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Detained

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Petitioner,

v.

Eric H. Holder, Jr.<sup>1</sup> and Janet  
Napolitano;  
Secretary of Department of Homeland  
Security,  
Respondents.

Case No. \_\_\_\_\_

File No. A\*\*\*\*\*

**PETITION FOR REVIEW  
AND REQUEST FOR STAY OF REMOVAL**

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<sup>1</sup> Pursuant to 8 U.S.C. § 1252(b)(3)(A), Petitioner has listed the Attorney General as the Respondent. However, as the agency decision upon review was issued by the Department of Homeland Security, as opposed to the Department of Justice, Petitioner has also listed the Secretary of the Department of Homeland Security as the Respondent.

## **WITH REQUEST TO SUPPLEMENT STAY IN 14 DAYS**

Petitioner \*\*\*\*\* hereby seeks review by this Court of the decision of the Department of Homeland Security, dated \*\*\*, to issue reinstatement of removal pursuant to 8 U.S.C. § 1231(a)(5). A copy of the Department of Homeland Security's decision is attached. In addition, the decision of the United States Citizenship and Immigration Services ("USCIS") denying Petitioner's application for adjustment of status and her application for a an "I-212 waiver" is attached.

1. Venue is properly with this Court pursuant to 8 U.S.C. § 1252(b)(2) because the administrative proceeding at issue occurred within the \*\*\* district office in the Department of Homeland Security, within the jurisdiction of this judicial circuit.
2. Jurisdiction is asserted in this Court under 8 U.S.C. § 1252(a). Cases initiated in the immigration court after April 1, 1997 are controlled by 8 U.S.C. § 1252(a), as enacted by section 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). This Court has jurisdiction to directly review orders of reinstatement of removal issued pursuant to 8 U.S.C. § 1231(a)(5). Morales-Izquierdo v. Gonzales, 486 F.3d 484 (9<sup>th</sup> Cir. 2007) (en banc).
3. This petition for review asserts that the Department of Homeland Security erred as a matter of law in issuing an order of reinstatement of removal after it denied Petitioner's application for permanent residency. Petitioner's claim is related to

class-wide litigation currently pending before this Court, and Petitioner is a member of the certified class. See Duran Gonzalez, et al v. DHS, No. 09-35174 (9<sup>th</sup> Cir.). She contends that she cannot be denied adjustment of status and summarily removed pursuant to 8 U.S.C. § 1231(a)(5) because she filed for permanent residency in reliance on this Court's decision in Perez-Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir.2004). See generally Montgomery Ward & Co., Inc. v. FTC, 691 F.2d 1322 (9th Cir. 1982).

4. The validity of the Order herein complained of has not been upheld at any prior judicial proceeding.
5. Petitioner further requests a stay of removal pending this Court's resolution of his petition for review. See DeLeon v. INS, 115 F.3d 643, 644 (9th Cir. 1997) (stay of deportation); Andreu v. Ashcroft, 253 F.3d 477 (9th Cir. 2001) (en banc) (stay of removal). The filing of this motion with this Court operates to stay Petitioner's removal temporarily, "until the court rules on the stay motion . . . ." DeLeon, 115 F.3d at 644.
6. In Nken v. Holder, 129 S. Ct. 1749, 2009 WL 1065976 (2009), the Supreme Court identified four factors that should be considered in adjudicating a motion for stay of removal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the

other parties interested in the proceeding; and (4) where the public interest lies.”

Prior to Nken, this Court stated that in order to grant a discretionary stay of removal in conjunction with a petition for review requires the moving party to show either: (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the movant's favor. Andreiu v. Ashcroft, 253 F.3d 477, 483 (9th Cir. 2001); Gilder v. PGA Tour, Inc., 936 F.2d 417 (9th Cir. 1991).

Petitioner satisfies both the Nken standard and the standard articulated in Andreiu. Hence a stay of removal is warranted regardless of which test is applied.

7. Petitioner will supplement this motion within 14 days, i.e., by \*\*\* 2009. See Ninth Circuit General Order 6.4(c).
8. Petitioner is in the custody of the Department of Homeland Security. She has no other motions or applications for adjustment of status pending, although is within the appeal period to file for review of the denial of her application for an I-212 waiver. Petitioner is subject to removal to Mexico today and requires an immediate stay of removal.

Dated: \*\*\*, 2009

Respectfully submitted,

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Stacy Tolchin  
Van Der Hout, Brigagliano & Nightingale,  
LLP  
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I, Stacy Tolchin, the undersigned, say:

I am over the age of eighteen years and not a party to the within action or proceedings; my business address is Van Der Hout, Brigagliano & Nightingale, LLP, 634 S. Spring St. Suite 714, Los Angeles, CA 90014.

On \*\*\*, 2009, I served the within:

**PETITION FOR REVIEW  
AND REQUEST FOR STAY OF REMOVAL WITH REQUEST TO  
SUPPLEMENT STAY IN 14 DAYS**

on the opposing counsel and the opposing party by depositing one copy thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the United States Postal Service at Los Angeles, California, addressed as follows:

Director, Detention and Removal Operations  
U.S. Immigration and Customs Enforcement  
300 North Los Angeles  
Los Angeles, California 90012

Thomas W. Hussey  
Director  
Office of Immigration Litigation  
Department of Justice/Civil Division  
Post Office Box 878, Ben Franklin Station  
Washington, DC 20044

Executed on \*\*\*, 2009, at Los Angeles, California. I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

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Stacy Tolchin  
Declarant