IN THE SUPREME COURT OF THE UNITED STATES

No. 08A413

JEAN MARC NKEN, APPLICANT

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON APPLICATION FOR A STAY OF REMOVAL

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The Solicitor General, on behalf of the Attorney General, respectfully submits this memorandum in opposition to the application for a stay of removal.

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., in order to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996). IIRIRA made three amendments to the INA that are particularly relevant here.

First, IIRIRA modified a provision of the INA that previously had provided for an automatic stay of the enforcement of a removal order upon the filing of a petition for review in a court of appeals. Instead, the INA now provides that "[s]ervice of the petition [for judicial review] * * * does not stay the removal

of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. 1252(b)(3)(B). Second, IIRIRA enacted a new provision that provides that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2). Third, IIRIRA repealed a provision of the INA that had barred further consideration of a petition for judicial review following an alien's departure or removal from the United States. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)). Post-IIRIRA, therefore, "an alien may continue to prosecute his appeal of a final order of removal even after he departs the United States." Ngarurih v. Ashcroft, 371 F.3d 182, 192 (4th Cir. 2004); see Dada v. Mukasey, 128 S. Ct. 2307, 2320 (2008).

2. Applicant, a native and citizen of Cameroon, was admitted to the United States on April 1, 2001, as a non-immigrant visitor with authorization to remain until April 9, 2001. Appl. Exh. 5, Exh. 2, Oral Decision of the Immigration Judge (IJ) 1 (Apr. 23, 2003) (4/23/03 IJ Decision). Applicant failed to depart the United States within the time specified. Ibid.

3. a. In February 2002, the former Immigration and Naturalization Service charged applicant with being removable. 4/23/03 IJ Decision 2. Applicant admitted the factual allegations

contained in the notice to appear and conceded removability. Ibid. Applicant had filed an application for asylum in December 2001, which the IJ deemed also to encompass requests for withholding of removal and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85. See 4/23/03 IJ Decision 2. A hearing was held before an IJ, at which applicant testified. Id. at 3.

On April 23, 2003, the IJ issued an oral decision that denied applicant's applications for asylum, withholding of removal, and protection under the CAT. 4/23/03 IJ Decision 15. The IJ concluded that applicant had "failed to meet his burden in establishing past persecution, or [a] * * * well-founded fear of future persecution should he return to Cameroon." Id. at 10. The IJ accordingly found no need to address the issue whether applicant had firmly resettled in the Ivory Coast, where he claimed to have lived for 10 years after leaving Cameroon. Id. at 10-11; see id. at 6. The IJ described applicant's account of his departure from Cameroon as "improbable," id. at 11, noted that applicant's asylum application had not mentioned his later claim "that he was a propaganda delegate" for a student organization while in Cameroon, id. at 11-12, "question[ed]" other aspects of applicant's account, id. at 12, and described applicant's answers to various questions as "vague[] and evasive[]," id. at 13. The IJ

also stated that various letters that applicant claimed to have been written by his father and brother "ha[d] not been notarized," that the IJ had "no way of determining [the letters'] authors," and that applicant "presented no proof as to [his] relationship" with those individuals. Id. at 14.

b. Applicant filed an administrative appeal with the Board of Immigration Appeals (BIA or Board). On August 12, 2004, the BIA remanded applicant's case to the IJ. Appl. Exh. 6, Exh. 1, Decision of the Board of Immigration Appeals (Aug. 12, 2004) (8/12/04 BIA Decision). The Board stated that the IJ's April 23, 2003, decision had "raised numerous problems relating to [applicant's] credibility," and it observed that the IJ's "ultimate conclusion finding [applicant] to be ineligible for relief appeared to be based largely on the credibility problems." Ibid. The Board noted, however, "that the [IJ] did not make a specific adverse credibility finding," and it explained that "[u]nder our standard of factual review, we cannot make a de novo determination of credibility on appeal." Ibid. The Board therefore remanded for the IJ "to make a specific credibility finding in accordance with the standards articulated by the Board." Ibid.

c. On remand, the IJ "ma[de] a specific adverse credibility finding." Appl. Exh. 6, Exh. 2, Oral Decision of the Immigration Judge 4 (March 4, 2005) (3/4/05 IJ Decision). The IJ "f[ound applicant's] testimony to be incredible" and stated that "the

documents he submitted do not overcome the Court's finding of incredibility." Id. at 3. The IJ again denied applicant's applications for asylum, withholding of removal, and protection under the CAT, id. at 4, and she expressly incorporated her April 23, 2003, decision into her March 4, 2005, decision, id. at 2.

d. Applicant appealed the IJ's March 4, 2005, decision to the BIA. While that appeal was pending, applicant filed a motion to remand his case to the IJ in order to permit him to apply for adjustment of status based on an immediate relative (I-130) visa petition that his United States citizen wife had filed on his behalf. The Department of Homeland Security (DHS) filed a statement opposing applicant's motion to remand. Appl. Exh. 6, Exh. 3, Decision of the Board of Immigration Appeals 1 (June 16, 2006) (6/16/06 BIA Decision).

On June 16, 2006, the BIA affirmed the IJ's March 4, 2005, decision. 6/16/06 BIA Decision 1-2. The Board determined that the IJ's adverse credibility finding was not clearly erroneous. Id. at 1. The BIA noted the "contradictory evidence" and "divergent accounts" concerning the activities and treatment applicant asserted he had experienced in Cameroon, and noted as well applicant's failure to address why he had not applied for asylum in the Ivory Coast and how he was granted admission to a university almost immediately after he claimed to have fled there. Id. at 2. The BIA also declined to remand to the IJ for further proceedings.

Id. at 2-3. The Board concluded that applicant was "not prima facie eligible for adjustment of status" because his wife's I-130 application had not been approved, and it determined that applicant's case did not fall within any "exception * * * to the general rule that aliens in [removal] proceedings are not accorded continuances for the resolution of a visa petition." Ibid.

e. On July 14, 2006, applicant filed a motion asking the Board to reopen and reconsider its June 16, 2006, decision. On September 27, 2006, the BIA issued a decision denying that motion, stating that applicant "has not submitted any material evidence that was previously unavailable nor has he made any arguments that were not already considered in our June 16, 2006, decision." Appl. Exh. 6, Exh. 6, Decision of the Board of Immigration Appeals (Sept. 27, 2006).

f. Applicant filed a petition for review of the BIA's June 16, 2006, decision with the United States Court of Appeals for the Fourth Circuit. On April 3, 2007, the court of appeals issued an unpublished per curiam decision denying that petition. Appl. Exh. 6, Exh. 4 (4/3/07 CA4 Decision). The court of appeals "conclude[d] that substantial evidence support[ed] both the [IJ's] adverse credibility finding and [her] ultimate finding that [applicant was] ineligible for asylum, withholding of removal, and protection under the CAT." Id. at 3. The court also concluded that the BIA "did

not abuse its discretion" in denying applicant's motion to remand. Ibid.

g. Applicant filed a petition for rehearing, which the court of appeals denied. Appl. Exh. 6, Exh. 5.

4. a. On December 19, 2006, applicant filed with the BIA a second motion to reopen his removal proceedings. Appl. Exh. 6, Exh. 7, Decision of the Board of Immigration Appeals (June 7, 2007) (6/7/07 BIA Decision). On June 7, 2007, the BIA denied that motion, stating that applicant had "exceed[ed] the numerical limitations on motions to reopen." Ibid. (citing 8 C.F.R. 1003.2(c)(2), which provides that, subject to one exception, "an alien may file only one motion to reopen removal proceedings"). The Board acknowledged that "[t]he general time and number requirements applicable to motions to reopen do not apply in certain circumstances," but it concluded that "none of those circumstances apply in this case." Ibid.

b. Applicant filed a petition for judicial review of the BIA's June 7, 2007, decision. On April 9, 2008, the court of appeals denied that petition in an unpublished one-page per curiam opinion. Appl. Exh. 6, Exh. 8 (4/9/08 CA4 Decision). The court concluded that "the Board did not abuse its discretion in denying the motion [to reopen] as numerically barred," and it determined that it "lack[ed] jurisdiction to review [applicant's] claim that

the Board should have exercised its sua sponte power to reopen his [removal] proceedings." Id. at 2.

5. a. On May 7, 2008, applicant filed with the BIA his third motion to reopen his removal proceedings, which ultimately gave rise to the stay application that is currently before this Court. Appl. Exh. 2. That motion asserted that it was "not barred by time and/or numerical limitations, because it [was] based on changed country conditions" in Cameroon. Id. at 3 (emphasis in original); see 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(2) & (3). Applicant attached three sets of documents to his May 7, 2008, motion to reopen. Appl. Exh. 2, at 4. The first purported to be an original and English-language translation of a letter written by applicant's younger brother. Ibid. The second was identified as "four (4) recent photographs of [applicant] and other activists during a political demonstration * * * in front of the Embassy of Cameroon." Ibid. The third consisted of "nine recent news-articles from the internet regarding the current political situation in Cameroon." Id. at 4-5. Applicant also requested a stay of removal pending the BIA's consideration of his motion to reopen. Appl. Exh. 5, Exh. 13, Decision of the Board of Immigration Appeals (June 17, 2008) (6/17/08 BIA Decision).

b. On June 17, 2008, the BIA denied applicant's request for a stay of removal. The Board "concluded that there is little

likelihood that the motion [to reopen] will be granted." 6/17/08 BIA Decision.[1]

On June 23, 2008, the BIA denied applicant's third motion to reopen his removal proceedings. Appl. Exh. 3, Decision of the Board of Immigration Appeals (June 23, 2008) (6/23/08 BIA Decision). The Board acknowledged that "[t]here is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for asylum or withholding of removal and is based on changed country conditions * * *, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." Id. at 1 (citing 8 U.S.C. 1229a(c)(7)(C)(ii)). The Board acknowledged that applicant "ha[d] proffered three attachments" in support of his motion to reopen, the first of which it described as "a letter from his brother in Cameroon." Ibid.

The Board concluded that applicant "ha[d] not presented sufficient facts or evidence to establish that his motion f[ell] within the 'changed country conditions' exception to the time limitation for motions to reopen." 6/23/08 BIA Decision 1. The BIA observed that applicant "failed to submit his own statement or asylum application articulating his persecution claim based on

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[1] Applicant also sought a stay of removal from the United States District Court for the District of Columbia. The district court denied that request on June 18, 2008. See Nken v. Chertoff, No. 1:08-cv-01010-CKK, docket entry 3.

recent reports of civil unrest in Cameroon," and it concluded that applicant's failure to do so was "significant in this case where the [IJ's] adverse credibility determination remains undisturbed." Ibid. The Board described it as "well established that tragic and widespread savage violence resulting from civil war or military strife is not persecution," ibid., and it stated that applicant had not explained how either "his participation in an event in the United States" or recent events in Cameroon "alter his persecution claim," id. at 1-2.

The Board also declined to exercise its authority to reopen applicant's removal proceedings sua sponte based on the fact that applicant's "immediate relative visa petition ha[d] been approved and that he and his wife now have a United States citizen child born on March 27, 2007." 6/23/08 BIA Decision 2. The BIA stated that "[t]he acquisition of equities in the United States is to be expected when one continues to remain in the United States." Ibid.

6. a. On July 23, 2008, applicant filed a petition for judicial review of the BIA's June 23, 2008, denial of his third motion to reopen his removal proceedings. Appl. Exh. 4. On August 6, 2008, applicant filed with the court of appeals a Motion to Stay Deportation Pending Review. Appl. Exh. 5.

b. On August 13, 2008, the government filed an opposition to applicant's motion for a stay of removal. Appl. Exh. 6. The government cited the court of appeals' holding in Teshome-

Gerbreegziabher v. Mukasey, 528 F.3d 330, reh'g denied, 2008 WL 4741721 (4th Cir. Oct. 30, 2008) (No. 08-1060), that the standard set forth in 8 U.S.C. 1252(f)(2) "governs motions to stay removal." Appl. Exh. 6, at 7. The government explained that applicant's stay motion did not meet that standard, because applicant "did not establish that the reports of general changed conditions in Cameroon were material to his particular claim and thus did not establish that an exception to the time and number bar was warranted." Id. at 8-9.

The government also responded to applicant's claim that the court of appeals "should stay his removal because the Board committed [certain] legal errors in denying his motion." Appl. Exh. 6, at 9. With respect to the letter from applicant's brother, the government explained that "the Board is not required to specifically discuss each individual piece of evidence submitted in support of [a] motion," and that "the Board's failure to specifically address [applicant's] brother's bare assertion that [applicant] would be arrested if he returned to Cameroon [did] not provide a basis for finding the Board's order is 'prohibited as a matter of law.'" Id. at 10 (quoting Teshome-Gebreegziabher, 528 F.3d at 335). The government also stated that applicant had "misread[] the Board's decision" in arguing that the Board "requir[ed] that he submit a personal statement in support of his motion" to reopen. Id. at 11. To the contrary, the government

explained that the Board had simply concluded that applicant "had failed to link current changes in Cameroon to his claim of persecution by, among other things, failing to provide a personal statement or asylum application." Ibid.

c. On November 5, 2008, the court of appeals denied applicant's motion for a stay of removal in an unpublished per curiam order. The order reads, in its entirety, as follows:

> Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion.
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> Entered at the direction of Judge Motz with the concurrence of Judge King and Judge Shedd.

Appl. Exh. 1.

d. Applicant's opening brief in connection with his current petition for judicial review was filed on October 30, 2008. Appl. Exh. 7. The government's brief on the merits was originally due on December 1, 2008. This Office has been informed that the government filed a motion to extend that deadline to December 22, 2008, which the court of appeals granted. The government intends to file its brief in the court of appeals by the original December 1, 2008, deadline.

ARGUMENT

Applicant contends (Appl. 2) that this Court should grant an "emergency stay of removal pending adjudication of his petition for review in the [United States] Court of Appeals for the Fourth

Circuit."[2] Although this Court has authority to grant a stay pending review in the lower courts, see, e.g., Ashcroft v. New Jersey Media Group, Inc., 536 U.S. 954 (2002), such stays are "rarely granted," Heckler v. Lopez, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in Chambers), motion to vacate stay denied, 464 U.S. 879 (1983). "Because th[e] matter is pending in the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden" to carry. Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in Chambers). Applicant neither acknowledges the "especially heavy burden" he faces in seeking a stay pending further proceedings in the court of appeals, ibid., nor establishes that the standards for granting such a stay are present here.

1. An applicant who seeks a stay from this Court pending review in the court of appeals must establish: (1) "that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari"; (2) "that there is a fair

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[2] Applicant also requests, "[i]n the alternative," that "the Court treat [this] application * * * as a petition for a writ of certiorari, grant the petition, and grant [applicant] a stay of deportation pending full review." Appl. 16; see id. at 1, 2. This Court certainly has the power to grant certiorari before a court of appeals has rendered judgment. See 28 U.S.C. 2101(e). But applicant does not acknowledge that the Court will do so "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice," S. Ct. R. 11, nor does he attempt to explain why that high standard is satisfied here.

prospect that five Justices will conclude that the case was erroneously decided below"; and (3) "that irreparable harm will likely result from the denial of equitable relief." Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in Chambers); see Packwood, 510 U.S. at 1319-1320 (Rehnquist, C.J., in Chambers); Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in Chambers). "In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." Lucas, 486 U.S. at 1304 (Kennedy, J., in Chambers).

2. Applicant contends (Appl. 2, 14-16) that, in considering his motion for a stay of removal, the court of appeals incorrectly applied the standard contained in 8 U.S.C. 1252(f)(2) rather than the traditional standard for granting injunctive relief. He further contends (Appl. 1, 6-8) that the courts of appeals disagree about the proper standard for determining whether to issue a stay of removal pending resolution of a petition for review and that the disagreement involves an important and recurring question of federal law.

Although applicant is correct that the courts of appeals have disagreed about the appropriate standard, this case would not be a suitable vehicle for resolving that disagreement. As explained below, the court of appeals correctly denied applicant's motion for

a stay of removal pending its consideration of applicant's petition for review of the BIA's denial of his successive -- indeed third -- motion to reopen his removal proceedings. Applicant cannot establish that any other circuit would have granted a stay under the circumstances presented here. Accordingly, applicant cannot demonstrate a reasonable probability that four Members of this Court would vote to grant certiorari. And because the court of appeals' disposition was correct, there is not a significant possibility that the judgment below would be reversed if the Court did grant review.

a. There is disagreement in the courts of appeals regarding what standard governs a request for a stay of removal pending the resolution of a petition for judicial review. Two courts of appeals have concluded that the applicable standard is contained in 8 U.S.C. 1252(f)(2). See Teshome-Gerbreegziabher v. Mukasey, 528 F.3d 330, 331, reh'g denied, 2008 WL 4741721 (4th Cir. Oct. 30, 2008) (No. 08-1060); Weng v. United States Attorney General, 287 F.3d 1335, 1337-1340 (11th Cir. 2002) (per curiam).

In contrast, seven courts of appeals have held that the Section 1252(f)(2) standard does not apply to a request for a stay of removal pending judicial review of a final order of removal. See Tesfamichael v. Gonzales, 411 F.3d 169, 171-176 (5th Cir. 2005), cert. denied, 128 S. Ct. 353 (2007); Hor v. Gonzales, 400 F.3d 482, 483-485 (7th Cir. 2005); Douglas v. Ashcroft, 374 F.3d

230, 233-234 (3d Cir. 2004); Arevalo v. Ashcroft, 344 F.3d 1, 8-9 (1st Cir. 2003); Mohammed v. Reno, 309 F.3d 95, 98-99 (2d Cir. 2002); Bejjani v. INS, 271 F.3d 670, 687-688 (6th Cir. 2001), abrogated on other grounds by Fernandez-Vargas v. Gonzales, 126 S. Ct. 2422 (2006); Andreiu v. Ashcroft, 253 F.3d 477, 480-482 (9th Cir. 2001) (en banc).[3] Those courts generally evaluate stay requests under the traditional standard for granting preliminary injunctive relief, which considers the applicant's likelihood of success on the merits; whether irreparable harm would occur if a stay is not granted; whether that potential harm outweighs the harm to the government if a stay is not granted; and whether granting a stay would serve the public interest. See, e.g., Tesfamichael, 411 F.3d at 172.

b. The position of the Fourth and Eleventh Circuits is correct, and for this reason alone the decision denying a stay is unlikely to be reversed if the Court were to grant certiorari. In addition, as explained below (see pp. 21-29, infra), applicant would not prevail even under the traditional standards for granting relief.

Under IIRIRA, requests for stays of removal pending a court's consideration of a petition for judicial review are governed by the

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[3] Applicant includes the Tenth Circuit's decision in Lim v. Ashcroft, 375 F.3d 1011, 1012 (2004), in this category (Appl. 7), but Lim did not explicitly address the issue of whether Section 1252(f)(2) applies to stays pending appeal.

standard set forth in 8 U.S.C. 1252(f)(2). Section 1252(f)(2) provides that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." The term "enjoin" is not defined in Section 1252(f)(2). In its customary usage, however, an injunction "command[s] or prevent[s] an action," Black's Law Dictionary 788 (7th ed. 1999), and a judicially granted stay of removal prevents DHS from removing an alien from the United States. See Teshome-Gerbreegziabher, 528 F.3d at 333 (stating that "'stay' is a subset of the broader term 'enjoin,'" and noting that the Sixth Edition of Black's Law Dictionary described a "stay" as "a kind of injunction").

If anything, the word "enjoin" is a more apt description of the relief that applicant is seeking than the word "stay." In its most customary usage, a stay is a tool by which a court freezes its own proceedings or suspends the operation of its own decisions or those of an inferior court pending further review. Cf. Winter v. NRDC, No. 07-1239 (Nov. 12, 2008), slip op. 22 n.5 (observing that "[a] stay is a useful tool for managing the impact of injunctive relief pending further appeal"). A request for an order prohibiting an alien's removal from the United States is not a request for an action of that sort. "Deportation orders are self-executing orders, not dependent upon judicial enforcement."

Stone v. INS, 514 U.S. 386, 398 (1995); see 8 C.F.R. 1241.1(a) (providing that a removal order "shall become final * * * [u]pon dismissal of an appeal by the Board of Immigration Appeals."). Accordingly, a court-granted stay of removal prevents an Executive Branch agency from taking an action that would be entirely lawful in the absence of any involvement by a court. The most natural label for such an order is an injunction.

Applicant's arguments to the contrary are not persuasive. It is true (Appl. 14-15) that Congress and this Court have sometimes distinguished between "stays" and "injunctions" in other contexts. But it is equally true that Congress has at other times used the term "stay" in a manner that makes clear that a stay is simply a particular type of injunction. See, e.g., Anti-Injunction Act, 28 U.S.C. 2283 (providing that "[a] court of the United States may not grant an injunction to stay proceedings in a State court") (emphases added).

Nor does Section 1252's structure support the view (Appl. 15) that Section 1252(f)(2) does not apply to motions for stays of removal pending judicial review. To the contrary, if Section 1252(f)(2) does not apply to such motions, "it is unclear when * * * [that provision] would ever apply." Teshome-Gerbreegziabher, 528 F.3d at 334. Section 1252(b)(9) provides that the only way to obtain "[j]udicial review of * * * questions of law and fact * * * arising from any action taken or proceeding

brought to remove an alien from the United States" is by way of a petition for judicial review of a final order of removal. 8 U.S.C. 1252(b)(9); accord 8 U.S.C. 1252(g) (stating that "[e]xcept as provided in this section * * * no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter"). A court that concludes that an alien is entitled to relief in connection with a petition for review does "not 'enjoin' the removal of [that] alien * * *; instead [it] vacate[s] the agency's final order of removal." Teshome-Gerbreegziabher, 528 F.3d at 334. Accordingly, a conclusion that Section 1252(f)(2) does not apply to motions for stays of removal pending the adjudication of a petition for judicial review would threaten to render that provision entirely superfluous.

Applicant contends (Appl. 15-16) that interpreting Section 1252(f)(2) in accordance with its plain terms "would virtually eliminate the ability of most aliens to obtain stays of removal pending review of their claims." It is clear, however, that one of Congress's primary purposes in enacting IIRIRA in 1996 was to ensure the prompt removal of illegal aliens from the United States. See, e.g., S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996). One of the ways Congress chose to implement that goal was by repealing the

provision of the INA that had generated an automatic stay of removal upon the filing of a petition for judicial review, while preserving an alien's ability to continue to pursue a petition for review from outside the United States. See pp. 1-2, supra. Many of applicant's arguments "are not really arguments against the § 1252(f)(2) standard" at all, but are more accurately characterized as "arguments against any standard other than an automatic stay," Teshome-Gerbreegziabher, 2008 WL 4741721, at *3 (Shedd, J., concurring in the denial of rehearing en banc), which is an option that Congress clearly rejected in enacting IIRIRA.

c. In any event, this case would be a poor vehicle for resolving the disagreement among the courts of appeals regarding the post-IIRIRA standard for issuing stays of removal pending consideration of an alien's petition for judicial review.

i. The operative portion of the court of appeals' unpublished order denying applicant's motion for a stay of removal states, in its entirety: "Upon review of submissions relative to the motion for stay pending appeal, the Court denies the motion." Appl. Exh. 1. The court of appeals did not state that its decision was in any way contingent on its holding in Teshome-Gebreegziabher, and two of the three judges on the unanimous panel that rejected applicant's stay motion had, just six days earlier, dissented from the court of appeals' denial of rehearing en banc in that case. While certainly far from dispositive, the panel's failure to mention Teshome-

Gebreegziabher in its order lends some support to the inference that the court of appeals did not regard that decision as essential to its denial of applicant's motion for a stay. At any rate, the lack of any description from the court of appeals about why it denied a stay in this case would hamper the conduct of this Court's review.

ii. This case would also be a poor vehicle for resolving the disagreement among the courts of appeals regarding the proper standard for granting stays of removal because applicant has failed to satisfy even the traditional standard for granting preliminary injunctive relief. See Winter, slip op. 10 (describing standard); Kenyeres v. Ashcroft, 538 U.S. 1301, 1305-1306 (2003) (Kennedy, J., in Chambers) (noting the disagreement in the circuits but concluding that it would not be appropriate to review the issue in that case because "[a]pplicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals").

First, applicant cannot establish a likelihood of ultimate success on his challenge to the BIA's denial of his third motion to reopen. Because applicant's current motion to reopen was his third, and because it was filed more than 90 days after the entry of a final order of removal, the BIA had no authority to grant applicant's motion unless his proffered evidence was "material and was not available and could not have been discovered or presented

at the previous proceeding." 8 U.S.C. 1229a(c)(7)(C)(ii); 8 C.F.R. 1003.2(c)(3)(ii). In addition, the BIA's denial of a motion to reopen on the ground "that the movant has not introduced previously unavailable, material evidence" is reviewable by courts only for "abuse of discretion." INS v. Abudu, 485 U.S. 94, 104-105 (1988).

Applicant is unlikely to establish that the BIA abused its discretion in denying his third motion to reopen. The IJ did not deny applicant's original application for asylum, withholding of removal, and protection under the CAT based on a conclusion about then-prevailing conditions in Cameroon. Instead, the IJ made "a specific adverse credibility finding," 3/4/05 IJ Decision 4, and she described applicant's testimony at the removal hearing as "incredible" and "improbable." Id. at 3. Cf. Huang v. Mukasey, 534 F.3d 618, 622 (7th Cir. 2008) (upholding denial of motion to reopen by asylum applicant previously found not to be credible and distinguishing between a denial based on country conditions from one based on adverse credibility), pet. for cert. pending, No. 08-490 (Oct. 13, 2008). The IJ also noted that certain documents -- including a letter that applicant claimed had been written by his brother -- had not been properly authenticated and were otherwise suspect. 4/23/03 IJ Decision 12, 14. Those findings were expressly upheld by the BIA, see 6/16/06 BIA Decision 1-2, and the court of appeals, see 4/3/07 CA4 Decision 3, and they "remain[] undisturbed" in the current proceeding, 6/23/08 BIA Decision 1.

As the BIA correctly concluded, the evidence that applicant submitted in connection with his current motion to reopen was not responsive to, and was thus not material in light of, the IJ's earlier adverse credibility finding. The Board imposed no per se requirement that an alien who seeks reopening of an asylum claim based on changed country conditions must invariably "submit a personal statement." Appl. 11.[4] Instead, the BIA simply recognized that, because "the Immigration Judge's adverse credibility determination remains undisturbed," applicant's failure to "submit his own statement" explaining how "recent reports of civil unrest in Cameroon" affected his particular claim "was significant in this case." 6/23/08 BIA Decision 1; see id. at 2 (stating that applicant had "failed to show how these events alter his persecution claim") (emphasis added); see also Huang, 534 F.3d at 622 (explaining that documents submitted in conjunction with a motion to reopen by an alien who had applied for asylum and had "been found to have lied" about his claim "were not evidence that could be assumed to be uncontaminated by his demonstrated propensity to lie to obtain asylum").

Applicant also asserts that the Board "ignored material evidence" (Appl. 9) by not adequately discussing the letter from

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[4] When an alien files a motion to reopen "for the purpose of submitting an application for relief" such as asylum, the Attorney General's regulations provide that the motion "must be accompanied by the appropriate application for relief and all supporting documentation." 8 C.F.R. 1003.2(c)(1).

applicant's brother. The BIA did not "ignore" that letter; to the contrary, the Board specifically identified it as one of the items of evidence applicant had submitted. See p. 9, supra. Moreover, especially in the context of a successive motion to reopen, the Board is not required to address separately each piece of evidence submitted in support of an aliens's claim for relief. See, e.g., Casalena v. INS, 984 F.2d 105, 107 (4th Cir. 1993). And, even now, applicant does not explain how that later-written third-party letter was sufficiently compelling to "rebut the adverse credibility finding that provided the basis for the IJ's denial of [applicant's] underlying asylum application." Kaur v. BIA, 413 F.3d 232, 234 (2d Cir. 2005) (per curiam).

The decisions from other courts of appeals that applicant cites (Appl. 10-11) do not warrant a different conclusion. Neither Shardar v. Attorney General, 503 F.3d 308, 318 (3d Cir. 2007) , nor Reyes v. INS, 673 F.2d 1087 (9th Cir. 1982), involved a situation in which the original denial of the alien's applications for relief had been based on an adverse credibility finding. To the contrary, in Shardar, the IJ had expressly "credited Shardar's testimony" and found that he had demonstrated past persecution but had originally denied relief based on the conclusion that "conditions in Bangladesh had changed that allowed him to receive justice from the judicial system." 503 F.d at 318. Here, in contrast, the IJ specifically concluded that applicant's entire account was not

credible and she specifically found that applicant had failed to demonstrate that he had been subjected to past persecution. See 3/4/05 IJ Decision 2; 4/23/03 IJ Decision 14.

In Shou Yung Go v. Gonzales, 463 F.3d 109 (2006), the Second Circuit recognized that an IJ's prior adverse credibility determination may serve as the basis for denying a motion to reopen unless the motion's factual predicate is "independent of the testimony the IJ found not to be credible," id. at 114 (emphasis deleted and citation omitted), but it concluded that the newly submitted evidence at issue in that case satisfied that standard and was "self-evidently material" as well, id. at 115.[5] Here, in contrast, the letter that applicant submitted from his brother was inextricably linked with applicant's testimony at the original removal hearing, which the IJ expressly found was not credible, and with the earlier letter that applicant had also claimed was from his brother, which the IJ concluded was suspect and had not been properly authenticated.

[5] The remaining three decisions cited by applicant are unpublished and non-precedential. Two of those decisions do not appear to have involved situations in which an IJ's initial denial of relief was based on an adverse credibility finding, see Quing Ming Lui v. Mukasey, 276 Fed. Appx. 93 (2d Cir. 2008); Shing Jiang Lui v. BIA, 237 Fed. Appx. 647, 648-649 (2d Cir. 2007), and the third involved a situation in which the court of appeals was unable to "tell whether the BIA specifically considered any of the materials" submitted in support of the alien's motion to reopen, Diallo v. Gonzales, 175 Fed. Appx. 74, 76 (7th Cir. 2006).

Second, applicant cannot demonstrate that he satisfies the remaining requirements for obtaining a stay under the traditional standard for granting preliminary injunctive relief. Applicant does not directly assert that he will suffer "a likelihood of irreparable harm * * * if the judgment below is not stayed," Edwards v. Hope Med. Group for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., in Chambers), and he fails to establish that the equities in this case favor the granting of a stay.

Applicant asserts that there is an "inherent inequality of deporting any alien prior to any judicial review of [a] BIA decision." Appl. 14; see id. at 12. As explained previously, however, applicant has already had the benefit of two full rounds of judicial review and the current stay application arises in the context of applicant's third motion to reopen a removal order that became final in June 2006. More fundamentally, applicant's argument is flatly inconsistent with the congressional judgment, reflected in IIRIRA, that it is generally appropriate to require an alien whose removal proceedings have become administratively final to pursue any further challenges to the validity of his removal from outside the United States. See pp. 1-2, supra. At minimum, the changes made by IIRIRA refute the suggestion that Congress intended for courts to grant stays of removal based on nothing more than an alien's claim that he should not be removed until after he has obtained judicial review of the underlying removal order.

Applicant also asserts that a stay is warranted because he "may face arrest, torture, and death upon his removal to Cameroon." Appl. 2; see id. at 12. But even under the traditional standard for granting preliminary injunctive relief, the party seeking such relief must establish a likelihood, not merely a possibility, of irreparable harm. See Winter, slip op. 12 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."). Moreover, applicant's assertion concerning the likelihood of persecution was expressly rejected by the IJ, the BIA, and the court of appeals when applicant first made it. The reason it was rejected was not based on then-prevailing conditions in Cameroon, the issue to which evidence of changed country conditions would be most directly relevant. Instead, it was rejected because the IJ expressly found -- in findings that the BIA found were not clearly erroneous and that the court of appeals found were supported by substantial evidence -- that applicant's entire account was simply not credible. Applicant's failure to provide any explanation for how the information he submitted undermines that fundamental conclusion and now compels a contrary conclusion is fatal to any attempt to justify a stay based on the evidence he now proffers. See Kenyeres, 538 U.S. at 1306 (Kennedy, J., in Chambers).

Applicant contends that the equities favor a stay because his removal would "leave behind his U.S. citizen wife and U.S. citizen young son." Appl. 2; see id. at 12, 13. At the time of his November 4, 2004, marriage, applicant had already been unlawfully present in the United States for more than three years and had been ordered removed by the IJ. At the time his son was born on March 27, 2007, applicant had been unlawfully present in the United States for nearly six years, and he was subject to a final order of removal entered by the BIA. As the BIA correctly explained, "[t]he acquisition of equities in the United States is to be expected when one continues to remain in the United States." 6/23/08 BIA Decision 2. The fact that applicant has now delayed his departure for more than seven and a half years cannot itself furnish equitable reasons for permitting his unlawful presence to continue even longer. Cf. INS v. Rios-Pineda, 471 U.S. 444, 450 (1985) ("The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites.").

Applicant also fails to address the harm to the government and the public interest that would occur if a stay were granted. Applicant has been found removable by the Executive Branch agency charged by Congress with making that determination, and that determination was upheld by a federal court of appeals in

proceedings that became final well over a year ago. Applicant's two previous attempts to reopen his long-concluded removal proceedings were rejected by the BIA and the court of appeals. The BIA has rejected this one as well, and the court before which applicant's latest challenge is currently pending has denied his request for a stay of the underlying removal order. The government has been involved in litigation regarding applicant's status for more than six-and-a-half years, and it wishes to execute the order of removal as soon as necessary steps have been taken. See Kenyeres, 538 U.S. at 1305 (Kennedy, J., in Chambers). The government's interests would also be harmed by applicant's continued presence in the United States insofar as the government must bear the costs of detaining him (or, if he were released, of monitoring his whereabouts). Finally, the public interest would also be harmed by permitting applicant to remain in the United States, because "the consequence of delay * * * in deportation proceedings * * * is to permit and prolong a continuing violation of United States law." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 490 (1999).

CONCLUSION

The application for a stay of removal should be denied.

Respectfully submitted.

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