No. 09-3391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KAROL IGOREVICH KLEPACH,
Petitioner,

v.

ERIC HOLDER, JR., ATTORNEY GENERAL,
Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND RESPONDENT'S OPPOSITION TO PETITONER'S MOTION FOR STAY OF REMOVAL

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Petitioner, KAROL IGOREVICH KLEPACH, ("Mr. Klepach") through undersigned counsel respectfully requests that this Court deny Respondent's Motion to Dismiss For Lack of Jurisdiction and grant Petitioner's Motion for Stay of Removal.

I. INTRODUCTION

Mr. Klepach, through counsel, timely filed the Petition for Review in this matter on April 8, 2009, within 30 days of the Board of Immigration Appeals' ("BIA") decision dismissing the appeal and denying the Motion to Remand. 8 U.S.C. §1252(b) (1).

Federal courts may also conduct plenary review of questions of law, including questions of statutory construction and interpretation pursuant to Section 10(e) of the Administrative Procedures Act. 5 U.S.C. §706 (1976) as well as the REAL ID amendments to the Immigration and Nationality Act, Pub. L. No. 109-13 (May 5, 2005) amending INA §242(a)(2)(D).

This Court has authority to grant a stay under 8 U.S.C. §1252(b)(3)(B). *Lim v. Ashcroft,* 375 F.3d 1011, 1012 (10th Cir. 2004); Fed. R. App. P. 18, 10th Cir. R. 18.1.

II. ARGUMENT

A. Court Has Jurisdiction Over The Petition For Review

In its Motion to Dismiss the Government incorrectly argues that this Court lacks jurisdiction over the determination by the BIA denying Mr. Klepach's Motion to Reconsider, claiming that Mr. Klepach's motion seeks a reconsideration of the agency's prior decisions denying him Cancellation of Removal in an "ultimate exercise of discretion." The Government refers to the Immigration and Nationality Act ("INA") § 240A(a), 242(a)(2)(B)(i), 8 U.S.C. § 1229b(a) and *Aburto-Rocha v. Mukasey*, 535 F .3d 500 (6th Cir. 2008). The Government argues that this Court lacks jurisdiction because the BIA's decision upheld the Immigration Judge's ("IJ's") discretionary denial of relief

sought. The Government misconstrues Mr. Klepach's petition. The Government ignores the specific basis for Mr. Klepach's Petition and Motion for Stay and instead uses a shotgun approach in its Motion to Dismiss. The Government reflexively and unreasonably takes the position that because the legal question at issue touches upon some degree of discretion, the statute automatically transforms a legal question into an unreviewable discretionary determination and, therefore, this Court lacks jurisdiction. Such a standard would, in essence, bar all IJ and BIA decisions from being reviewed by this Court. The Government's narrowly argued position effectively cuts off all avenues for a legal permanent resident ("LPR") to full due process of the law.

The fact is, as this Court stated in *Aburto-Rocha v. Mukasey*, "the statute elsewhere explicitly permits us to review 'constitutional claims or questions of law'." *Id*. at 502. This Court further noted that "[N]on-discretionary decisions," by contrast, are within our purview, even where they '*underlie determinations that are ultimately discretionary*.'" (Emphasis added), *Id*. at 502, citing *Billeke-Tolosa v Ashcroft*, 385 F .3d 708, 711 (6th Cir. 2004). The fact is Mr. Klepach's Petition for Review and Motion for Stay are firmly grounded in a question of law as dictated by 8 U.S.C. § 1252(a)(2)(D) which states :

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Mr. Klepach is not challenging the IJ's exercise of discretion as the Government tries to argue. Rather, the basis for Mr. Klepach's Petition is that the IJ made a legal error in the course of exercising her discretion. That error occurred when the IJ refused to apply the statutory standard which, if properly applied, would warrant a favorable action of granting his Motion for Cancellation of Removal. It is a long held maxim that the consistent application of the agency's statutory regulations, serves a critical purpose: the provision of fair notice to those subject to the agency's decisions. It is in this vain that Mr. Klepach has filed his

Petition for Review and Motion to Stay.

B. **The Petitioner Has Established Under Sixth Circuit Precedent That He Warrants A Stay of His Removal**.

In considering whether to grant a stay of removal, the Sixth Circuit employs a standard that is comparable to that for issuing a preliminary injunction. This standard weighs: (1) the likelihood of success on the merits, (ii) whether the moving party will be irreparably injured if the stay is denied, (iii) whether the party opposing the stay will suffer substantial injury if the Court grants a stay, and (iv) whether granting the stay would be in the public interest. *Bejjani v. INS* 271 F.3d 670, 688 (6th Cir. 2001) (citing *Sofinet v. INS*, 188 F. 3d 703, 706 (7th Cir. 1999)) *reh'g denied* (Feb. 25, 2002).[1] These factors are balanced; when a greater showing of irreparable harm in the absence of a stay is made, a lesser showing of likelihood of success on the merits is necessary to support a stay. *Nwakanma v. Ashcroft*, 352 F .3d 325, 327-28 (6th Cir. 2003).

Circuits adopting this standard do not require petitioners to demonstrate that success on the merits is probable. "It is enough that the plaintiff's chances are better than negligible." *Sofinet v. INS*, 188 F .3d 703, 707 (7th Cir. 1999) (quoting *Roland Mach, Co. v. Dressler Indust., Inc*., 749 F .2d 380, 387 (7th Cir. 1984)); see also *Mohammed v. Reno*, 309 F .3d 95, 102 (2nd Cir. 2002) (Concluding that "the degree of likelihood of success on appeal need not be set too high").

The balances of these factors in Mr. Klepach's case more than satisfies this standard for issuing a stay of removal pending appeal. First, Mr. Klepach can demonstrate that his likelihood of success on the merits meets the required threshold. Second, Mr. Klepach's predicament satisfies the requirement of irreparable harm. Third, any potential harm to the government is, at most, *de minimus*. Finally, the grant of stay of removal by this Court is sound public policy.

In its Motion to Dismiss For Lack of Jurisdiction and Alternatively Opposition to Petitioner's Motion

[1] The First, Second, Third, Fifth and Seventh Circuits have adopted this same standard in determining whether to issue a stay of deportation. See *Arevalo v. Ashcroft*, 344 F .3d 1, 6-9 (1st Cir. 2003); *Mohammed v. Reno*, 309 F .3d 95, 100 (2d Cir. 2002) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Douglas v. Ashcroft*, 374 F .3d 230, 234 (3rd Cir. 2004); *TesfaMichael v. Gonzales*, F .3d , (5th Cir. 2005).

for a Stay of Removal, the Government offers little opposition to Petitioner's arguments that he has met the four *Bejjani* Factors governing the grant of a stay of removal. *Bejjani v. INS*, 271 F .3d 670, 688 (6th Cir. 2001).

First, the Government does not allege that granting this stay would result in any substantial harm or injury to the Government's interests. The Government disingenuously argues that allowing Mr. Klepach to exercise his right to "full due process" is an inconvenience to the Government and thus will cause some unspecified injury. The Government makes a vague reference to potentially suffering an injury to its interests in lawfully enforcing removal orders and promoting orderly immigration to the United States. Ex. A (Respondent's Motion to Dismiss) at 17. The Government's burden is considerably greater in showing a substantial harm than just mechanically referencing undefined inconveniences in enforcing immigration rules and regulations, which it must do regardless of Mr. Klepach's attempts at exercising his rights to full due process. Mr. Klepach was admitted into this country legally and is clearly entitled to exhaust all remedies allowed under the law. The fact that he respectfully requests that his Petition for Review and Motion for Stay pending review be granted should not be belittled and diminished as an inconvenience. Rather, what Mr. Klepach seeks is fundamental to the American judicial system; his right to have his case reviewed on appeal. The fact is the Government must meet its obligations and in fulfilling these obligations has access to near unlimited resources and funds, while Mr. Klepach, a legally admitted resident, has nothing but the law to look to for assistance.

Further, and most disturbingly, the Government tries to mischaracterize Mr. Klepach's status as that of illegal, by way its vacuous reference to H.R. Rep. No. 104-469(I), at 134 (1996) Ex. A (Respondent's Motion to Dismiss) at 17. In this obscure quote there is a reference to procedures to deny entry to and removal of illegal aliens. Mr. Klepach's situation has nothing to do with denial of entry or being in the country illegally. The use of such a quote confirms the Government's heavy- handed, cookie-cutter approach to Mr. Klepach's Petition and Motion to Stay. The Government has continuously and unjustly lumped Mr. Klepach in with a

category of cases that involve much more serious crimes. It is clear that the Government's claims of inconvenience in preventing Mr. Klepach to full due process fails to rise to the level of *substantial* harm. The Government's harm if a stay is granted is clearly *de minimus*.

Second, the Government misconstrues the *Bejjani* standard by stating that Mr. Klepach would not suffer irreparable harm because removal is a statutorily mandated process and thus no genuine negative consequences can possibly be suffered by Mr. Klepach's removal. This is not the case. Even the IJ noted that Mr. Klepach and his family will suffer an impact by his deportation. Ex. B (Immigration Judge's Decision) at 22. In its Motion to Dismiss the Government attempts to misconstrue and diminish the destructive impact his removal would have on him and his family. Again, the Government refers to a 1996 Senate Report touching upon entry into the United States. The fact is Mr.Klepach was lawfully admitted when he was just 12-years old. At that time, his family was escaping the dangerous chaos and instability created in the aftermath of the fall of the Soviet Union. Since that faithful day of his admission, he has assimilated into American society and lived what could easy be described as a typical American life, with its usual accomplishments and setbacks.

The Government relies on *Lucacela v. Reno*, 161 F .3d 1055, 1059 (7th Cir. 1998) in asserting that the hardship of leaving friends, family and a life established in the United States does not rise to a level of irreparable harm that stays aim to prevent. Ex. A (Respondent's Motion to Dismiss) at 16. Once again the Government is blindly boxing Mr. Klepach in with other cases that bear no resemblance to his case. The Petitioner in *Lucacela*, was older than Mr. Klepach was at the time of his entry to the United States. Further, she entered unaccompanied in 1993 from Romania. In 1994 deportation proceedings were initiated. She then filed an asylum claim, claiming if returned she would be persecuted because of her anti-communist opinions and religious beliefs, with her petition eventually being denied. *Lucacela v. Reno*, 161 F .3d 1055, 1056 (7th Cir. 1998). Mr. Klepach's situation is vastly different than that of a person entering illegally and then petitioning for asylum based on political and religious opinions and beliefs.. Mr. Klepach was a child

when he was legally admitted into the United Stated and has since married an American citizen and had three children, all American born citizens. Unlike the petitioner in *Lucacela,* Mr. Klepach has no immediate family in Ukraine, has absolutely no ties to this country whatsoever, and thus, he has no support structure in place there. Further, *Lucacela* is distinguishable based on the fact that Mr. Klepach has three young children born in the United States and provides some degree of support and parental stability to his children. In *Lucacela*, the Petitioner did not have any American born children residing in the United States. The complete and total destruction of Mr. Klepach's immediate American family, with its concomitant negative effects on the community by way of increasing the chances that both his wife and children having to go back on welfare, confirms in the starkest sense, an immediate and irreparable harm.

Third, Mr. Klepach has demonstrated that a Stay is in the public interest because preserving the family unit is vital to preserving the general welfare of the community. As stated above, to place a family at risk of being forced onto public welfare because their greatest potential source of support has been removed from the country is not in the public's interests. The government overlooks the important fact that the public interest is always served when a father is involved to some degree in a child's life. As has been stated, Mr. Klepach wants to undue any negative issues his youthful indiscretions may have created. Such an immigrant should not be summarily removed without first receiving full judicial review. The Government gives short-shrift to these significant and severe ramifications created by the Government if Mr. Klepach is removed. Again, the Government attempts to categorize Mr. Klepach as somehow being in the United States illegally, when in fact, he was lawfully admitted as a child refugee. In its Motion to Dismiss, the Government makes another vague and irrelevant reference that illegal immigration imposes harmful effects on the public. Ex. A (Respondent's Motion to Dismiss) at 18. Again, Mr. Klepach was lawfully admitted when he was 12-years old and has since that time established typical ties to his community, which include trying to find work in a depressed economy, and dealing with family issues.

Fourth, Mr. Klepach has demonstrated the required likelihood of success on the merits. Mr. Klepach's

appeal raises questions of law that were erroneously adjudicated by the BIA. Foremost among these was the BIA's failure to properly consider the impact of the Immigration Judge's refusal to exercise discretion based on the statutory requirements.

Section 240(a) of the Immigration & Naturalization Act, 8 U.S.C. § 1229(b)(a) provides that "the Attorney General may cancel the removal of an alien who is inadmissible or deportable if the alien:

(1) Has been an alien lawfully admitted for permanent residency for not less than 5 years.

(2) Has resided in the United States continuously for 7 years after having been admitted in any status, and,

(3) Has not been convicted of any aggravated felony."

The Government tries to confuse the matter by arguing that "Petitioner fails to show any abuse of discretion by Board in denying his motion to reconsider." Ex. A (Respondent's Motion to Dismiss) at page 14. This is a straw man argument based on the fact that in Part I of the Government's Motion it argues that this Court lacks jurisdiction because it cannot review discretionary decisions, including denials of application for cancellation of removal. Then in Part II of its Motion the Government tries to tar Mr. Klepach for failure to challenge a discretionary determination. Mr. Klepach's Motion is brought forth based on a cognizable legal question alone. Despite this the Government tries to have it both ways. On one end of the Government's argument it claims that Mr. Klepach's Petition and Motion to Stay should be dismissed because it is based on a non-reviewable discretionary decision. At the other end of the Government's argument it claims that Mr. Klepach's Motion fails because there is no likelihood of success because he did not make a claim concerning judicial discretion.

Mr. Klepach has correctly cited *Matter of C-V-T-*, Interim Decision 3342 (BIA 1998), where the Board held, "the minimum equities required to establish eligibility for relief under Section 240A(a) inherent in [the statutory requirements for eligibility] may be sufficient in and of themselves to warrant favorable discretion-

ary action." Id. at 6. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), at 585. This is not a selective quote by any means, but rather it highlights the question of law at issue for the Court to review. Mr. Klepach has met the statutory requirements for eligibility and has petitioned that he be granted his Motion for Cancellation of Removal as the Petitioner in *Matter of C-V-T-* was. In the *Matter of C-V-T-*, the Petitioner in that case admitted that his controlled substance conviction involved the distribution of narcotic drugs, where he profited from this activity and was sentenced to 90 days in jail. Unlike Mr. Klepach, the Petitioner in the *Matter of C-V-T-* was granted Cancellation of Removal pursuant to Section 240A(a) having committed far worse offenses than anything Mr. Klepach is accused of and/or found to have done.

Without question, Mr. Klepach, in this case, has clearly satisfied all the necessary requirements. His Motion for Stay is firmly grounded in a question of law as dictated by 8 U.S.C. § 1252(a)(2)(D) and can be reviewed by this Court.

CONCLUSION

In summary, it is clear that this Court has jurisdiction over the Petition for review based on the fact that the review sought is firmly grounded in cognizable questions of law. Further, Mr. Klepach has satisfied all four elements of the test used by courts in this Circuit to issue a stay. Mr. Klepach has established the required likelihood of success on the merits of his appeal. He has established the very real possibility that he and his family would suffer irreparable harm and that no substantial harm would befall the government should the order be stayed. Issuing the Stay of Removal is in the public interest. Accordingly, Petitioner, Mr. Klepach respectfully requests that this Court deny the Respondent's Motion to Dismiss and grant his Motion to Stay his removal pending resolution of the Petition for Review.

Dated: April 22, 2009

Respectfully Submitted,

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BY: _____