TEMPLATE STAY MOTION
FOR INDIVIDUALS FILING MOTIONS TO REOPEN
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 SAMPLE MOTION AS LEGAL ADVICE.

This template is applicable to individuals seeking a stay of deportation in conjunction with the filing of a motion seeking to reopen removal proceedings in whole, or in part, to apply 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 also 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:)	File No.: A[ ]
)	
[RESPONDENT'S NAME])	
)	
In Removal Proceedings.)	
)	

RESPONDENT'S EMERGENCY MOTION TO STAY REMOVAL

I. INTRODUCTION

Respondent(s), [NAME(S)], [**for children:** a XX-year old child,] faces imminent removal to the country where [he/she] fears [persecution, torture,] and even death. [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 new and previously unavailable evidence of this same fear. That motion, filed on DATE [**or:** filed concurrently with this motion], seeks reopening to pursue [asylum / withholding of removal / protection under the Convention Against Torture (CAT)] and contains new evidence of changed conditions and a new claim of eligibility for such protection. **If seeking asylum/withholding, cite:** 8 U.S.C. § 1229a(c)(7)(B), (C)(ii); 8 C.F.R. § 1003.2(c)(1), (3)(ii); 8 C.F.R. § 1003.23(b)(3), (4)(i). **If seeking CAT only, cite:** 8 U.S.C. § 1229a(c)(7)(A), (B); 8 C.F.R. § 1003.2(c)(1); 8 C.F.R. § 1003.23(b)(3). That 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.[1]

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

[1] 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).

issue an administrative stay because Respondent's motion to reopen is currently pending. 8 C.F.R. § 1003.23(b)(1)(v), (b)(4)(i).

A. THE BOARD / COURT SHOULD AUTOMATICALLY STAY RESPONDENT'S REMOVAL UNTIL IT ADJUDICATES THE MOTION TO REOPEN

Because Respondent has filed [his/her] stay request in conjunction with a motion to reopen based on evidence and a claimed fear of [persecution or torture] that no administrative body or court has reviewed, the Board / Court should automatically stay removal. Absent an automatic stay in these circumstances, the Board / Court risks wrongfully deporting Respondent to face [persecution, torture, or even death] before it can fully and with sufficient deliberation evaluate the merits of the motion. The Board may create an automatic stay policy through adjudication of this motion. *See, e.g.*, *Matter of X-G-W-*, 22 I&N Dec. 71, 74 (BIA 1998) (adopting policy of excusing regulatory deadline to allow certain motions to reopen to pursue asylum claims based on coercive family planning policies), *overruled by Matter of G-C-L-*, 23 I&N Dec. 359, 361-62 (BIA 2002) (withdrawing the policy due to the passage of time); *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002) (adopting policy allowing adjudicators to grant motions to reopen to apply for adjustment of status pending approval of immigrant visa petition where respondent satisfies a five-factor test).

1. Where a Motion to Reopen is Predicated on New and Previously Unavailable Evidence of a Non-Frivolous Fear-Based Claim, an Automatic Stay is Warranted.

The Board / Court should automatically stay removal when a noncitizen, like Respondent, seeks a stay in conjunction with a non-frivolous motion to reopen based on new and previously unavailable evidence of a fear-based claim. First, premature removal may mean injury or even death before the Board / Court can adjudicate Respondent's fear-based claim. Second, a

cursory review of the merits of such a motion to reopen, as would necessarily occur in an emergency stay evaluation, is inappropriate where no adjudicator has previously examined the evidence or claim presented in the motion. Third, the Board's refusal to grant a stay before deciding the merits of the motion would deprive Respondent of the opportunity to seek a judicial stay in conjunction with a petition for review prior to their deportation to injury or death. *See* 8 U.S.C. § 1252(b)(3)(B). Third, the Court's refusal to grant a stay before deciding the merits of the motion would deprive Respondent of the opportunity to seek a stay in conjunction with an appeal to the Board of Immigration Appeals (BIA or Board). *See* 8 C.F.R. § 1003.6(b). Finally, absent an automatic stay in these circumstances, the Board could deprive Respondent of [his/her] statutory right to seek reopening.

First, the stakes in stay adjudications are especially high when they are tied to a motion to reopen based on a fear of physical harm and/or torture in the noncitizen's country of origin. Such claims inherently carry the risk of irreparable harm if the noncitizen is removed prematurely. *See Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (observing that for persecution and torture-based claims, the risk of physical harm must be part of the irreparable harm inquiry); *Khouzam v. Hogan*, 497 F. Supp. 2d 615, 626–27 (M.D. Pa. 2007) (granting stay of removal where habeas claims challenging rescission of relief under the Convention Against Torture were "not frivolous" and there was a likelihood of torture). [**If Respondent is a child:** The risk of harm is particularly high here, because Respondent is a child. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045 (9th Cir. 2007) ("[H]arm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution.").] If the Board / Court denies or fails to rule on the stay sought by Respondent, who has a pending fear-based motion to reopen, the practical result is that Respondent likely will face the ultimate harm [s/he] fears. *See Devitri v.*

Cronen, 289 F. Supp. 3d 287, 294 (D. Mass. 2018) (delay in the Board's adjudication of stay motions for asylum applicants leads to "Kafkaesque" result that "they will be removed back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture"); *cf. Desta v. Ashcroft*, 365 F.3d 741, 748 (9th Cir. 2004) ("If [asylum applicants] are required to return to their countries of origin while they petition for review by this court, they may not be able to return to this country even if they are eventually successful on the merits of their petitions."). Automatically staying removal in these circumstances is necessary to avoid the high risk of irreparable harm absent a stay.

Second, because Respondent's underlying motion includes new, previously unavailable evidence, it necessarily has never been reviewed by any adjudicator. *See* 8 U.S.C. § 1229a(c)(7)(B), (C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii); 8 C.F.R. § 1003.23(b)(4)(i). Therefore, the motion for stay is not well-suited to the rushed review that necessarily occurs when assessing it on an emergency basis. The time frame between a stay motion becoming an emergency (and therefore amenable to adjudication) and actual deportation is too short to allow adequate review of new facts, claims, legal arguments and often voluminous documentary evidence.[2] Moreover, the Board member adjudicating the stay request may not have access to the record of proceedings below. Until the Board / Court can fully evaluate the underlying motion to reopen, an automatic stay is the only way to ensure that Respondent is not wrongly deported despite a new meritorious fear-based claim.

[2] The BIA only immediately adjudicates "emergency" stay requests and categorizes stay requests as such when, inter alia, deportation is "imminent." BIA Practice Manual, Ch. 6.3(c)(ii)(A). In practice, the BIA generally treats a deportation as imminent if it is scheduled within 48 hours. The Court only immediately adjudicates "emergency" stay requests and categorizes stay requests as such when, inter alia, deportation is "imminent." Immigration Court Practice Manual, Ch. 8.3(c)(ii)(A).

A[ ]

Third, failing to issue an automatic stay would conflict with the right to seek a judicial stay of removal in conjunction with filing a petition for review. *See* 8 U.S.C. § 1252(a), (b)(3)(B). Were the Board to deny a stay of removal before adjudicating the underlying motion to reopen, it would deprive Respondent of the right to seek a judicial stay from the [____] Circuit Court of Appeals.[3] Until the Board rules on Respondent's pending motion to reopen, there is no final order of removal of which Respondent can seek judicial review. 8 U.S.C. § 1101(a)(47)(B); 8 U.S.C. § 1252(a)(1); *Shaboyan v. Holder*, 652 F.3d 988, 989-90 (9th Cir. 2011) (concluding the court lacked jurisdiction to review interim BIA order denying stay request where BIA had not yet adjudicated pending motion to reopen). Granting an automatic stay until the Board rules on the motion to reopen is the only way to ensure that, should the Board deny the motion to reopen, Respondent may seek a stay in federal court.

Third, failing to issue an automatic stay would conflict with the right to seek a stay of removal in conjunction with filing an appeal to the BIA. *See* 8 C.F.R. § 1003.6(b). Were the Court to deny a stay of removal before adjudicating the underlying motion to reopen, it would deprive Respondent of the right to seek a stay from the Board. The Board will not consider an appeal of the stay denial alone. *See Matter of K-*, 20 I. & N. Dec. 418, 419 (BIA 1991) ("In order to avoid the piecemeal review of the many questions which may arise in a deportation proceeding, this Board does not ordinarily entertain interlocutory appeals."). Granting an automatic stay until the Court rules on the motion to reopen is the only way to ensure that, should the Court deny the motion to reopen, Respondent an opportunity to stay from the Board.

---

[3] In some circuits, the mere filing of a judicial stay motion triggers a temporary stay of removal pending briefing and a decision on the stay motion. *See, e.g.*, First Cir. Local Rule 18.0; *In re Immigrant Petitions*, 702 F.3d 160, 162 (2d Cir. 2012); Third Circuit Standing Order Regarding Immigration Cases (Aug. 5, 2015); Ninth Circuit General Order 6.4(c).

A[ ]

Finally, in these circumstances, deportation prior to adjudication of the motion to reopen essentially would defeat Respondent's statutory right to pursue a motion under 8 U.S.C. § 1229a(c)(7), which serves as an "important safeguard" to "ensure a proper and lawful disposition" of [his/her] immigration proceedings. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008); *see also Kucana v. Holder*, 558 U.S. 233, 242 (2010) (same, citing *Dada*). Where the consequence of an erroneous deportation is physical harm to, or even the death of, Respondent, it is plausible, if not likely, that [s/he] would not benefit from later success on the merits. Thus, an automatic stay is the only way to ensure that Respondent has a meaningful opportunity to pursue [his/her] fear-based motion to reopen and benefit from a favorable decision. *See Desta*, 365 F.3d at 748; *Devitri*, 289 F. Supp. 3d at 294. The Board / Court may not cut off this statutory right. *See, e.g.*, *Kucana*, 558 U.S. at 252-53 (holding that the agency cannot cut off right to judicial review of motions to reopen by regulation); *Madrigal v. Holder*, 572 F.3d 239, 245 (6th Cir. 2009) ("To allow the government to cut off Madrigal's statutory right to appeal an adverse decision, . . . , simply by removing her before a stay can be issued or a ruling on the merits can be obtained, strikes us as a perversion of the administrative process."). An automatic stay in these circumstances avoids this risk of jeopardizing Respondent's ability to benefit from any decision granting reopening.

For the foregoing reasons, because Respondent has filed [his/her] stay request in conjunction with a motion to reopen based on evidence and a claimed fear of [persecution or torture], the Board / Court should grant an automatic stay.

2. Respondent Merits an Automatic Stay

[Explain merits of fear-based claim, including new claim/evidence raised]

B. IN THE ALTERNATIVE, THE BOARD / COURT SHOULD STAY RESPONDENT'S REMOVAL BASED ON A TWO-FACTOR BALENCING TEST.

1. In the Alternative, the Board / Court Should Adopt a Two-Factor Balancing Test that Prioritizes the Prevention of Harm.

If the Board / Court declines to automatically stay Respondent's deportation for the reasons set forth above, 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 the motion to reopen is based on a non-frivolous, new, fear-based claim.

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

A[ ]

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, Respondent's motion to reopen is based on a non-frivolous fear-based claim arising from changed country conditions. *See* Section II.A.1 (citing *Leiva-Perez*, 640 F.3d at 969; *Desta*, 365 F.3d at 748; *Devitri*, 289 F. Supp. 3d at 294). 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 fear-based claims, the Board / Court should place more weight on preventing irreparable harm.[4]

[4] 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 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.

A[ ]

In sum, as an alternative to the automatic stay standard discussed above, 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 motion to reopen is based on a non-frivolous, never-reviewed fear-based claim.

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, including both the risk of physical harm/death, but also address any other harm (e.g., separation from family, community, etc.,) 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 fear-based claim that has never been reviewed on its merits. *See supra* n.4. 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 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, including both the risk of physical harm/death, but also address any other harm (e.g., separation from family, community, etc.,) 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, the Board / Court should issue an order staying Respondent's removal.

Respectfully submitted,

_____

[Attorney Name]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OFIMMIGRATION 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