

**TEMPLATE STAY MOTION  
FOR INDIVIDUALS FILING MOTIONS TO REOPEN  
THAT ARE NOT BASED ON FEAR-BASED CLAIMS**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice.  
DO NOT TREAT THIS TEMPLATE MOTION AS LEGAL ADVICE.

This template is applicable to individuals seeking a stay of deportation in conjunction with the filing of a motion to reopen that is not based on eligibility for asylum, withholding of removal, or protection under the United Nations Convention Against Torture.

This template can be adapted for filing with the Board of Immigration Appeals (BIA), where highlighted in blue, or the Immigration Court, where highlighted in green. The motion is written for a single respondent. Counsel should include the plural for family units.

[Attorney & EOIR ID #]  
[Address, Phone, Email]

[DETAINED]  
[REMOVAL IMMINENT]

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS / IMMIGRATION COURT  
FALLS CHURCH, VIRGINIA / CITY, STATE

\_\_\_\_\_  
In the Matter of: )  
)  
[RESPONDENT'S NAME] )  
)  
In Removal Proceedings. )  
\_\_\_\_\_ )

File No.: A[ ]

**RESPONDENT'S EMERGENCY MOTION TO STAY REMOVAL**

A[ ]

## I. INTRODUCTION

Respondent(s), [NAME(S)], [for children: a XX-year old child,] faces imminent removal to a country where [he/she] [add brief summary of consequences: she will be separated from her children, has not lived in X years, has no family, etc.]. [On information and belief, Respondent's deportation is scheduled for DATE or Respondent is in custody and could be deported at any time.]. [He/She] seeks an emergency stay of removal to allow the [Board of Immigration Appeals (Board or BIA) / Immigration Court] to adjudicate Respondent's pending motion to reopen based on [\_\_\_\_ (e.g. ineffective assistance of counsel / new eligibility for relief / a fundamental change in law)]. That motion, filed on DATE [or: filed concurrently with this motion], contains new, previously unavailable material evidence that [\_\_\_\_ (e.g., Respondent's prior counsel provided ineffective assistance and Respondent suffered prejudice as a result / Respondent is now eligible for [form of relief] / Respondent is no longer subject to removal due to a change in law)]. The motion is pending.

Respondent is detained at [name of facility] with a final order of removal and deportation is imminent. Therefore, the [Board] / [Court] should immediately rule on this stay motion.<sup>1</sup>

## II. RESPONDENT MERITS A STAY OF REMOVAL

The Board has authority to issue an administrative stay because Respondent's motion to reopen is currently pending. 8 C.F.R. §§ 1003.2(f), 1003.1(d)(1)(ii). The Court has authority to

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<sup>1</sup> Emergency action is necessary, particularly because the Board's Emergency Stay Unit (ESU) hotline does not operate on weekends or holidays or on weekdays between 5:30 pm and 9 am Eastern Time, but ICE Enforcement and Removal Operations (ERO) does conduct removals during those times. *See* BIA Practice Manual, Ch. 6.3(c)(ii)(A). Emergency action is necessary because the Court will not consider stay requests on weekends or holidays or on weekdays after operating hours, but ICE Enforcement and Removal Operations (ERO) does conduct removals during those times. *See* Immigration Court Practice Manual, Ch. 8.3(c)(ii)(A).

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C.F.R. § 1003.23(b)(1)(v).

A. **THE BOARD / COURT SHOULD STAY RESPONDENT'S REMOVAL  
BASED ON A TWO-FACTOR BALENCING TEST.**

1. **The Board / Court Should Adopt a Two-Factor Balancing Test that  
Prioritizes the Prevention of Harm.**

When evaluating Respondent's motion to stay removal, the Board / Court should employ a two-factor test that balances both the likelihood of success on the merits and the risk of irreparable harm, and weighs heavily in favor of preventing harm where Respondent(s) [brief summary of the consequences: are members of family facing separation, is a child facing removal alone, etc.] and [have/has] filed a non-frivolous motion to reopen.

As an initial matter, the Board / Court cannot adjudicate this stay motion *solely* based on the likelihood of success of Respondent's motion, as that would require the Board / Court to prematurely adjudicate the entire merits of the case and would be contrary to the purpose of the stay process. Stays traditionally have been intended to resolve a two-pronged problem: "what to do when [(1)] there is insufficient time to resolve the merits and [(2)] irreparable harm may result from delay." *Nken v. Holder*, 556 U.S. 418, 432 (2009); *see also id.* ("The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review.") (quotation omitted). A standard which fails to take harm into account would be arbitrarily divorced from the purpose of the process. *Cf. Judulang v. Holder*, 565 U.S. 42, 55 (2011) ("[A]gency action must be based on non-arbitrary, relevant factors," including "the purposes of the immigration laws or the appropriate operation of the immigration system.") (quotation and citations omitted). Focusing solely on the likelihood of success is particularly inappropriate where the exigencies of the deportation process may require

noncitizens to initially file skeletal motions and supplement them later. *Cf. Yeghiazaryan v. Gonzales*, 439 F.3d 994, 1000 (9th Cir. 2006) (holding that Board erroneously denied skeletal motion to reopen where counsel notified the Board that additional evidence would be forthcoming within the 90-day statutory time period for filing a motion to reopen). Thus, in addition to the likelihood of success on the merits, the Board / Court must give considerable weight to irreparable harm when adjudicating this stay motion.

The Board / Court should weigh the risk of harm heavily and prioritize preventing irreparable harm where, as here, [brief summary of harm: a family is facing separation, a child is facing removal alone, etc.]. Even the more strident federal court test for injunctive relief involves a balancing of factors, key among them the prevention of irreparable harm. *See Nken*, 556 U.S. at 434 (holding that “the most critical factors” for a federal appellate court stay of removal are risk of irreparable harm and likelihood of success on the merits); *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015) (finding that stay adjudication requires sliding scale balancing test so showing of high risk of irreparable harm reduces necessary degree of possibility of success on the merits); *Braintree Labs., Inc. v. Citigroup Global Mkts., Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010) (same); *Leiva-Perez*, 640 F.3d at 966, 970 (same); *cf. Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37–38 (2d Cir. 2010) (in analogous context, holding that the preliminary injunction standard must be flexible). And, where—as here—the motion to reopen presents never reviewed evidence and argument [by a family unit or an unaccompanied child], the Board / Court should place more weight on preventing irreparable harm.<sup>2</sup>

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<sup>2</sup> The Board / Court should not adopt the four-factor test set forth in *Nken* for federal courts of appeals considering stay motions filed in conjunction with a petition for review. This more demanding test, discussed in Section II.C. *infra*, assumes the agency already has reviewed and

In sum, the Board / Court should adopt a two-factor balancing test that considers both the likelihood of success on the merits and preventing irreparable harm, giving significant weight to the later factor where, as here, the Respondent has filed a non-frivolous motion to reopen and will be [brief summary of harm: separated from his/her family, etc.] absent a stay.

**2. Respondent Merits a Stay Under a Two-Factor Balancing Test that Prioritizes Prevention of Irreparable Harm.**

[Address likelihood of success on the merits of the motion and irreparable harm, such as separation from family and/or community, and cite evidentiary support whenever available (see sample stay support letters)]

**C. EVEN UNDER THE TEST FOR JUDICIAL STAYS OF REMOVAL, RESPONDENT MERITS A STAY.**

In *Nken v. Holder*, the Supreme Court instructed courts of appeals to apply the “traditional” standard when adjudicating stay motions filed in conjunction with a petition for review. Under this standard, the court considers the following 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*, 566 U.S. at 434. This four-factor test is not an appropriate standard for the agency to apply in the first instance when assessing a motion to reopen based on a claim that has never been reviewed on its merits. *See supra* n.2. Nevertheless, even under this more rigid test, Respondent merits a stay of removal.

**1. Respondent Has Made A Strong Showing That [He/She] Would Likely Succeed on [His/Her] Motion to Reopen.**

As discussed above, *supra* Section II.A.2, Respondent has filed a meritorious

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rejected the underlying claim on the merits; it is not appropriate when the agency has not yet considered the facts, arguments, or evidence supporting the claims.

motion to reopen.

[Summarize merits of Respondent’s motion to reopen]

**2. Respondent Has Established that [He/She] Would Suffer Irreparable Harm if Deported Before the Adjudication of [His/Her] Motion to Reopen.**

As discussed above, *supra* Section II.B.2, Respondent will suffer irreparable harm if the Board / Court denies [him/her] a stay.

[Summarize irreparable harm and cite evidentiary support whenever available (see sample stay support letters)]

**3. A Stay of Respondent’s Removal Will Not Injure the Department of Homeland Security, and the Public Interest Favors Granting a Stay.**

The last two stay factors, injury to other parties in the litigation and the public interest, “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. Here, those factors favor Respondent because, as the Supreme Court observed, “there is a public interest in preventing [noncitizens] from being wrongfully removed, particularly to countries where they are likely to face substantial harm.” *Id.* at 436. Furthermore, Respondent is not “particularly dangerous” nor has [he/she] “substantially prolonged his stay by abusing the process provided to him,” *id.*, nor do any other factors exist to suggest a greater than usual interest in Respondent’s removal.

[Briefly discuss how Respondent is not a threat to the community or otherwise dangerous, cite evidentiary support whenever available (see sample stay support letters).]

**III. CONCLUSION**

For these reasons, this Board / Court should issue an order staying Respondent’s removal.

Respectfully submitted,

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[Attorney Name]

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS / IMMIGRATION COURT  
FALLS CHURCH, VIRGINIA / [CITY, STATE]

\_\_\_\_\_  
In the Matter of ) File No.: A[ ]  
)  
[RESPONDENT] )  
)  
In Removal Proceedings. )  
\_\_\_\_\_)

**Exhibit List in Support of Respondent’s Motion to Stay Removal**

**Include, if possible:**

Declaration of Respondent, dated [date], attesting that \_\_\_\_\_

Documentary evidence supporting Respondent’s claim

Articles/evidence of country conditions supporting Respondent’s claim

Letters from [family/friend/community member/employer/religious letter], dated [DATE], attesting that [describe harm Respondent would suffer if deported]

File No.: A[ ]  
[NAME]

**PROOF OF SERVICE**

On \_\_\_\_\_, I, [Name] served a copy of Respondent's [Emergency] Motion to Stay Removal to the Office of Chief Counsel, Department of Homeland Security, at the following address: [OCC Address] by first class mail.

\_\_\_\_\_  
[Name]

\_\_\_\_\_  
Date