Circuit Rule 27-1(a)(3), Internal Operating Procedures). A motion should contain information about prior actions of the court or whether a similar application for relief has been made (Circuit Rule 27-1(a)(4)).

Emergency Stay Information: Motion will be treated as emergency only if the motion will be moot unless ruled upon within 7 days. Motion must be labeled as "Emergency Motion" and state nature of emergency and date by which action is necessary. Counsel must notify opposing counsel by phone and may contact clerk by phone to discuss forthcoming motion. Counsel may file motion outside normal business hours only if motion will be moot unless ruled upon before noon of the next business day. (Circuit Rule 27-1(b)).