**Practice Advisory**

# Stays of Removal[1]

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## I. Introduction

A stay of removal prevents the Department of Homeland Security (DHS) from executing a final order of removal against a person.[2] DHS, immigration judges (IJs), the Board of Immigration Appeals (BIA), and the U.S. courts of appeals all have the authority to grant stays of removal. If a stay of removal is in effect, DHS may not remove the person from the United States.

There are two categories of stays of removal: court-ordered and administrative. Although immigration court**s** and the BIA are part of the Department of Justice and therefore administrative tribunals under the Executive Branch rather than Judicial Branch courts, stay requests considered by these adjudicators are governed by similar standards and procedures as those that govern judicial stay requests. As such, this practice advisory uses the term "court-ordered stay of removal" to describe a stay issued by an immigration court, the BIA, or a U.S. court of appeals. Administrative stays of removal refer to DHS-issued stays of removal. This practice advisory explains how to seek a court-ordered stay of removal with an IJ, the BIA, and the U.S. courts of appeals, and how to apply for an administrative stay of removal from DHS. This practice advisory

[2] Deportation and exclusion orders may also be stayed. *See, e.g.*, *Ofosu v. McElroy*, 98 F.3d 694, 703 (2d Cir. 1996) (staying an exclusion order). However, this practice advisory will refer exclusively to removal orders.

incorporates changes since the since the start of the second Trump administration that have undermined or seek to undermine stay of removal protections namely the One Big Beautiful Bill Act (OBBBA)[3] new fee regime, new BIA decisions, and the interim final rule (IFR) "Appellate Procedures for the Board of Immigration Appeals."

## II. Overview of Stays of Removal

A removal order is automatically stayed in certain situations, while in others a stay is granted only at the discretion of the court. Where an automatic stay of removal does not apply, a person with a final removal order[4] can obtain a court-ordered stay only when they have a certain type of case pending before that adjudicative body.[5] At the immigration court level, a person may seek a stay only when a motion to reopen or reconsider is pending.[6] At the BIA level, a stay can only be sought while the BIA is reviewing an appeal of a motion to reopen or reconsider, or when the BIA is considering a motion to reopen or reconsider in the first instance. At the U.S. court of appeals level, an attorney may file a motion for a stay only if a petition for review of a removal order or a petition for rehearing is pending. If an IJ, the BIA, or a U.S. court of appeals has granted a stay, DHS must take all reasonable steps to comply with that order;[7] compliance is not discretionary. Similarly, if a statute, regulation, or settlement agreement requires a stay in an individual's case, DHS must comply.[8] However, since the start of the second Trump administration, DHS has flouted stays of removal and unlawfully removed many people who should have been safe from removal.[9]

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[3] Act of July 4, 2025, Pub. L. 119-21, 139 Stat. 72, *available at* https://www.congress.gov/119/plaws/publ21/PLAW-119publ21.pdf.

[4] An order of removal become final: (1) upon an immigration judge's order if the noncitizen waives his or her right to appeal to the 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] *See* INA § 242(b)(3)(B); 8 C.F.R. §§ 1003.2(f), 1003.6(b), 1003.23(b)(1)(v).

[6] As a result of the OBBBA, the current fee for a motion to reopen or reconsider filed with an immigration court is $1,065 while the fee for a motion filed before the BIA is $1,030. EOIR, *Types of Appeals, Motions, and Required Fees*, https://www.justice.gov/eoir/types-appeals-motions-and-required-fees (last updated Feb. 18, 2026).

[7] 8 C.F.R. §§ 241.6(c); 1241.6(c).

[8] *See, e.g.*, INA § 240(c)(7)(C)(iv) (filing of certain motions to reopen by battered spouses, children, and parents "shall" stay removal until final adjudication, including BIA appeal); INA § 208(c)(1)(A) (government "shall not remove" a noncitizen granted asylum); INA § 244(a)(1)(A) (government "shall not remove" a noncitizen with Temporary Protected Status); Settlement Agreement, *J.O.P. v. DHS*, No. 19-cv-01944-SAG, §III.I (approved Nov. 25, 2024), https://nipnlg.org/sites/default/files/2024-07/2024-JOP-settlement-agreement.pdf (stating that "ICE will refrain from executing a Class Member's final removal order" until USCIS adjudicates their asylum application); *Calderon Jimenez v. Mayorkas*, No. 18-CV-10225-MLW, 2025 WL 220511, at *2 (D. Mass. Jan. 16, 2025) (during the two-year period of the settlement, ICE may not take enforcement actions against class members except when ICE determines that an individual poses a threat to public safety).

[9] *See e.g.,* Ximena Bustillo, *His mistaken deportation was thought to be unique. But 'the problem is getting worse'*, NPR (Feb. 3, 2026, 5:00 AM), https://www.npr.org/2026/02/03/g-s1-108426/trump-kilmar-abrego-garcia-immigration-mistaken-deportations; Kyle Cheney, *Trump admin acknowledges another 'inadvertent' deportation despite court order*, Politico (Nov. 18, 2025, 7:36 PM), https://www.politico.com/news/2025/11/18/trump-admin-

A person with a removal order may seek an administrative stay of removal from DHS at any time, even if they do not have a case pending before any adjudicative body and even if they are pursuing a judicial stay.[10] There are no circumstances wherein DHS is required to grant an administrative stay; it is always at the agency's discretion.[11] The Supreme Court has recognized that the agency "retains discretion over whether to remove a noncitizen from the United States."[12] Past DHS prosecutorial discretion guidance has reflected this discretionary authority to stay removals of certain noncitizens. For example, the September 30, 2021, prosecutorial discretion memo, "Guidelines for the Enforcement of Civil Immigration Law," known as the "Mayorkas Memo," noted, "It is well established in the law that federal government officials have broad discretion to decide who should be subject to arrest, detainers, removal proceedings, and the execution of removal orders."[13] Similarly, the now rescinded May 27, 2021 memo on prosecutorial discretion issued by former Director of the DHS Office of the Legal Principal Advisor (OPLA), John D. Trasviña, made clear that while OPLA attorneys "are both authorized by law and expected to exercise discretion,"[14] other law enforcement entities, including other ICE sub-agencies "have tools at their disposal that OPLA does not, including stays of removal."[15]

Beyond pursuing a stay of removal before the immigration court, the BIA, or a U.S. court of appeals, noncitizens who have a cause of action to bring a case in a U.S. district court may also seek a stay of removal or temporary restraining order (TRO) from that court.[16] Attorneys have used this strategy of seeking a stay in conjunction with a habeas petition or a challenge under the Administrative Procedure Act.[17] At least one federal district court—the U.S. District Court for

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deportation-order-00657401; Lindsay Whitehurst, Michael Casey, Rebecca Santana and Tim Sullivan, '*Unquestionably in violation': Judge says US government didn't follow court order on deportations*, Associated Press (May 21, 2025), https://www.ap.org/news-highlights/spotlights/2025/unquestionably-in-violation-judge-says-us-government-didnt-follow-court-order-on-deportations/; Nikki McCann Ramirez, *Trump-Appointed Judge Orders Return of Another Wrongfully Deported Man*, Rolling Stone (Apr. 24, 2025), https://www.rollingstone.com/politics/politics-news/trump-appointed-judge-order-return-el-salvador-1235324029/.

[10] 8 C.F.R. §§ 241.6(a), 1241.6(a).

[11] 8 C.F.R. § 241.6(a) ("The Commissioner, Deputy Commissioner, Executive Associate Commissioner for Field Operations, Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, regional directors, or district director, in his or her discretion and in consideration of factors listed in 8 C.F.R. 212.5 and section 241(c) of the Act, may grant a stay of removal or deportation for such time and under such conditions as he or she may deem appropriate").

[12] *United States v. Texas*, 599 U.S. 670, 679 (2023).

[13] Memorandum from Alejandro N. Mayorkas, DHS Sec'y, Guidelines for the Enforcement of Civil Immigration Law at 2 (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.

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

[15] *Id.* at 10.

[16] Motions for TROs or stays of removal are governed by a four-factor test: 1) the petitioner's likelihood of success on the merits, (2) the likelihood that the petitioner will suffer irreparable harm in the absence of such relief, (3) whether the balance of equities tips in the petitioner's favor, and (4) whether an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *Nken v. Holder*, 556 U.S. 418, 434 (2009).

[17] *See, e.g., Ozturk v. Trump*, 777 F. Supp. 3d 26, 44 (D. Mass. 2025) (granting stay of removal "to preserve the status quo" and ensure Ms. Ozturk's habeas claim could be considered); *Leuthavone v. Salisbury*, No. 97-CV-556-JJM, 2025 WL 1135588, at *1 (D.R.I. Apr. 17, 2025) (finding inherent authority to issue stay to preserve status quo in habeas proceedings under the All Writs Act); *Hamama v. Adducci*, 261 F. Supp. 3d. 820 (E.D. Mich. 2017)

the District of Maryland—has a standing order automatically staying removal for two business days after a noncitizen files a habeas petition and a request for emergency relief in that district, which the presiding judge may shorten or extend by order.[18] However, some federal courts have held that federal district courts lack jurisdiction to grant relief in the form of a stay or TRO for people with deportation orders due to section 242(g) of the Immigration and Nationality Act (INA).[19] Attorneys pursuing a stay of removal or TRO from a district court should determine if there is binding circuit court precedent regarding jurisdiction in this context, if the relevant district court has granted such relief in the past, and if the petitioner's case satisfies the four factors required to receive a stay.[20]

## III. Stays of Removal Before the Executive Office for Immigration Review

When a person is in administrative proceedings before the Executive Office of Immigration Review (EOIR), an automatic stay of removal may apply in a few limited situations, which are described below. Unless one of those situations applies, the decision to grant a stay is at the discretion of the immigration court, the BIA, or DHS.

### A. Automatic Stays of Removal for Cases Pending with EOIR

Automatic stays apply only to certain situations where a case or motion is before the immigration court or the BIA.[21] An individual's removal order will be stayed automatically in the situations listed below. Note that on February 6, 2026, EOIR issued an IFR regarding appellate procedures at the BIA would significantly impact the length of certain automatic stays.[22] The rule was scheduled to go into effect on March 9, 2026, but a federal district court vacated the three key provisions, two of which are highlighted below.[23] As a result, those provisions will not go into effect unless EOIR engages in further rulemaking (which must survive any subsequent legal challenge) or the court of appeals reverses.[24]

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

[18] Second Amended Standing Order 2025-01 (D. Md. Dec. 1, 2025), https://www.mdd.uscourts.gov/sites/mdd/files/Second%20Amended%202025-01.pdf.

[19] *See, e.g., Imran v. Harper*, No. 25-30370, 2026 WL 93131, at *1 (5th Cir. Jan. 13, 2026); *Hamama v. Adducci*, 912 F.3d 869 (6th Cir. 2018); *Ashqar v. Hott*, No. 1:19-cv-716, 2019 WL 2712276 (E.D. Va. June 5, 2019); *Majano Garcia v. Martin*, 379 F. Supp. 3d 1301 (S.D. Fla. 2018); *Adan v. Sessions*, No. 17-5328, 2017 WL 6001740 (D. Minn. Dec. 4, 2017).

[20] *See supra* note 14.

[21] Immigration Court Practice Manual (ICPM) Ch. 7.2, https://www.justice.gov/eoir/policy-manual-eoir/part-II/icpm/chapter-7-2 (last updated Feb. 10, 2026); BIA Practice Manual Ch. 5.2, https://www.justice.gov/eoir/policy-manual-eoir/part-III/bia/chapter-5-2 (last updated Feb. 10, 2026).

[22] Appellate Procedures for the Board of Immigration Appeals, 91 Fed. Reg. 5267 (Feb. 6, 2026).

[23] *Amica Center for Immigrant Rights v. EOIR*, No. CV 26-696 (RDM), 2026 WL 662494, at *24-27, 34 (D.D.C. Mar. 8, 2026).

[24] For the status of the litigation challenging the IFR, *Amica Center for Immigrant Rights v. Executive Office for Immigration Review*, No. 1:26-cv-696 (D.D.C. filed Feb. 26, 2026), see https://www.americanimmigrationcouncil.org/litigation/board-immigration-appeals/.

- If a direct appeal of an immigration court decision ordering removal is reserved, removal is automatically stayed during the period for filing the Notice of Appeal with the BIA—currently 30 days, *but if the BIA IFR goes into effect, this filing period would be reduced to 10 days for most appeals*;[25]
- If an appeal of an immigration court decision ordering removal is timely filed, removal is stayed pending adjudication of the appeal by the BIA[26]—*but if the BIA IFR goes into effect, the BIA would summarily dismiss all appeals within 15 days of the notice of appeal unless it votes en banc to accept an appeal*;[27]
- If a motion to reopen and rescind an *in absentia* order is filed pursuant to INA § 240(b)(5)(C), removal is stayed pending an IJ's decision on that motion;[28]
- If a timely direct appeal of an immigration court decision denying a motion to reopen and rescind an *in absentia* order that was issued prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[29] is filed, removal is stayed pending adjudication of the appeal;[30]
- If a case is certified to the BIA, removal is stayed pending a BIA decision;[31] and
- If a motion to reopen (or an appeal of a denial of a motion to reopen) is filed by a "qualified" noncitizen pursuant to the Violence Against Women Act,[32] removal is stayed pending a decision on the motion or appeal.[33]

**PRACTICE TIP:** The OBBBA raised appeal, motion to reconsider, and motion to reopen fees significantly.[34] These new fees make it harder for people to access stay of removal protections by pricing them out of the vehicles that provide these protections and additional review or by forcing them to take additional time to seek a fee waiver (Form EOIR 26A), which EOIR adjudicators may approve at their discretion.[35] When seeking a fee waiver, legal representatives should take into account *Matter of Garcia Martinez*, 29 I&N Dec. 169 (BIA 2025). If the EOIR adjudicator denies the fee waiver request, both the Immigration Court Practice Manual (ICPM) and the BIA Practice Manual provide a grace period to cure the filing by submitting the

[25] 8 C.F.R. §1003.6(a); 8 C.F.R. §1003.38(b) (2025) (30-day appeal period); 91 Fed. Reg. at 5278 (shortening appeal period to 10 days). The IFR retains a 30-day appeal deadline for some, but not all, appeals of asylum denials. 91 Fed. Reg. at 5272, 5278.
[26] *See* Immigrant and Refugee Appellate Center, *How To Never Miss A Briefing Schedule From The Board of Immigration Appeals*, https://www.irac.net/updates/how-to-never-miss-a-briefing-schedule-from-the-board-of-immigration-appeals/ (last updated Jan. 30, 2025).
[27] 8 C.F.R. §1003.6(a); 91 Fed. Reg. at 5277 (amending 8 C.F.R. §1003.1(d)(2)(ii)).
[28] 8 C.F.R. §1003.23(b)(4)(ii).
[29] Congress passed IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, on September 30, 1996. This law, among other things, repealed the portion of the INA providing for an automatic stay when the denial of a motion to reopen an *in absentia* order is appealed to the BIA.
[30] 8 C.F.R. § 1003.23(b)(4)(iii)(C).
[31] 8 C.F.R. § 1003.6(a).
[32] *See* Victims of Trafficking and Violence Protection Act of 2000 (VAWA 2000), Pub. L. No. 106-386, div. B, tit. V, 114 Stat. 1464, 1518-37.
[33] INA § 240(c)(7)(C)(iv).
[34] See Act of July 4, 2025, Pub. L. 119-21, Title X, Subtitle A, Part I ("Immigration Fees"), 139 Stat. 72, 364–85.
[35] For guidance on fee waiver requests post the OBBBA, see the National Immigration Project, A Guide to Requesting a Fee Waiver in Immigration Court, https://nipnlg.org/work/resources/guide-requesting-fee-waiver-immigration-court.

applicable fee.[36] Both sources state that the "filer will be given 15-days to re-file the rejected appeal or motion with the fee or new fee waiver request, and any applicable filing deadline will be tolled during the 15-day cure period."

Where a noncitizen is eligible for an automatic stay of removal from the immigration court or BIA, it is not necessary to file a separate motion for a stay of removal.[37] In cases where a timely direct appeal is filed, the filing of the Notice of Appeal is generally sufficient to stay removal.[38] However, if the BIA IFR goes into effect, the period of this automatic stay would likely be only a matter of days, and a maximum of 15 days, in the vast majority of cases.

**PRACTICE TIPS:** If a client is facing imminent removal, legal representatives filing motions that provide automatic stay protections may want to:

- **Tailor the cover page accordingly**. Legal representatives should note on the cover page of the motion to reopen that the automatic stay provision applies and cite to the relevant statute, regulation, or settlement agreement under which they believe the automatic stay applies.
- **File the motion to reopen as quickly as possible** to trigger the automatic stay of removal. Ideally, the legal representative drafted the motion to reopen prior to the person's removal becoming imminent.[39] Otherwise, it is likely that DHS will remove the person before the legal representative is able to file the motion to reopen. Cases that are not eligible for filing electronically via the EOIR Courts & Appeals System (ECAS) Case Portal because they have a paper record of proceedings require a hard copy filing.[40] Legal representatives may file a hard copy via a mailing service such as UPS or FedEx for immigration court filings or companies that provide same-day filing at the BIA such as The Immigrant and Refugee Appellate Center, LLC (IRAC)[41] and BIA Help.[42]
- **Serve a copy of the filing on the local Immigration and Customs Enforcement (ICE) Field Office and the ICE Office of the Principal Legal Advisor (OPLA)**.[43] By serving a copy of the filing on the local ICE Field Office and OPLA, legal representatives ensure that ICE is aware that a stay is in effect and they cannot remove the client. Legal representatives should include evidence proving that the immigration court or the BIA received the filing that triggered the stay of removal. For electronic ECAS filings, legal

[36] ICPM 3.4(d) (citing 8 C.F.R. § 1003.24(d)); BIA Practice Manual 3.4(c) (citing 8 C.F.R. § 1003.8(a)(3)).
[37] ICPM Ch. 7.2; BIA Practice Manual Ch. 5.2.
[38] ICPM Ch. 7.2(b); BIA Practice Manual Ch. 5.2(b).
[39] *See* National Immigration Project, *Fifteen Steps for Addressing Orders of Removal Issued by an Immigration Judges*, https://nipnlg.org/work/resources/fifteen-steps-addressing-orders-removal-issued-immigration-judge (issued Dec. 2, 2025).
[40] EOIR, *EOIR Courts & Appeals System (ECAS) User Manual*, https://www.justice.gov/eoir/page/file/1300086/dl?inline (updated Sept. 25, 2022) ("As a general matter, cases that predate the ECAS rollout in the assigned immigration court and that have a paper ROP will remain in paper and not be available for electronic filing because there is not an eROP."). The ECAS rollout date is February 11, 2022.
[41] Immigrant & Refugee App. Ctr., *BIA Same Day Filing*, https://www.irac.net/bia-same-day-filing/ (last visited Jan. 15, 2025).
[42] BIAHelp.com, *Same Day BIA Filings with the Board of Immigration Appeals*, https://biahelp.com/same-day-bia-filings-with-the-board-of-immigration-appeals/ (last visited Jan. 15, 2025).
[43] *See* ICE, *ICE Field Offices*, https://www.ice.gov/contact/field-offices (last updated Sept. 25, 2024) (listing ICE offices, including ERO Field Offices and OPLA offices).

representatives can include the email from EOIR confirming receipt of the document.[44] For paper filings, legal representatives may submit a FedEx of UPS tracking receipt. Or, for BIA filings served through a same-day filing service company, the company will provide stamped copies of the first pages of the filing and legal representatives can submit those as evidence of the filing.

The automatic stay is valid until there is a decision on the appeal or motion to reopen.[45] Prior to receiving the decision, legal representatives should, in conversation with their client, prepare for what steps they will need to take if the appeal is dismissed or motion to reopen is denied, to minimize the delay between the receipt of the decision and the next filing and any subsequent stay application.

**PRACTICE TIP:** To minimize the delay in receiving the decision in the mail or the risk of overlooking email correspondence, especially in light of in *Matter of Arciniegas-Patino*, 28 I&N Dec. 883 (BIA 2025), legal representatives should check the online ECAS Case Portal every day to learn about the status of the appeal or motion to reopen.[46]

### B. Discretionary Stays of Removal with the IJ and BIA

Where a stay is not automatic, legal representatives may seek a stay as a matter of discretion. There are two types of discretionary stays of removal: emergency and non-emergency.

To obtain a discretionary stay, a legal representative must file a separate, written motion to stay removal with the court where the motion or appeal is pending.[47] In general, the filing of the stay motion with the immigration court or the BIA does not immediately stay the removal order.[48] DHS can still remove the individual while the motion is pending.[49] If granted, a discretionary stay remains in effect until the immigration court or the BIA denies the underlying motion to reopen or reconsider or appeal.[50] If the legal representative seeks review of the IJ's denial of a motion to reopen or reconsider from the BIA, the stay will not continue automatically.[51] The legal representative must seek a new discretionary stay with the BIA.

#### 1. Legal Standard

The BIA has not enunciated a standard of review or a list of factors for EOIR adjudicators to consider when adjudicating a discretionary motion for a stay. However, legal representatives have traditionally looked to the standard in *Nken v. Holder*, 556 U.S. 418 (2009) for guidance on establishing that the client merits a stay of removal from EOIR. In *Nken*, the U.S. Supreme Court

[44] *See* EOIR, *ECAS: Attorneys and Accredited Representatives, FAQs*, https://www.justice.gov/eoir/ecas-attorneys-and-accredited-representatives#faq ("How do I know the status of my document?") (last visited Jan. 17, 2025).
[45] *See* 8 C.F.R. § 1003.23(b)(4)(iii)(C); ICPM Ch. 8.2(d); BIA Practice Manual Ch. 6.2(d).
[46] ECAS Case Portal, https://portal.eoir.justice.gov/.
[47] ICPM Ch. 7.3(c); BIA Practice Manual Ch. 5.3(c).
[48] ICPM Ch.7.3(d); BIA Practice Manual Ch. 5.3(d).
[49] *Id*.
[50] ICPM Ch. 7.3(f); BIA Practice Manual Ch. 5.3(f).
[51] *Id*.

decided the standard that the U.S. courts of appeals should use when deciding a motion for a stay of removal. The *Nken* standard consists of a four-factor test:

1. whether the stay applicant has made a strong showing that [they are] 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.[52]

These factors are discussed at length below in section IV.D.2. Although legal representatives have traditionally defaulted to the *Nken* standard when arguing for a stay of removal before EOIR, legal representatives should propose a different standard for stay motions based on a pending motion to reopen. Legal representatives should propose a less rigorous two-factor test that considers only the likelihood of success on the merits and the risk of irreparable harm with more weight given to the irreparable harm that the client will face absent a stay. Because the *Nken* standard assumes that EOIR has already reviewed and rejected the underlying claim on the merits, this less rigorous two-factor test better aligns with the motion to reopen context in which the client has raised new and previously unavailable evidence that has never been reviewed on its merits.[53] Therefore, when the stay motion is based on a pending motion to reopen, legal representatives should argue the *Nken* standard in the alternative as opposed to leading with this standard. The National Immigration Litigation Alliance issued two template motions to stay removal for people pursuing a motion to reopen that reflect this strategy, one for those who have a fear claim[54] and the other for those who do not have fear-based claims.[55]

### 2. Where to File

A discretionary motion for a stay of removal should be filed with the same adjudicator where the case is pending.

### 3. Filing Format

When preparing a motion for a stay to the immigration court or the BIA, legal representatives should follow the rules and formatting guidelines outlined in the Immigration Court Practice Manual or the BIA Practice Manual. Motions should conform to the general rules for filing motions, as well as the specific rules for filing a stay motion.[56] When filing with the immigration

[52] *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).
[53] *See Nken*, 556 U.S. at 436 (finding the fact that a noncitizen has been "deemed removable" following full removal proceedings relevant to the third and fourth factors); *see also id.* at 434 (holding that the first two factors, likelihood of success and irreparable harm, "are the most critical" factors).
[54] National Immigration Litigation Alliance (NILA), *Template Motion to Stay Removal for Individuals Who Have Fear-Based Claims and Are Filing A Motion to Reopen Removal Proceedings* (Apr. 2022), https://immigrationlitigation.org/wp-content/uploads/2022/04/Template-Stay-Motion-Fear-Based-Claim.doc;
[55] NILA, *Template Motion to Stay Removal for Individuals Who Do Not Have Fear-Based Claims and Are Filing a Motion to Reopen Removal Proceedings* (Apr. 2022), https://immigrationlitigation.org/wp-content/uploads/2022/04/Template-Stay-Motion-No-Fear-Claim.doc.
[56] ICPM Ch. 7.3; BIA Practice Manual Ch. 5.3.

court, legal representatives should reach out to the IJ's legal assistant, as well as to local colleagues, to determine if the IJ requires any special filing procedures.

### 4. Timing of the Filing

A discretionary motion for a stay can be filed at any time once an appeal or a motion to reopen or reconsider is pending. However, neither the IJ nor the BIA will generally rule on the motion unless it is an emergency stay of removal.[57] Because it is currently difficult to assess when a person's removal is imminent, and ICE ERO is moving quickly and surreptitiously to remove people, legal representatives may wish to file the stay motion with the appeal or a motion to reopen or reconsider and then ask the immigration court or the BIA to decide the stay motion.

### 5. Special Procedures for Filing an Emergency Stay Motion with the IJ or the BIA

EOIR has outlined special procedures for the handling of emergency motions to stay removal.[58] Although legal representatives will usually file written emergency stay motions, if a client's situation requires immediate attention, both the immigration courts and the BIA are able to consider a telephonic stay request at their discretion.[59]

Legal representatives seeking an emergency stay of removal from an IJ must call the immigration court where the motion to reopen or reconsider is pending to inform the IJ of the emergency stay filing and need for expedited adjudication.[60] This notice will help the immigration court staff identify the emergency stay filing among the hundreds of filings that they often receive per day and flag it for expeditious adjudication.

Immigration courts and the BIA will consider a stay request to be an emergency in only three circumstances: 1) the person is in DHS's physical custody and removal is imminent; 2) the person must turn themselves in to DHS custody and removal is scheduled within the next three business days; 3) the person is scheduled to self-execute an order of removal within the next three business days.[61] The motion should explain the circumstances that make removal of the client imminent.[62] If a legal representative has filed a motion for a stay as a non-emergency motion, but the circumstances have changed and removal has become imminent while the stay motion is pending, legal representatives may supplement a non-emergency stay request with an emergency stay request.[63]

The BIA has a BIA Emergency Stay Unit with designated staff to oversee emergency stays of removal. The BIA Emergency Stay Unit reviews and adjudicates emergency stay motions on an expedited basis. The BIA Emergency Stay Unit accepts emergency stay motions on weekdays,

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[57] BIA Practice Manual Ch. 5.3(c)(2)(A)-(B).
[58] *Id*. at Ch. 5.3(c)(2)(A)
[59] *Id*.
[60] *Id*. For a list of immigration court numbers, visit EOIR's website at www.justice.gov/eoir/eoir-immigration-court-listing.
[61] BIA Practice Manual Ch. 5.3(c)(2)(A).
[62] *Id.*
[63] *Id*.

except federal holidays, from 8:30 a.m. to 5:00 p.m.[64] Eastern Time. While ECAS filings should be considered by the BIA Emergency Stay Unit until 5:00 p.m. Eastern Time, paper filings must be received by 4:30 p.m. Eastern Time, when the BIA filing window closes.[65] Legal representatives are encouraged to file stay motions as early in the day as possible for consideration on the day of filing.

Legal representatives must contact the BIA Emergency Stay Unit at 703-306-0093 to confirm receipt of their motion and share relevant case information. For example, if the legal representative knows the name and contact information for the individual's ICE ERO deportation officer, the legal representative should share this information with the Emergency Stay Unit. The Emergency Stay Unit can then inform the ICE ERO deportation officer that they received a motion for a stay of removal and, subsequently, of the BIA's decision. Legal representatives should not contact the BIA Clerk's Office or any other BIA office as only the BIA Emergency Stay Unit can process an emergency stay request.[66]

**PRACTICE TIP**: If the client is detained, legal representatives should diligently check with the ICE ERO deportation officer to determine whether there is a planned removal date. If it impossible to reach the ICE ERO deportation officer, legal representatives should rely on circumstantial evidence to assess whether their client faces imminent removal. This includes any rumors of an upcoming transfer to an ICE detention facility that is known as a staging facility for removal. Any information about ICE ERO's plans to remove the client should be communicated to the immigration court or BIA Emergency Stay Unit. If the client is not detained, but has an order of supervision, legal representatives should inform the immigration court or the BIA Emergency Stay Unit of the client's next check in with ICE ERO. The current Trump administration, ICE ERO often detains people during their check-ins.

### 6. Checklist for Filing a Motion for a Discretionary Stay with the Immigration Court or BIA

A discretionary stay filing with the immigration court or BIA should include the following components:

- Notice to Appear
    - If submitting a paper filing of the discretionary stay, include a copy of the Notice of Appearance (Form EOIR-28 for the immigration court or Form EOIR-27 for the BIA) to make it easier for the Immigration Court or BIA staff and OPLA and ICE ERO to identify counsel. If filing over ECAS, it is not necessary to refile the Notice of Appearance.
- Cover page labeled "[EMERGENCY] MOTION TO STAY REMOVAL" and indicating if the client is detained

[64] The BIA Practice Manual still indicates that the Emergency Stay Unit operates from 9:00 am to 5:30 pm, but the BIA announced in December 2025. BIA, *Contact the Board of Immigration Appeals*, https://www.justice.gov/eoir/contact-bia-icor (last updated Dec. 14, 2025).
[65] EOIR, *Shared Practice Manual Appendices Appendix A - Directory*, https://www.justice.gov/eoir/policy-manual-eoir/part-VII/appendices/a.
[66] EOIR, *EOIR Factsheet: BIA Emergency Stay Requests* (Mar. 2018), https://www.justice.gov/eoir/page/file/1043831/dl?inline.

- Motion to Stay Removal
    - The motion should include the procedural history and all of the relevant facts including the harm that the person or their U.S. citizen or lawful permanent resident family members would suffer absent a stay.
    - The motion must also contain a specific statement of the time exigencies involved. Motions containing vague or general statements of urgency are not persuasive.[67]
    - The motion should apply the legal standard discussed in section III.B.1.
        - If the client is seeking a stay while a motion to reopen is pending, the stay motion should explain in detail the changed circumstances or new relief available that is the basis for the motion to reopen to show likelihood of success on the merits.
    - Any factual assertions in the motion should include a citation to the exhibits.[68]
- Index of Exhibits, followed by all exhibits, separately tabbed, as evidence of the facts included in the motion
    - A declaration from the client is an essential exhibit. The National Immigration Litigation Alliance (NILA) has provided a template declaration in support of a motion to stay removal for people who are pursuing a motion to reopen removal proceedings.[69]
    - A copy of the removal order that the person wants the IJ or the BIA to stay[70]
        - If the legal representative cannot access a copy of the removal order in a timely manner, the legal representative should include in the motion the date of the order and a detailed factual description of the IJ's ruling and reasoning.[71]
    - If the IJ issued an oral decision and there is a transcript available, the legal representative may wish to include the transcript of the decision as an exhibit if it would help the current adjudicator understand the basis for the motion to reopen.
- Proposed Order, if filing with the immigration court
- Proof/Certificate of Service

### 7. Adjudication Notification

Although the immigration court and BIA may not always issue a written order for a denial of a stay motion, both adjudicative bodies will issue a written order when granting a discretionary stay.[72] The stay is valid until the immigration court or BIA issues a decision on the motion to reopen or reconsider.[73]

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[67] BIA Practice Manual Ch. 5.3(c).
[68] *See Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (stating that "statements in a brief, motion, . . . are not evidence and thus are not entitled to any evidentiary weight").
[69] NILA, *Template Declaration in Support of a Motion to Stay Removal for Individuals Who Are Filing a Motion to Reopen Removal Proceedings* (Apr. 2022), https://immigrationlitigation.org/wp-content/uploads/2022/04/Template-Stay-Declaration.docx.
[70] BIA Practice Manual Ch. 5.3(c)(1).
[71] *Id*.
[72] BIA Practice Manual Ch. 5.3(e).
[73] *Id.* at Ch. 6.3(f).

**PRACTICE TIP:** Although the immigration court or BIA decision should be visible to ICE ERO deportation officers in their records system, legal representatives should immediately communicate to the ICE ERO deportation officer assigned to the client's case or, if this information is unknown, to the local ICE Field Office, that the stay motion was granted. Providing ICE ERO notice of the granted stay motion is particularly important where the person's removal is imminent. It is very important for legal representatives to not assume that ICE ERO has the relevant information or will err on the side of not executing the removal order.

## IV. Stays of Removal with a U.S. Court of Appeals

A person can seek a stay of removal with a U.S. court of appeals if they are filing a petition for review of a final order of removal (such as a BIA removal order, a reinstated removal order under INA § 241(a)(5), or an administrative removal order under INA § 238(b)) or the BIA's denial of a motion to reopen or reconsider a removal order.[74]

Obtaining a stay of removal from a U.S. court of appeals requires filing a written motion. As discussed in detail below in section IV.D.2, courts of appeals apply the legal standard from *Nken v. Holder*, 556 U.S. 418 (2009), to determine whether to grant a stay of removal pending appeal.

### A. Where to File

The motion for a stay should be filed with the same court where the petition for review is pending,[75] which is the U.S. court of appeals that provides the proper venue for the removal order.[76] Although there is a $600 fee for a petition for review (unless the court grants permission to appear *in forma pauperis*), there is no fee for filing a motion for stay of removal.[77]

Motions for stay pending review by the U.S. courts of appeals must conform to the Federal Rules of Appellate Procedure as modified by any circuit-specific rules, operating procedures, or general or standing orders.[78] Rule 18 (Stay Pending Review), Rule 27 (Motions), and any corresponding

[74] INA § 242(a)(1), (b)(3)(B), (b)(6); Fed. R. App. P. 18. Note that while this practice advisory cites sections of the INA, when filing in federal court, practitioners should include the parallel cite to the U.S. Code. Before filing a petition for review, a person must exhaust his or her administrative remedies, INA § 242(d)(1), and thus not all final orders of removal are reviewable by U.S. courts of appeals. Although Fed. R. App. P. 18 says "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order," courts typically do not require petitioners to seek an agency stay 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 "because a[] [noncitizen] may be detained and removed immediately after the decision, and the BIA does not entertain applications for stay" pending federal court review); *Sofinet v. DHS*, 188 F.3d 703, 706-07 (7th Cir. 1999) (same). As a practical matter, the BIA will not accept a stay motion if there is no appeal or motion pending before it. BIA Practice Manual Ch. 5.3(a).

[75] INA § 242(b)(2).

[76] Venue is generally based on the location of the immigration court or DHS office that issued the removal order. The geographic boundaries of the federal courts are shown here: https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

[77] United States Courts, *Court of Appeals Miscellaneous Fee Schedule* (Dec. 1, 2023), https://www.uscourts.gov/court-programs/fees/court-appeals-miscellaneous-fee-schedule.

[78] For a more detailed list of the circuit rules and policies relevant to judicial stay motions broken down by each U.S. court of appeals, please refer to the Appendix. Additionally, NILA has issued a practice advisory addressing these rules. NILA, *Courts of Appeals Rules Governing Judicial Motion to Stay Removal* (Nov. 14, 2023), https://immigrationlitigation.org/wp-content/uploads/2025/01/2023.11-Circuit-Stay-Rules-FINAL-FINAL.pdf.

local rules must be consulted before a stay motion is filed. Legal representatives may find specific local rules on each U.S. court of appeals' website. Legal representatives can also call the relevant clerk's office to determine if there are specific local rules or procedures for filing a motion for a stay of removal.

## B. Timeline

### 1. When to File a Stay Motion

There is a 30-day period for filing the petition for review after entry of the relevant order.[79] Attorneys may file the motion for a stay with the petition for review or at any time while the petition for review is pending. However, unlike the 30-day period for filing an appeal with the BIA, a person's removal is not automatically stayed during the 30-day period for filing a petition for review.[80] Therefore, attorneys should consider filing a petition for review as early as possible within the 30-day window and filing a stay motion concurrently with the petition for review or shortly thereafter, or at the latest, promptly after learning that removal is scheduled or imminent.[81]

**PRACTICE TIP**: If a motion for a stay is not filed with the petition for review, attorneys should prepare the stay motion so that it is ready for filing should ICE detain or schedule the client to report to the local ICE Field Office. Attorneys should also review the court's local rules and contact the relevant court clerk's office to ascertain any specific emergency filing procedures before removal becomes imminent as time will be of the essence at that juncture.

### 2. Briefing and Decision Schedule

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.[82] Given the importance of obtaining a stay for the client and their family, the attorney should generally submit a reply brief if a stay motion is opposed.

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[79] INA § 242(b)(1). The date that the removal order becomes final in reinstatement cases where withholding-only proceedings occur after issuance of the reinstated removal order is currently before the Supreme Court. *Riley v. Garland*, No. 23-1270 (cert. granted Nov. 4, 2024). *See Inestroza-Tosta v. Att'y Gen.*, 105 F.4th 499, 514 & n.12 (3d Cir. 2024) (concluding a reinstated order becomes "final" for purposes of judicial review only after withholding-only proceedings are complete, and noting the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits agree, whereas the Second and Fourth Circuits have held the deadline for a petition for review of a reinstated removal order is 30 days after issuance of that order, not the conclusion of withholding-only proceedings). The outcome in *Riley* will likely apply to individuals in withholding-only proceedings with administrative removal orders under INA § 238(b) as well.

[80] INA § 242(b)(3)(B).

[81] In counseled cases, the First Circuit considers a stay motion "timely" only if it was filed by the docketing of the petition or two business days after the government has notified the Court of a removal date, whichever is later. 1st Cir. R. 18.0. The court will issue an automatic ten-day administrative stay only for "timely" stay motions. *Id.*

[82] Fed. R. App. P. 27(a)(3), (4). See Fed. R. App. P. 26 and corresponding local rules to determine how to compute time periods stated in circuit court rules.

Subject to local rules, most circuits assign stay motions to a three-judge motions panel.[83] There is no binding timeline under which a motions panel must decide a stay motion. In contrast with merits panels, motions panels typically do not hear oral argument.[84]

### 3. Removal While a Stay Motion Is Pending

The Second, Third, and Ninth Circuits provide a temporary automatic stay when a stay motion is filed that lasts until the stay motion is decided.[85]

The First and Fourth Circuits provide a temporary automatic stay when an initial stay motion is filed that lasts for a specified period (10 business days in the First Circuit, 14 days in the Fourth Circuit).[86]

In all other circuits, DHS may remove the person unless the court grants a stay motion. In such cases, if removal may be imminent, attorneys should consider filing a motion for stay on an emergency basis as set out in the relevant circuit's local rules. An attorney may also consider requesting a temporary administrative stay be entered pending consideration of the stay motion.[87] The Sixth Circuit local rules now explicitly authorize the court to enter an administrative stay pending resolution of a stay motion in order to preserve the status quo while considering the merits

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[83] *See* Fed. R. App. P. 18(a)(2)(D).

[84] *See* Fed. R. App. P. 27(e).

[85] Second Circuit: The Second Circuit's so-called "forbearance policy" is based on a longstanding agreement between the Circuit and the government. Supporting documentation is attached to the NILA practice advisory, *supra* note 68.

Third Circuit: U.S. Court of Appeals for the Third Circuit, Standing Order Regarding Immigration Cases (Aug. 5, 2015), https://www.ca3.uscourts.gov/sites/ca3/files/BIA%20Standing%20Order%20final.pdf. The standing order applies where the petition for review was timely filed, venue is proper, the order is "arguably final" and the court has authority to review it.

Ninth Circuit: U.S. Court of Appeals for the Ninth Circuit, General Order 6.4(c), https://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders.pdf. This rule allows a petitioner to request a stay of removal without analysis and to supplement the motion for stay within 14 days. If the government does not oppose the stay motion, the automatic stay will remain in place for the duration of the petition for review proceedings unless the government later moves to lift the stay.

[86] First Circuit: 1st Cir. R. 18.0. To qualify for this temporary automatic stay, the stay motion must be "timely" as defined in the rule. The rule also requires the government to notify the court immediately when removal has been scheduled, to allow time for a motion to stay removal if one has not already been filed.

Fourth Circuit: U.S. Court of Appeals for the Fourth Circuit, Standing Order 19-01 (Oct. 21, 2019), https://www.ca4.uscourts.gov/docs/pdfs/noticestandingorder19-01.pdf?sfvrsn=91fcbf09_8v.

[87] *See, e.g.*, *Antonio v. Garland*, 38 F.4th 524, 525 (6th Cir. 2022) (noting the court had previously granted an administrative stay pending receipt and full consideration of the administrative record); *Singh v. Garland*, 4 F.4th 322, 324 (5th Cir.), *opinion withdrawn but stay maintained*, 855 F. App'x 958 (5th Cir. 2021) (noting the court had previously granted an emergency stay of removal pending further order on the stay motion); *Duran-Ortega v. U.S. Att'y Gen.*, No. 18-14563-D (11th Cir. Nov. 15, 2018), https://www.splcenter.org/wp-content/uploads/2018/11/10-_order_stay_of_removal.pdf (staying removal for two weeks while the court reviewed emergency motion for stay of removal).

of the stay motion.[88] Advocates may consider requesting an administrative stay while a stay motion is pending where there is a basis to argue such a stay may be necessary to preserve the status quo.[89]

### C. Filing Format

The format of stay motions must comply with the Federal Rules of Appellate Procedure—Rules 27 and 32 relate most directly to format—as amended by any applicable local rules. Unless local rules state otherwise, motions must not exceed 5,200 words and replies in support of motions must not exceed 2,600 words.[90] Attorneys should be sure to check local rules for circuit-specific requirements regarding issues such as:

- formatting
- length
- method of filing (paper or electronic)
- whether paper duplicates need to be filed
- proof of service (if filing in paper), and
- redaction of personal information.

### D. Motion Contents

A motion for stay should include:

- relevant factual and procedural history with supporting documents attached,
- a legal argument that a stay is warranted based on *Nken v. Holder*, and
- a statement about whether the government has been notified of the motion and the government's position on the motion (when known).

Local rules may require additional sections, information, or attachments be included in the motion.[91]

#### 1. Factual and Procedural History, with Support Attached

The motion should include all of the facts and procedural history that will be referenced in your legal arguments. This will likely include:

- facts relevant to showing the harm that the client and their family will suffer if removed

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[88] 6 Cir. R. 18(b)(2) (requiring the government to file a notice within 24 hours of the docketing of a stay motion stating whether removal has been scheduled and, if so, the earliest possible date of removal; imposing a continuing obligation to update the court and the petitioner if the information in the notice changes; and explaining that "[t]he court will decide whether, and to what degree, to expedite briefing and submission of the motion, *and whether to administratively stay the order of removal pending resolution of the motion*" (emphasis added)).

[89] *See* Triche Immigration Appeals, *Sixth Circuit Issues Groundbreaking Stay to Mexican Grandmother* (Nov. 1, 2025), https://tricheimmigrationappeals.com/sixth-circuit-issues-groundbreaking-administrative-stay-to-mexican-grandmother/ (linking to redacted order from the Sixth Circuit clerk's office dated October 31, 2025, sua sponte granting administrative stay to preserve the status quo in order to give the court "sufficient opportunity" to consider the merits of the stay motion where the movant asserted removal was "possibly imminent").

[90] Fed. R. App. P. 27(d)(2).

[91] For example, the Eleventh Circuit requires a certificate of interested persons and corporate disclosure statement to be filed within every motion. 11th Cir. R. 27-1(a)(10). The Sixth Circuit requires inclusion of "any known information regarding the status and timing of the removal." 6 Cir. R. 18(b)(1).

- personal details demonstrating equities in the client's favor and that their continued presence in the country would not pose a danger to the community, such as length of residence in the United States, employment history, health, medical infirmities, prior adherence to conditions of release, nature of any criminal history (if non-violent), rehabilitation, religious attendance, community service, and close relationships with family members
- the client's relevant immigration history
- a history of the client's immigration proceedings
- an explanation of the BIA decision (or DHS removal order, where applicable), noting the errors in the order or decision that are the basis for the petition for review, and
- any information known about the anticipated date of removal, or other information suggesting removal may be imminent.

Relevant portions of the record and affidavits or other evidence supporting these factual assertions should be attached.[92] If the attorney is filing the stay before the brief in support of the petition for review, the court will have minimal information about the case and might not even have the record of the prior proceedings. In this situation, legal representatives may wish to file, as evidence, all documents from the prior proceedings that are relevant to the factual and procedural history detailed in the motion.

If an attorney is preparing the stay motion in the absence of a complete administrative record, they may consider filing a skeletal stay motion and informing the court that they intend to supplement the motion with additional information and supporting documentation upon obtaining the record. Attorneys should check local rules for time limitations and procedures for submitting supplementary information.

### 2. Legal Analysis

The Supreme Court's decision in *Nken v. Holder* governs stay motions before the U.S. courts of appeals. As noted in section III.B.1, to prevail on a motion to stay a removal order under *Nken*, a noncitizen must demonstrate:

1. a "strong showing" that they are likely to succeed on the merits of the underlying petition for review
2. that they will be irreparably injured if the stay is not granted
3. that the issuance of the stay will not substantially injure DHS, and
4. that the issuance of the stay will not harm the public interest.

The Court in *Nken* held that a stay is not a matter of right.[93] Showing that DHS or the public interest will not be harmed is insufficient, and the first two factors—likelihood of success on the

[92] Fed. R. App. P. 18(a)(2)(B). It is best practice to attach the relevant EOIR or DHS removal order and any IJ or BIA decisions explaining that order. Some circuits require they be attached under local rules. *See, e.g.*, *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004) (noting the petitioner should file the BIA and IJ decisions and portions of the record that support their factual assertions).
[93] *Nken v. Holder*, 556 U.S. 418, 433 (2009).

merits and a showing of irreparable harm—are the most important.[94] The motion should address the *Nken* factors in as much detail as possible under separate headings.

### *a.* Nken *Factor 1: A Strong Showing of Likelihood of Success on the Merits*

For the first factor, likelihood of success on the merits, the petitioner must establish more than a "better than negligible" chance of success or some "possibility" of prevailing in the petition for review.[95] However, the Ninth Circuit and the Sixth Circuit have held that "petitioners need not demonstrate that it is more likely than not that they will win on the merits."[96] The stay motion should raise serious legal questions, or have a reasonable probability or fair prospect of success.[97] To make a strong showing that the petitioner has a reasonable probability of success, attorneys filing a stay request for their client must describe the arguments that will be included in the brief in support of the petition for review. Although the arguments in the stay motion do not need to be as detailed as in the brief, they need to be sufficiently detailed to show that the petitioner has a strong likelihood of success.[98] A circuit court decision that favorably decided the same or a similar issue provides a strong basis for this factor, even if other circuits have disagreed. The absence of a published decision on a novel issue of law, however, does not suggest that success on the merits of the petition is unlikely.

### *b.* Nken *Factor 2: Irreparable Harm If a Stay Is Not Granted*

The Court in *Nken* held that removal does not amount to irreparable harm *per se* because it accepted the government's argument that noncitizens may return to the United States after prevailing on a petition for review.[99] Therefore, individualized personal and family circumstances are especially important to demonstrate irreparable injury. Attorneys should also consider arguing that ICE's return directive, discussed below, is inadequate to protect a client's rights to continue litigating their immigration proceedings or to have meaningful access to relief.[100] Attorneys should also point to DHS' more recent practice of refusing to return wrongly deported noncitizens, sometimes even when ordered to do so by courts.

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[94] *Id.* at 434.
[95] *Id*.
[96] *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011); *see Antonio v. Garland*, 38 F.4th 524, 526 (6th Cir. 2022) ("[A] 'strong' showing does not mean proof by a preponderance—once against, that would spill too far into the ultimate merits . . . .") (quoting *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020)). Similarly, in *Nken*, the Supreme Court rejected the government's argument that a movant must provide clear and convincing evidence that the removal order is unlawful, under INA § 242(f)(2), to obtain a stay. *Nken*, 556 U.S. at 432-33. The Court reasoned that this standard should not apply because it would force courts of appeals to effectively "decide[] the merits" of the petition for review to resolve a stay motion. *Id.* at 432.
[97] *Leiva-Perez*, 640 F.3d at 971; *Antonio*, 38 F.4th at 526.
[98] *See Koutcher v. Gonzales*, 494 F.3d 1133, 1135 (7th Cir. 2007) (declining to grant a stay where petitioner filed a "bare bones" motion without sufficient detail).
[99] *Nken*, 556 U.S. at 435 ("It is accordingly plain that the burden of removal alone cannot constitute the requisite irreparable injury. [Noncitizens] 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.").
[100] *See* ICE, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, Directive 11061.1§ 2 (Feb. 24, 2012), https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

*i. Personal factors must demonstrate irreparable injury.*

Attorneys should explain what individual circumstances will lead to irreparable harm during a client's time spent outside the United States while the petition for review is pending, including but not limited to any possible persecution or torture that forms the basis for the petition for review.[101] Also relevant are harm due to separation from family members, economic hardship, or medical needs, and accompanying emotional harm the person would suffer.[102] The facts and evidence used to demonstrate irreparable harm at the federal court level will be similar to the facts and evidence relating to motions for a stay with the immigration court and BIA.

**PRACTICE TIP**: For those familiar with certain waivers and immigration relief that require a hardship showing, such as non-lawful permanent resident cancellation of removal, it may be helpful to think of this second factor in those terms. In other words, if the client were seeking a waiver or immigration relief with a hardship element, what facts would be relevant and what arguments should be raised.

*ii. ICE's return directive may not ameliorate irreparable harm to a client's immigration proceedings and ultimate ability to access relief.*

Given the Supreme Court's holding in *Nken* that removal is not categorically irreparable harm, attorneys should think comprehensively and creatively about whether removal will give rise to irreparable injury to a client's immigration proceedings or ultimate ability to access relief despite the existence of ICE's return directive.

ICE's return directive requires ICE to facilitate the return of individuals who were removed and subsequently prevailed in a petition for review only in certain limited circumstances, where:

(1) the person is restored to lawful permanent resident status by the petition for review decision

(2) the person's presence is deemed "necessary" for continued administrative removal proceedings, or

(3) the person's presence is not deemed "necessary" for continued administrative proceedings, but those proceedings ultimately result in a grant of "relief . . . allowing him or her to reside in the United States lawfully."[103]

The procedures for returning under the directive are opaque, can take months to complete, and require the noncitizen to possess a valid passport and pay for their own travel back to the United

[101] *See, e.g.*, *Antonio*, 38 F.4th at 526 (concluding that a likelihood of torture is "a remarkably strong satisfaction of the irreparable-harm factor"); *Leiva-Perez*, 640 F.3d at 969 (finding that risk of "physical danger if returned to his or her home country . . should be part of the irreparable harm inquiry").

[102] *See, e.g.*, *Sanchez v. Sessions*, 857 F.3d 757, 759 (7th Cir. 2017) (finding irreparable harm to minor U.S. citizen children where petitioner was the sole breadwinner in his family, he would be unable to provide the same support through wages earned in Mexico, and his youngest son required therapy for delayed motor development); *Demjanjuk v. Holder*, 563 F.3d 565 (6th Cir. 2009) (granting stay where petitioner demonstrated irreparable harm due to his medical condition and the fact that he faced arrest and incarceration if removed); *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (holding the likelihood "that the country of origin will not freely permit a return to the United States upon a grant of asylum" along with "separation from family members, medical needs, and potential economic hardship" to be "important factors" in establishing harm).

[103] ICE, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, Directive 11061.1§ 2 (Feb. 24, 2012), https://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf.

States.[104] ICE may also deny a request to return and instead arrange for video or telephonic participation in further proceedings.[105] Courts may refuse to enforce the directive.[106]

The directive's limited application has stranded people abroad, often despite strong family connections to U.S. citizens and lawful permanent residents.[107] Moreover, ICE's application of the directive as written has been inconsistent.[108] Historically, the government has not effectively redressed wrongful removal through returns despite its return directive.

Moreover, the current Trump administration has refused to return noncitizens unlawfully deported, sometimes even when ordered to do so.[109] The administration's refusal to abide by court orders and existing agency policies raises significant doubts about whether it will abide by its own return directive.[110]

**PRACTICE TIP**: Because there is no guarantee that DHS will return the person to the United States if the petition for review is granted or the case is remanded for further hearings, attorneys should consider arguing that their client's removal *would* result in irreparable injury because:

- ICE might deem their presence at future proceedings unnecessary, depriving them of the right to participate in those proceedings
- ICE might refuse to follow the return directive
- if ICE arranges for participation by phone or video, the client will be prejudiced by the lack of in-person testimony, will be unable to develop necessary evidence while abroad, or will face other logistical barriers to meaningful remote participate
- they might face a lengthy delay in returning to the United States as they navigate the return directive
- they might be unable to afford a flight back to the United States or unable to obtain a valid passport allowing them to do so[111]
- depending on the circuit and the individual circumstances, removal of a person in withholding-only proceedings could arguably moot their claim for humanitarian

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[104] ICE, *FAQs: Facilitating Return for Lawfully Removed Aliens,* https://www.ice.gov/remove/facilitating-return (last updated Feb. 2, 2024).
[105] *Id.*
[106] *See Ghafi v. Dep't of Homeland Sec.*, No. 24-CV-03736, 2025 WL 1507075, at *2 n.1 (N.D. Cal. May 27, 2025) (finding "the policy creates no judicially enforceable right for which [a noncitizen] could seek mandamus relief").
[107] *See* National Immigration Project, *Challenges of Return After Deportation* (Oct. 13, 2023), https://nipnlg.org/work/resources/challenges-return-after-deportation; National Immigrant Justice Center, *A Chance to Come Home: A Roadmap to Bring Home the Unjustly Deported* (Apr. 2021), https://immigrantjustice.org/research-items/white-paper-chance-come-home#currentprocedures.
[108] *Id.*
[109] *See, e.g.*, Respondent's Response to Order to Show Cause, *Lopez Belloza v. Hyde*, No. 1:25-cv-13499 (D. Mass. Feb. 6, 2026) (ICE declining to facilitate return of college freshman deported despite court order prohibiting her removal); Order, *Abrego Garcia v. Noem*, No. 8:25-cv-00951 (D. Md. Apr. 11, 2025) (finding DHS "failed to comply" with order to facilitate return of unlawfully deported man).
[110] *See* Just Security, *The "Presumption of Regularity" in Trump Administration Litigation* (Nov. 20, 2025), https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/ (collecting cases where courts have found current administration willfully disobeyed court orders).
[111] *But see Ledesma v. Garland*, 850 F. App'x 84, 90 (2d Cir. Apr. 6, 2021) (rejecting argument that petitioner's "financial position would present an insurmountable obstacle" to return, where "he has given . . . no reason to think that he would be unable to purchase a plane ticket in the event that he were to prevail on the merits of his appeal").

protection, leaving them without the ability to access withholding or Convention Against Torture (CAT) relief at all,[112] or

- OPLA may choose to seek unilateral dismissal of the proceedings, depriving the client of the opportunity to seek and obtain immigration relief that could form the basis for their return to the United States.[113]

### *c.* Nken *Factors 3 & 4: Substantial Injury to DHS and 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.[114] The Court found that the government and the public have an interest in the prompt execution of removal orders, particularly where a person has a criminal record of dangerous offenses or has substantially prolonged their stay in the United States by "abusing the appeals process."[115] The Court found, however, that the public also has an interest in preventing noncitizens from being wrongfully removed.[116]

Attorneys should explain why the petitioner is not a threat to the community and/or not particularly dangerous. Facts to consider discussing include, but are not limited to, the person's age, employment history, health, medical infirmities, prior adherence to conditions of release, nature of any criminal history (if non-violent), rehabilitation, tax payments, religious attendance,

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[112] *See Mendoza-Flores v. Rosen*, 983 F.3d 845, 847–48 (5th Cir. 2020) (discussing situations in which removal might moot a petition for review). *But see Aguilar-Quintanilla v. McHenry*, 126 F.4th 1065, 1069–70 (5th Cir. 2025) (distinguishing *Mendoza-Flores* and concluding that a petition for review seeking relief under CAT was not moot because of ICE's return directive); *Del Cid Marroquin v. Lynch*, 823 F.3d 933, 935-36 (9th Cir. 2016) (same).

[113] The Immigration Court Practice Manual specifies that the moving party should seek opposing counsel's position before filing the motion and state opposing counsel's position in that motion. ICPM Ch. 4.2(i). But OPLA often defies this instruction, a maneuver that began during the Biden administration with the "Doyle Memo" and has continued under the second Trump administration despite the rescission of the "Doyle Memo." *See* Memorandum from Kerry A. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, at 11-12 n.24 (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf. Both under the Biden administration and the second Trump administration, IJs often granted OPLA's unilateral motions to dismiss. While the BIA granted respondents' appeals of dismissals during the Biden administration, the BIA has upheld these dismissals during the second Trump administration.

[114] *Nken*, 556 U.S. at 435.

[115] *Id*. at 436.

[116] *Id.*; *See also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."); *Jordan v. De George*, 341 U.S. 223, 231 (1951) (recognizing the "grave nature of deportation" and that it "is a drastic measure and at times the equivalent of banishment or exile"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [noncitizen]makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."); *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (noting that the Court has "long recognized that deportation is a particularly severe 'penalty'"); *Dillingham v. INS*, 267 F.3d 996, 1010 (9th Cir. 2001) (noting that "[t]he private liberty interests involved in deportation proceedings are indisputably substantial"), *overruled on other grounds by Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011).

community service, and close relationships with family members. To the extent possible, attorneys should attach and cite corroborating exhibits that highlight petitioner's positive qualities.[117]

In most cases, the government will be unable to make any particularized showing that a stay grant will substantially injure its interests or conflict with the public interest in preventing a wrongful removal. Attorneys may wish to highlight this point in this section.[118]

### 3. Opposing Counsel's Position

Some circuits' local rules require that the motion inform the court of the position of opposing counsel. Even where it is not required, attorneys should contact the Department of Justice's Office of Immigration Litigation (OIL), which represents the government before U.S. courts of appeals, to ascertain their position on the stay motion. If an OIL attorney has not entered an appearance yet, counsel can contact the OIL General Litigation and Appeals Section at (202) 616-4900.[119] Often the OIL attorney will not take a position on the motion. Their position (including taking no position) should be included in the motion. The court is more likely to grant the motion for a stay if OIL does not oppose the motion or is taking no position.

## E. Checklist for Filing a Motion for a Stay with a U.S. Court of Appeals[120]

- Motion to Stay Removal
- Exhibits, including
    - a copy of the IJ decision, BIA decision, and/or DHS removal order;
    - relevant excerpts of the record; and
    - evidence showing irreparable harm, equities, and imminence of removal.

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[117] *See, e.g.*, *Duran-Ortega v. U.S. Atty' Gen.*, No. 18-14562-D, at 6-7 (11th Cir. Nov. 29, 2018), https://www.splcenter.org/sites/default/files/documents/duranortega_stay_11thclean.pdf (Martin, J., concurring) (granting stay, and finding that the third and fourth factors weighed in petitioner's favor, where there were "no circumstances . . . that would heighten the ordinary public interest in removing [petitioner, and he] served as a community leader").

[118] *See Leiva-Perez*, 640 F.3d at 970 ("[A]though petitioners have the ultimate burden of justifying a stay of removal, the government is obliged to bring circumstances concerning the public interest to the attention of the court.").

[119] Dep't of Just., General Litigation & Appeals Section, "Contact Us," https://www.justice.gov/civil/contact-us (last updated Oct. 15, 2024).

[120] While immigration practice requires the inclusion of certificates of service, where all parties are being served electronically, no certificates of service are required in practice before the U.S. courts of appeals. *See* Fed. R. App. P. 25(d)(1).

## F. U.S. Court of Appeals Decisions

### 1. Cases Granting a Stay

- *Antonio v. Garland*, 38 F.4th 524 (6th Cir. 2022). Stay granted where both parties agreed that petitioner would likely be tortured if removed, he presented "serious questions on the merits,"[121] and a stay was "necessary to preserve any value in hearing [the petitioner's] case on the merits."[122]

- *Singh v. Garland*, 4 F.4th 322 (5th Cir.), *opinion withdrawn but stay maintained*, 855 F. App'x 958 (5th Cir. 2021). Stay granted where petitioner was likely to succeed on the merits, presented evidence that his life would be in jeopardy in light of multiple past attacks on him and his parents by members of the BJP Party in India, and there was no evidence that petitioner was dangerous or had abused the removal process to prolong his stay.

- *Duran-Ortega v. U.S. Atty' Gen.*, No. 18-14563-D (11th Cir. Nov. 29, 2018), https://www.splcenter.org/sites/default/files/documents/duranortega_stay_11thclean.pdf. Stay granted, with concurring opinion from Judge Martin explaining that the petitioner made a strong showing of likely success on the merits, there was a significant likelihood that he would be physically harmed in El Salvador due to his work as a reporter covering corruption and law enforcement issues, no circumstances heightened the government's interest in his removal, and he was a community leader who reported on important local events.

- *Sanchez v. Sessions*, 857 F.3d 757 (7th Cir. 2017). Stay granted where the petitioner's removal would result in irreparable harm to his minor U.S. citizen children. The petitioner was the sole breadwinner in his family, he would be unable to provide the same support through wages earned in Mexico, and his youngest son required therapy for delayed motor development. Additionally, although he had DUI convictions, staying his removal would not harm DHS or the public interest because his removal was not based on criminal convictions.

- *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011). Stay granted where petitioner demonstrated that he had a reasonable probability of success on the merits, he showed that he would likely suffer irreparable harm because he would be personally targeted for beatings and extortion if removed, and the public interest weighed in favor of a stay because the public has an interest in ensuring noncitizens are not delivered into the hands of their persecutors, the petitioner was not detained, the government made no showing that it would actually take steps to remove the petitioner soon without a stay, and the government made no other arguments to the contrary regarding the relative equities.

[121] 38 F.4th at 526.
[122] *Id*. at 527.

- *Demjanjuk v. Holder*, 563 F.3d 565 (6th Cir. 2009). Stay granted where removal was imminent and petitioner demonstrated irreparable harm due to his medical condition and the fact that he faced arrest and incarceration if removed, which he also argued would amount to a violation of the Convention Against Torture.

- *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005). Stay granted where petitioner demonstrated a likelihood of success on the merits and a likelihood of irreparable harm in the form of forced separation from a spouse and likely persecution, noting that there was also a public interest in "having the immigration laws applied correctly and evenhandedly."[123]

**2. Cases Denying a Stay**

- *Sarkisov v. Bondi*, 138 F.4th 976 (6th Cir. 2025). Stay denied despite no opposition from government where the motion stated nothing about likelihood of success on the merits and only a conclusory assertion of irreparable harm.

- *Sarr v. Garland*, 50 F.4th 326 (2d Cir. 2022). Stay denied where the court had already rejected petitioner's argument that the immigration court applied the wrong circuit law and the only argument he made regarding irreparable harm was that removal would render his petition for review moot (which was incorrect).

- *Ledesma v. Garland*, 850 F. App'x 84 (2d Cir. 2021). Stay denied notwithstanding the strength of petitioner's case on the merits, where the court rejected his argument that he could not afford a plane ticket to return and that he would be targeted by the Philippine government, and where the court determined he was a danger to the public because he was found with large amount of drugs and two guns.

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

- *Maldonado-Padilla v. Holder*, 651 F.3d 325 (2d Cir. 2011). Stay denied, pending completion of transfer of venue to the Fifth Circuit, where petitioner did not satisfy her burden under *Nken* to show likely success on the merits.

- *Koutcher v. Gonzales*, 494 F.3d 1133 (7th Cir. 2007). Stay denied where petitioner filed a bare bones motion and failed to address the four factors required to grant a stay.

- *Lim v. Ashcroft*, 375 F.3d 1011 (10th Cir. 2004). Stay denied despite government non-opposition because it was not properly filed and did not include a copy of the order of removal.

[123] 411 F.3d at 178.

- *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001). Stay denied where petitioner was unable to establish that he could not freely return to the United States if his petition for review were granted, he had no substantial family ties in the United States, and he failed to show a likelihood of success on the merits.

- *Lucacela v. Reno*, 161 F.3d 1055 (7th Cir. 1998). Stay denied where petitioner failed to explain in detail why she was likely to prevail in her petition for review and failed to establish specific harm to herself beyond "the normal hardship resulting from deportation."[124] The court rejected the assertion that all asylum applicants, by definition, merit a stay.

## V. Administrative Stays with the Department of Homeland Security

A noncitizen with a prior order of deportation, exclusion, or removal can seek a discretionary stay of removal from DHS at any time. Legal representatives can request a stay while an individual is pursuing a motion or appeal with the immigration court, BIA, or a U.S. court of appeals, or while the individual is pursuing an application with USCIS, such as an application for a U visa.[125] Legal representatives may also request a stay from DHS where the individual is not pursuing any legal relief. Historically, the chance of success on an administrative stay of removal depended on the following factors: whether a motion or appeal was pending before a court or an application was pending with USCIS; the local field office with jurisdiction over the person; the prosecutorial discretion priorities of the current presidential administration; and the person's ties to the United States, lack of a criminal record, and exceptional medical or humanitarian reasons for obtaining a stay. Currently, reports from legal representatives reflect that it is rare for ICE ERO to grant administrative stays of removal.[126] Therefore, practitioners should consider if it is worth investing resources in an administrative stay strategy or if it is best to invest resources into a motion to reopen or habeas strategy, if these strategies are viable in the person's case.

**PRACTICE TIP**: Given the low chance of obtaining a favorable exercise of discretion from DHS currently, legal representatives must consider the risks of seeking a stay when advising a client with a final order of removal. If an individual is arrested or has a date to appear at an ICE office,

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[124] 161 F.3d at 1059.

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

[126] On February 6, 2025, Fox News reported that ICE issued a directive that the Acting ICE Director must personally review and approve every noncitizen's release from ICE custody. *See* https://immpolicytracking.org/policies/reported-ice-tightens-and-limits-immigrant-release-rules/. This seemingly sent the message to ICE ERO to restrict their prosecutorial discretion when adjudicating administrative stay requests. On September 9, 2025, the American Immigration Council and the National Immigration Project filed a FOIA lawsuit seeking this directive and other records and data related to this directive. *See* https://www.americanimmigrationcouncil.org/foia-request/investigating-ice-changes-parole-policies-president-trump/.

there is nothing to lose in filing a request for a stay. Otherwise, legal representatives should know that seeking a stay from DHS will highlight the existence of the individual and may place them at greater risk for removal by DHS.

### A. How to Apply for an ICE Administrative Stay of Removal

To seek a discretionary stay with DHS where doing so is worthwhile, a person must submit Form I-246[127] along with required documents. It is wise to support the stay request with arguments and evidence of positive equities.

A person must submit the filing fee or a fee waiver request[128] and the specific passport-related documents as outlined in the instructions on Form I-246. If paying the fee, the filing fee is $155.00 and must be paid through either a U.S. money order or cashier's check. The fee is nonrefundable regardless of DHS's decision on the stay request. Regarding the specific passport-related documents, one of the following is required with the application:

- original passport valid for six months past the requested period of the stay
- a copy of a passport valid for six months past the requested period of the stay and a copy of the individual's birth certificate or other identity document, or
- if the individual does not have a passport, evidence that the individual has applied for a passport from their country's consulate.[129]

Legal representatives should be aware that submitting an original passport to DHS will assist DHS in removing the client if the stay is denied.

While no legal brief is required, legal representatives should submit a cover letter or memorandum arguing why the client deserves to be granted a stay. The cover letter is the opportunity to tell the client's story and address any concerns that DHS may have (such as a client's criminal history). If the individual does not have a pending motion with the immigration court, BIA, or U.S. court of appeals, or a pending application for relief with USCIS, legal representatives should try to identify some other temporary need for the individual to remain in the United States. Examples of such a need include completing an educational program or obtaining medical treatment for the client or a close family member. DHS is more likely to grant a stay where there appears to be an end-point to the need for the individual to remain in the United States, rather than a request to stay indefinitely. Additionally, many of the factors discussed above in section IV.D.2 related to court-ordered stays should be similarly addressed in the cover letter to DHS. These factors include:

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

[128] Memorandum from John Torres, Director, Office of Detention and Removal, Fee Waiver Guidelines (Feb. 11, 2008), https://www.ice.gov/doclib/foia/policy/11023.1_FeeWaiverGuidelines.pdf. ICE accepted fee waivers for Form I-246 as recently as March 18, 2020. *See* ICE, *Guidance on COVID-19*, (Mar. 18, 2020), https://immpolicytracking.org/policies/covid-19-ice-temporarily-allows-filing-i-246-through-mail-extends-initial-check-in-deadline/#/tab-policy-documents ("Has ICE revised the process for filing the Form I-246, 'Application for Stay of Deportation of Removal?").

[129] ICE, Application for a Stay of Deportation or Removal, at 1 (Oct. 2024), https://www.ice.gov/doclib/forms/i246.pdf.

- how the client is not a danger to the community
- how the client, or the client's U.S. citizen or lawful permanent resident family members, will suffer if the client is removed
- how the client has the potential to obtain lawful status in the future (if applicable), and
- how it is in the public interest for the client to remain in the United States.

Legal representatives should not rely on the cover letter or a declaration from the client alone. Legal representatives should work with the client to gather as much supporting evidence as possible to submit with the request. Some suggested forms of evidence to submit include:

- Declarations from family members with lawful immigration status, explaining the harm they will suffer if the applicant is removed
- Medical or mental health records supporting any claims of a medical condition
- Letter from a treating physician or mental health professional explaining the condition, and how the applicant or family member will suffer if the applicant is removed
- Country conditions evidence, such as news articles or the State Department Human Rights Report, demonstrating the dangers the applicant will face if removed
- Letters from elected officials. It is strongly encouraged to reach out to the offices of the client's representatives and elected officials to ask for a letter of support. Sometimes the elected official will submit the letter directly to the ICE Field Office.
- Letters from other individuals in the community who can speak to the client's good character, such as employers, clergy, and friends
- Evidence of pending or approved applications with USCIS such as a VAWA self-petition, U-visa, or prior DACA grants, to demonstrate that the client has attempted to seek lawful status and successfully complied with the requirements
- Employment records[130]
- School records, such as graduation certificates, report cards, or evidence that the applicant is enrolled in school
- Tax returns or other proof that the applicant has complied with tax filing requirements,[131] and
- Evidence to mitigate any criminal history. This may include proof of completion of community service, a letter from the probation officer, or a certificate of completion of an anger management course.

In the cover letter, legal representatives should also summarize the included supporting evidence and highlight the portions of the evidence that are most compelling for the client.

The administrative stay request should be submitted in a packet to the relevant ICE Field Office. In non-detained cases, the administrative stay request is filed with the ICE Field Office where the non-detained client reports or is closest to their residence in the United States. In detained cases, the administrative stay request is filed with the ICE Field Office with jurisdiction over the client's custody. To determine which ICE Field Office has jurisdiction over the client's custody,

[130] Legal representatives should be aware of and counsel the client on the potential consequences of submitting evidence of unauthorized employment.

[131] Legal representatives should refrain from submitting evidence of incorrect tax-filings. For example, erroneously filing taxes as "head of household."

representatives should inquire with the ICE ERO deportation officer or check to see which ICE Field Office is closest to the ICE detention facility at issue.[132]

In person or mailed filings are required because no administrative stay of removal electronic submission process currently exists, and the filing must include the fee, paid through either a U.S. money order or cashier's check, or a fee waiver request. For those who are not detained, the I-246 instructions recommend that if filing the administrative stay application in person proves problematic, the ICE Field Office may permit mailing or another delivery service for the administrative stay request. Legal representatives may inquire with the ICE Field Office about alternative filing methods. Additionally, legal representatives should ask the ICE Field Office or experienced local counsel to determine if there are any filing procedures unique to that ICE Field Office.

If ICE ERO approves the administrative stay request, ICE ERO will determines the length of a stay. Generally, ICE ERO will grant a stay for six months or one year. At the end of the stay period, the local ICE Field Office usually schedules the person to report in person.

### B. Checklist for Filing a Stay Request with DHS

- Form G-28, Notice of Entry of Appearance of Attorney or Representative[133]
- Form I-246, Application for Stay of Deportation or Removal
- Fee of $155 (or fee waiver request)
- Cover letter or memorandum
- Passport-related documents
- Records of conviction. If the client has been arrested, a certificate from the court or other evidence of the disposition of that arrest must be submitted
- Index of supporting evidence
- Supporting evidence, individually tabbed

[132] ICE, *Detention Facilities*, https://www.ice.gov/detention-facilities (last visited Jan. 17, 2025).
[133] Form G-28 is available on the USCIS website at https://www.uscis.gov/sites/default/files/files/form/g-28.pdf.

## APPENDIX
## CIRCUIT SPECIFIC INFORMATION

Attorneys should become familiar with the Federal Rules of Appellate Procedure, corresponding local circuit court rules, and local internal operating procedures. In particular, attorneys should review Rules 18 (Stay Pending Review) and 27 (Motions), and corresponding local rules, internal operating procedures (IOP), and practices. These are posted on each circuit court's website.

### First Circuit Court of Appeals

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| Jurisdiction: | Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island |
| Mailing Address: | John Joseph Moakley U.S. Courthouse<br>1 Courthouse Way, Suite 2500<br>Boston, Massachusetts 02210 |
| Clerk's Office: | (617) 748-9057 |
| Website: | www.ca1.uscourts.gov |
| Relevant Local Rules: | **1st Cir. R. 18.0:** governs stays in immigration cases (petitions for review and habeas proceedings).<br>o The government must notify the court of the scheduled removal date.<br>o After the first "timely" stay motion is filed, removal is automatically stayed for 10 business days; then government opposition is due the later of 2 business days later or 10 days before scheduled removal; reply due briefing deadlines for government opposition and reply are set in this rule.<br>o A petition is "timely" in counseled cases if filed by later of the docketing of the petition or two business days after government notifies court of scheduled removal. In pro se cases, no deadline but stay motion should be filed "as expeditiously as possible."<br>**1st Cir. R. 27.0(b):** governs emergency motions.<br>**IOP V.:** sets forth additional procedures regarding motions, including for emergency motions requiring after-hours action by the court. |

### Second Circuit Court of Appeals

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| Jurisdiction: | Connecticut, Vermont, New York |
| Mailing Address: | Thurgood Marshall U.S. Courthouse<br>40 Foley Square<br>New York, NY 10007 |
| Clerk's Office: | (212) 857-8500 |
| Website: | www.ca2.uscourts.gov |
| Relevant Local Rules: | **LR 27.1:** governs motions, including emergency motion procedures in Local Rule 27.1(d)<br>**IOP 27.1:** governs oral argument on motions<br>**Second Circuit Forbearance Policy:** |

- The Second Circuit has entered into an agreement with the government not to remove a person who has filed a petition for review and a stay motion until the stay motion is adjudicated, other than in cases where OIL believes review is sought of an order that is "clearly not reviewable" or is "per se untimely."[134]

**Third Circuit Court of Appeals**

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| Jurisdiction: | Pennsylvania, New Jersey, Delaware |
| Mailing Address: | 21400 U.S. Courthouse<br>601 Market Street<br>Philadelphia, PA 19106-1790 |
| Clerk's Office: | (215) 597-2995 |
| Website: | www.ca3.uscourts.gov |
| Relevant Local Rules: | **3d Cir. L.A.R 18.1:** governs stays pending appeal<br>- IJ opinion must be included, and failure to do so is ground for dismissal of the motion.<br>**3d Cir. L.A.R 27:** governs motions, including emergency motion procedures in L.A.R 27.7<br>**IOP Chapter 10:** governs motions<br>**Standing Order Regarding Immigration Cases:**<br>- The Clerk's Office will automatically enter an administrative stay of removal upon receipt of a motion for stay as long as the petition for review is timely, venue is proper, the order appealed is arguably final, and the Court has authority to review that order.<br>- The administrative stay will remain in place until the court decides the stay motion.<br>**Standing Order Regarding Motions Practice:** sets forth emergency motions procedures and additional motions guidelines, including:<br>- IJ and BIA decisions must be attached to motions for stay of removal. |

**Fourth Circuit Court of Appeals**

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|---|---|
| Jurisdiction: | Maryland, North Carolina, South Carolina, Virginia, West Virginia |
| Mailing Address: | 1100 East Main Street<br>Richmond, VA 23219 |
| Clerk's Office: | (804) 916-2700 |
| Website: | www.ca4.uscourts.gov |
| Relevant Local Rules: | **Loc. R. 8 & 18:** govern motions for stay pending appeal<br>**Loc. R. 27:** governs motions, including emergency motion procedures in Loc. R. 27(e) |

[134] Letter from David M. McConnell, Deputy Director, Off. of Immigr. Litig., U.S. Dep't of Justice, to The Honorable Jon O. Newman (Apr. 8, 2009), *attached to* NILA, *Courts of Appeals Rules Governing Judicial Motions to Stay Removal* (Nov. 14, 2023), https://immigrationlitigation.org/wp-content/uploads/2025/01/2023.11-Circuit-Stay-Rules-FINAL-FINAL.pdf. *See also In re Immigr. Petitions for Rev. Pending in U.S. Ct. of Appeals for Second Cir.*, 702 F.3d 160, 162 (2d Cir. 2012) (acknowledging forbearance policy).

**Standing Order 19-01:** governs stays of removal:
- The Clerk's Office will automatically enter a 14-day administrative stay of removal upon receipt of a motion for stay.
- The administrative stay may be vacated or extended by order of the court.

**Fifth Circuit Court of Appeals**

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| Jurisdiction: | Louisiana, Texas, Mississippi |
| Mailing Address: | 600 S. Maestri Place<br>New Orleans, LA 70130-3408 |
| Clerk's Office: | (504) 310-7700 |
| Website: | https://www.ca5.uscourts.gov/ |
| Relevant Local Rules: | **5th Cir. R. 27:** governs motions, including emergency motion procedures in LR 27.3 |

- The court will consider an emergency stay motion only where there is a scheduled removal date and the noncitizen is in custody. "Petitioners and counsel are responsible for obtaining accurate information about the custody status of their clients, as well as confirming the scheduled removal date." (LR 27.3.1).

**Sixth Circuit Court of Appeals**

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| Jurisdiction: | Michigan, Ohio, Kentucky, Tennessee |
| Mailing Address: | 540 Potter Stewart U.S. Courthouse<br>100 East Fifth Street<br>Cincinnati, OH 45202 |
| Clerk's Office | (513) 564-7000 |
| Website: | www.ca6.uscourts.gov |
| Relevant Local Rules: | **6 Cir. R. 18(b) :** governs motions for stay of removal pending review |

- When filing a stay motion, a petitioner "shall include any known information regarding the status and timing of the removal."
- Within 24 hours of docking the stay motion, the government must file and serve a notice regarding whether removal has been scheduled, and "if so, the earliest date upon which the petitioner will be removed." The government has a continuing obligation to update the notice if that information changes.
- "The court will decide whether, and to what degree, to expedite briefing and submission of the motion, and whether to administratively stay the order of removal pending resolution of the motion."

**6 Cir. R. 25(b)(1):** governs manner of filing of motion for stay filed with a petition for review[135]

[135] Although IOP 15(b) states that "[a] party filing a motion for a stay at the same time as the petition for review must file the motion in paper format with an electronic copy as provided in 6 Cir. R. 25(b)(1)," as of the publication

**6 Cir. R. 27:** governs motions, including emergency motion procedures in 6 Cir. R. 27(c)
**IOP 27(b):** additional information on emergency motions

**Seventh Circuit Court of Appeals**

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| Jurisdiction: | Illinois, Indiana, Wisconsin |
| Mailing Address: | U.S. Court of Appeals<br>Room 2722<br>219 S. Dearborn Street<br>Chicago, IL 60604 |
| Clerk's Office: | (312) 435-5850 |
| Website: | www.ca7.uscourts.gov |
| Relevant Local Rules: | **Cir. R. 27:** governs emergency motions |

**Eighth Circuit Court of Appeals**

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| Jurisdiction: | Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota |
| Mailing Address: | Thomas F. Eagleton Courthouse<br>Room 24.329<br>111 South 10th Street<br>St. Louis, MO 63102<br>OR<br>Room 500 Federal Court Building<br>316 North Robert Street<br>St. Paul, MN 55101 |
| Clerk's Office: | (314) 244-2400 (St. Louis); (651) 848-1300 (St. Paul) |
| Website: | www.ca8.uscourts.gov |
| Relevant Local Rules: | **IOP I.D.3:** governs emergency motions<br>**IOP III.I.:** governs motions |

**Ninth Circuit Court of Appeals**

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| Jurisdiction: | California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam, the Northern Mariana Islands |
| Mailing Address: | P.O. Box 193939<br>San Francisco, CA 94119-3939 |
| Overnight mailing: | 95 Seventh Street<br>San Francisco, CA 94103 |
| Clerk's Office: | (415) 355-8000 |
| Website: | www.ca9.uscourts.gov |
| Relevant Local Rules & General Orders : | **Circuit Rule 27-1 & Circuit Advisory Committee Notes:** govern motions<br>**Circuit Rule 27-2:** governs motions for stay pending appeal |

of this practice advisory the Sixth Circuit Clerk's Office does not enforce this rule, and instead expects stay motions in counseled cases to be filed electronically pursuant to Sixth Circuit Rules 15 and 25(a), (b)(1)(A)(iii). Attorneys should confirm with the Sixth Circuit Clerk's Office before filing.

**Circuit Rule 27-3 & Circuit Advisory Committee Notes:** govern emergency motions
**Circuit Rule 27-8:** governs required recitals in motions in immigration cases
**General Order 6.4:** governs emergency motions, including **General Order 6.4(c):**[136]

- The filing of a stay motion temporarily stays removal until further order of the court. A stay motion may be supplemented within 14 days of filing the initial motion.
- General Order 6.4(c) sets briefing deadlines for opposition and reply for motions to stay removal.
- If the government does not oppose the stay motion or fails to file a response to the stay motion, the temporary stay shall remain in effect during the pendency of the petition for review or until further order of the court.

**Tenth Circuit Court of Appeals**

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| Jurisdiction: | Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming |
| Mailing Address: | The Byron White U.S. Courthouse<br>1823 Stout Street<br>Denver, CO 80257 |
| Clerk's Office: | (303) 844-3157 |
| Website: | www.ca10.uscourts.gov |
| Relevant Local Rules: | **10th Cir. R. 18 & 8.2:** govern stays pending appeal, including emergency motion procedures in LR 8.2<br>o A motion for stay of removal must attach a copy of the transcript from the IJ's ruling, if relevant, plus copies of the IJ and BIA written rulings<br>**10th Cir. R. 27:** governs motions |

**Eleventh Circuit Court of Appeals**

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| Jurisdiction: | Alabama, Florida, Georgia |
| Mailing Address: | 56 Forsyth St.<br>Atlanta, GA 30303 |
| Clerk's Office: | (404) 335-6100 |
| Website: | www.ca11.uscourts.gov |
| Relevant Local Rules: | **11th Cir. R. 18-1 & IOP:** govern stay pending appeal<br>**11th Cir. R. 27-1 & IOP:** govern motions, including emergency motion procedures in LR 27-1(b) and IOP 2 |

[136] *See also DeLeon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997) (adopting automatic stay procedure).