National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]

Courts of Appeals Rules Governing Judicial Motions to Stay Removal

November 14, 2023

Motions for judicial stays of removal are governed by 8 U.S.C. § 1252(b)(3)(B), which provides that service of a petition for review (PFR) does not stay removal while the PFR is pending "unless the court orders otherwise."

Courts apply a four-factor test to determine whether a judicial stay is warranted. The test is: "(1) whether the stay applicant has made a strong showing that [the applicant] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *id*. at 435 (stating that courts should consider the second two factors only after "an applicant satisfies the first two factors").

Post-*Nken*, only a few circuits have issued published decisions deciding stay motions and addressing how to weigh the stay factors. *Compare Leiva-Perez v. Holder*, 640 F.3d 962, 966-70 (9th Cir. 2011) (applying flexible sliding scale approach); *Antonio v. Garland*, 38 F.4th 524, 526 (6th Cir. 2022) (applying balancing test) *with Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011) (citing *Nken* standard); *Blake v. U.S. Att'y Gen*., 945 F.3d 1175, 1178 (11th Cir. 2019) (same).

Federal Rule of Appellate Procedure 27 sets forth procedural requirements for motions filed with the courts of appeals. NILA strongly advises attorneys to consult both this rule and any local circuit court rule prior to preparing and filing a judicial stay motion.

The following is a breakdown by circuit of rules and policies relevant to judicial stay motions, with detailed information about the rules and policies that are specific to stays of removal in immigration cases:

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[1]

First Circuit

- Local Rule 18.0
- Applies to both immigration PFRs and appeals of habeas petitions.
- If removal is scheduled, the Office of Immigration Litigation (OIL) must file notice of the earliest possible removal date on the later of either one day after PFR/appeal is docketed or as soon as removal is scheduled.
- Upon notice, a litigant may file a stay motion within 2 business days.
- When a first stay motion is timely filed, the clerk enters an automatic stay for 10 business days, and OIL must respond by the later of either 2 business days after the litigant filed the stay motion or 10 business days prior to the earliest date of removal.
- In pro se cases, the 2-business-day deadline does not apply.

Second Circuit

- *In the Matter of Immig. Petitions for Review Pending in the U.S. Ct. of Appeals for the Second Circuit*, 702 F.3d 160 (2d Cir. 2012); *id*. at 162 (recognizing government forbearance policy which assures removal will not occur during the tolling period).
- Forbearance policy documents are attached to this advisory.
- Upon the filing of a PFR *and* stay motion, the government will refrain from removing the petitioner until the Court denies the stay motion or the mandate issues.
- OIL will not follow this policy in certain circumstances, including where it deems the absence of jurisdiction is clear. See attached forbearance documents.

Third Circuit

- Third Circuit Standing Order Regarding Immigration Cases
- Upon the filing of a PFR *and* stay motion, the clerk will automatically administratively stay removal until the stay motion is decided, provided the PFR is timely filed, venue is proper, the order challenged is "arguably final," and the court has "authority to review the challenged order."
- The automatic, administrative stay remains in effect until the court decides the stay motion or otherwise vacates the administrative stay.

Fourth Circuit

- Fourth Circuit Standing Order 19-01
- Upon the filing of an initial stay motion, removal is automatically stayed for 14 days to allow OIL to respond.
- The automatic stay may be vacated or extended by order of the court.

Fifth Circuit

- Local Rules 27.3 and 27.4
- The court only will give emergency consideration to stay motions where the petitioner has a scheduled removal date and is in custody.
- Petitioners and counsel are responsible for obtaining accurate information about custody status and confirming the scheduled removal date.

Sixth Circuit

- Local Rules 25(b)(1) and 27, 6th Cir. I.O.P. 15(b), 27(b)

Seventh Circuit

- Local Rule 27

Eighth Circuit

- 8th Cir. I.O.P. I.D.3

Ninth Circuit

- Ninth Circuit General Order 6.4(c); *DeLeon v. INS*, 115 F.3d 643 (9th Cir. 1997)
- Removal is automatically, temporarily stayed upon the filing of either a PFR that also requests stay of removal or an initial stay motion.
- A petitioner may supplement a stay motion within 14 days of the filing of the initial motion (but the court generally will not order a petitioner to do so).
- Briefing schedule: OIL's response is due within 21 days from the due date of the administrative record (and OIL must simultaneously file any dispositive motion); the petitioner's reply is due within 7 days of service of the response.
- If no opposition or response to a stay motion is filed, the temporary stay continues during the pendency of the PFR, absent further order from the court.

Eleventh Circuit

- Local Rules 8-1, 18-1, 27-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RONE v. SHANAHAN	Dkt. No. 16-1541

DECLARATION OF BRANDON M. WATERMAN

Brandon M. Waterman, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, attorney for respondents-appellants (the "government") in the above-captioned appeal. I respectfully submit this declaration in support of the government's motion to dismiss the appeal as moot.

2. Attached hereto as Exhibit A is a copy of the 1995 memorandum from the Clerk of the U.S. Court of Appeals for the Second Circuit, concerning the forbearance policy.

3. Attached hereto as Exhibit B is a copy of the March 16, 2009, letter, written by the Honorable Jon O. Newman, addressed to David McConnell, Director of the Department of Justice's Office of Immigration Litigation ("OIL"), concerning the forbearance policy.

4. Attached hereto as Exhibit C is a copy of the April 8, 2009, letter, written by OIL Director David McConnell, addressed to the Honorable Jon O. Newman, concerning the forbearance policy.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2016
New York, New York

/s/
BRANDON M. WATERMAN
Assistant United States Attorney

EXHIBIT A

September 5, 1995

MEMORANDUM FOR CHAMBERS AND STAFF **REVISED**

Subj: Motions for Stay of INS Deportation Orders

The United States Attorney for the Southern District of New York (U.S. Attorney), acting through her Chief of Civil, Jane Booth, has agreed to instruct INS not to deport or return an alien who has filed a motion for stay of deportation with the Court until and unless that motion is denied. This changes long standing practice and is applicable to appeals from Board of Immigration Appeals (BIA) rulings on deportation orders issued throughout the Circuit.

As you know, aliens who are not classified as aggravated felons are legally entitled to an automatic stay of deportation upon filing a Petition for Review.

Aliens classified as aggravated felons are not so entitled, and the U.S Attorney had taken the position that such aliens remained subject to deportation pending judicial determination of their motions for stay. In response, the Court began considering these motions on an emergency basis.

Effective immediately, however, the U.S. Attorney will instruct INS not to deport or return aliens in any case where the Clerk's office has informed the U.S. Attorney that a stay motion has been filed, until and unless the motion for stay is denied (except for certain habeas petitions noted below). The U.S. Attorney will not instruct INS to refrain from steps preliminary to deportation.

The U.S. Attorney for the Southern District of New York represents INS in all appeals from BIA rulings on deportation orders issued throughout the Circuit. Accordingly, the new policy provides comprehensive protection from deportation while these motions for stay are pending.

The U.S. Attorney will also instruct INS not to deport or return aliens seeking stays pending appeal from SDNY habeas petitions, until and unless the motion for stay is denied. Since other U.S. Attorneys in the Circuit handle their own district court proceedings in immigration cases, the SDNY U.S. Attorney's new policy, as applied to stay motions in habeas cases, only covers such motions arising in the SDNY. Motions for stay arising out of districts other than SDNY will be handled by the Clerk's office on an ad hoc basis.

The Clerk's office and the U.S. Attorney have also refined procedures to insure the latter is promptly notified whenever a motion for stay has been filed. The U.S. Attorney concurs in this memorandum.

George Lange III
Clerk

cc: U.S. Attorney (SDNY)

EXHIBIT B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

March 16, 2009

Mr. David McConnell
Director
Office of Immigration Litigation
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Mr. McConnell:

I write on behalf of the United States Court of Appeals for the Second Circuit to seek clarification of the understanding that has existed between the Department of Justice and the Second Circuit concerning what has been informally characterized as "forbearance," that is, a voluntary decision on the part of the Department of Justice and the Department of Homeland Security concerning removal of an alien who has filed in the Second Circuit a petition for review of a decision of the Board of Immigration Appeals ("BIA").

In view of our Court's recent and continuing effort to deal promptly with our high volume of BIA petitions, thereby minimizing the time between filing and disposition and substantially eliminating the need for extended litigation over stay motions, we are hopeful that "forbearance" will continue as it has in the past.

We understand "forbearance" to function as follows:

1. No alien who has filed a petition for review and has also filed a motion for a stay of removal will be removed until the Court of Appeals has made a ruling. We understand that forbearance might not be possible in rare instances where a petition is filed within an exceedingly short interval prior to a scheduled removal, e.g., an hour or two, but even in such circumstances we expect Government officials, working in cooperation with Court staff, to make every effort to avoid removal prior to a Court ruling.

2. The Government may seek to precipitate a ruling on a stay motion, in advance of adjudication of the merits of the petition, in one of three ways:

(A) move to dismiss a petition for lack of jurisdiction, improper venue, or untimeliness.

(B) move for summary adjudication of a petition on the ground that is it frivolous.

(C) file papers specifically opposing a stay motion.

3. If a Government motion to dismiss or for summary adjudication is denied or if a petitioner's motion for a stay motion is specifically adjudicated and granted, the alien will not be removed until the mandate of our Court has issued following a dispositive decision on the merits of the petition.

4. The Court will promptly schedule and adjudicate a motion to dismiss for lack of jurisdiction, improper venue, or untimeliness. If motions for summary disposition or papers in opposition to stay motions are routinely filed, the Court reserves the option to refer these motions and papers to a merits panel, without a ruling, to avoid the need to have six judges consider matters that will be expeditiously resolved on the merits by a panel of three judges. The Court will schedule and adjudicate a motion for summary adjudication in those instances where preliminary consideration indicates that the petition is frivolous.

Your acknowledgment that this letter correctly sets forth the understanding concerning "forbearance" will be appreciated.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

cc: Thomas W. Hussey

EXHIBIT C

U.S. Department of Justice

Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Washington, D.C. 20530

DMM:LMA:lma

VIA FEDERAL EXPRESS

APR - 8 2009

The Honorable Jon O. Newman
United States Circuit Judge
United States Court of Appeals for
the Second Circuit
450 Main Street
Hartford, Connecticut 08103

Dear Judge Newman:

This is in response to your letter of March 16, 2009, setting forth your court's understanding of how the so-called "forbearance policy" applies to motions for stays of removal in immigration review petitions filed in the Second Circuit. As an initial matter and by way of reminder, I attach Office of Immigration Litigation (OIL) Director Thomas W. Hussey's letter of January 26, 2007, in which he articulated OIL's understanding of the forbearance arrangement, stated our intention to continue adhering to it, and provided his assurance that OIL would notify the Second Circuit in advance of any decision to change its adherence to the policy. Mr. Hussey's letter still accurately represents OIL's current position on forbearance in Second Circuit immigration petitions and, we believe, fully conforms to your court's understanding of the policy as set forth in your March 16 letter.

With specific regard to the numbered points of your letter, OIL responds as follows:

1. Your understanding of forbearance as stated in paragraph 1 of your letter is consistent with OIL's understanding and practice. In short, we agree that generally an "alien who has filed a petition for review and has also filed a motion for a stay of removal will" not be removed "until the Court of Appeals has made a ruling" on the motion seeking a stay. We also anticipate that there may be instances in which there is very little time left between the filing of the stay request and the alien's removal, making it very difficult for the government to stop the removal process. However, we also expect those instances to be rare, and that government officials will make reasonable efforts to avoid removal when this occurs.

That having been said, and as we have discussed in our recent email communications, we

believe there are circumstances that arise that fall outside the scope of the forbearance arrangement. Specifically, they are occasions in which, we believe, individuals are abusing the forbearance agreement by bringing cases that clearly fall outside the court's jurisdiction. For example, we believe Immigration and Customs Enforcement should not be required to automatically stay removal when the order for which review is sought is clearly not a reviewable order (e.g., as when a petition is filed seeking review of BIA decision to deny a stay request while it adjudicates a pending motion to reopen), or in a case wherein the alien files a petition for review from a Board decision that is clearly several years old, and therefore per se untimely. In these situations, the Court's lack of jurisdiction is so clear, and the alien's abuse of the forbearance policy so evident, as to make any period of automatic forbearance unreasonable. As I have mentioned, I believe these occasions arise relatively rarely, and when they do we will endeavor to inform the court of any scheduled time frame for removal, within which the court may adjudicate a government motion to dismiss and decide whether to formally enter a stay before removal occurs. This is consistent with our practice in other circuits where there is no forbearance policy, but where we normally apprise the court that removal will occur in a specific number of days unless the court affirmatively grants a stay.

In addition, although the foregoing accurately reflects our current position regarding forbearance, we anticipate that our future practices may be greatly affected by how the Supreme Court decides the pending case of Nken v. Mukasey, No. 08-681, cert.granted, 129 S. Ct. 622 (Nov. 25, 2008). The Supreme Court will therein address the proper legal standard for adjudicating stay requests in immigration petitions. Of course, OIL will provide the Second Circuit with notice of any decision to re-examine the forbearance agreement, if we determine that changes are warranted in light of Nken. For your information, oral argument was held in this case on January 21, 2009, and a decision is expected before the end of the Court's term this July.

2. We understand and agree that the government may seek to precipitate a ruling on a stay motion in one of the three ways you mention (motion to dismiss, motion for summary adjudication, opposition to the stay). While there might be rare situations in which OIL may seek to obtain an early ruling on a stay motion by filing a motion falling outside these categories, the vast majority of the scenarios should fall within those described in your paragraph 2.

3. OIL agrees that under the forbearance arrangement, the petitioner will not be removed if the government's motion to dismiss or for summary adjudication is denied, or if the stay motion is adjudicated and granted. Under these circumstances, the stay will remain in effect until the Second Circuit issues the mandate following "a dispositive decision on the merits of the petition."

4. Paragraph 4 of your letter indicates that the court will promptly schedule and adjudicate motions to dismiss for lack of jurisdiction, improper venue, and untimeliness, and we greatly appreciate the court's efforts in this regard to schedule and adjudicate these motions as expeditiously as possible. Your letter also notes that motions for summary disposition and oppositions to stays of removal may be referred to merits panels if they are filed routinely. While this may reflect the court's perception that such papers are being filed more often by OIL attorneys than in the past (especially with regard to stay oppositions), I believe the frequency with which we file such documents is commensurate with our practice in the other circuits. In

any event, we understand the court's concerns and we will continue to review our cases carefully and file summary disposition motions and oppositions to stay motions only in those cases where our attorneys, in consultation with their supervisors, deem them to be appropriate based on the facts and circumstances of each case.

I hope this clarifies our mutual understanding of OIL's practices and procedures under the forbearance policy. Please contact me at (202) 616-4881 should you have any questions or desire any additional information.

Sincerely,

DAVID M. McCONNELL
Deputy Director

cc:
Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, New York 10007

U.S. Department of Justice

Civil Division
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P.O. Box 878, Ben Franklin Station
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TWH:DMM:LMA:lma

Washington, D.C. 20530

JAN 26 2007

VIA FEDERAL EXPRESS

The Honorable Dennis Jacobs
Chief Judge, United States Court
Of Appeals for the Second Circuit
U.S. Courthouse
40 Foley Square
New York, New York 10007

Dear Judge Jacobs:

I am providing this letter at the request of Judge Newman, who inquired as to the Office of Immigration Litigation's intentions with respect to stays of removal in review petition cases in the Second Circuit. As you are aware, the Office of Immigration Litigation (OIL) has assumed primary responsibility for the government's representation in immigration matters filed with the Second Circuit since May 15, 2006.

Judge Newman has inquired whether OIL intends to adhere to certain practices adopted by the U.S. Attorney's Office for the Southern District of New York that are outlined in a September 5, 1995 memorandum issued by the Clerk of the Court. As described in this memorandum, on that date, the then- U.S. Attorney, through her Chief of Civil, agreed to issue instructions to the Immigration and Naturalization Service directing it to forbear removing any alien who has filed a petition for review and accompanying motion for a stay until or unless the court denied the stay.

OIL has adhered to the practices described in the September 5, 1995 memorandum since it began its transition to Second Circuit work last May. At the same time, the Department is considering whether the approach outlined in the memorandum remains the one that it should follow. We will notify you in advance should the Department determine a different approach is warranted.

Please contact me at (202) 616-4852 should you have any questions or desire any additional information.

Sincerely,

THOMAS W. HUSSEY
Director

cc:
Thomas Asreen
Acting Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, New York 10007