**No. 22-1234**

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

**John Smith,**

**Petitioner,**

**v.**

**Merrick B. GARLAND,**

**Attorney General of the United States,**

**Respondent.**

**ON PETITION FOR REVIEW OF AN ORDER OF THE**

**BOARD OF IMMIGRATION APPEALS**

**AGENCY CASE NUMBER: A012-345-678**

**[DETAINED]**

**PETITIONER’S MOTION FOR STAY OF REMOVAL**

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# INTRODUCTION

 Pursuant to FRAP 27, Petitioner John Smith (“Smith”) moves for a stay of removal during the pendency of his Petition for Review. Smith received an administratively final order of removal to Mexico on December 3, 2021. Smith anticipates that he will be removed during the week of January 10, 2022 absent a stay. Smith is currently detained by Immigration and Customs Enforcement (“ICE”) at the Freeborn County Jail in Albert Lea, Minnesota. Smith seeks a stay to permit him to remain in the country while this Court considers his petition.[[1]](#footnote-2) A stay of removal is warranted under *Nken v. Holder*, 556 U.S. 418 (2009), because of the extraordinary risk of harm to Smith in Mexico as found by the Immigration Judge (“IJ”), his strong likelihood of success on the merits, and the minimal harm to Respondent and the public interest.

The IJ found that Smith would more likely than not be tortured if returned to Mexico. However, the Board of Immigration Appeals (“BIA”) reversed the IJ’s decision and ordered Smith removed to Mexico.

Smith has filed a motion for reconsideration at the BIA to ensure administrative exhaustion of his claims. (Ex. 5.) Smith will move to hold this Petition in abeyance pending resolution of the motion for reconsideration and, if reconsideration is not granted, consolidate both appeals pursuant to 8 U.S.C. § 1252(b)(6). However, if Smith is removed, the motion to reconsider will be automatically dismissed by the BIA and judicial review will be frustrated.

 Counsel communicated with Nelle Seymour, Respondent’s counsel, who indicated that Respondent will oppose this motion.

# STATEMENT OF FACTS AND CASE[[2]](#footnote-3)

## The IJ Granted Petitioner CAT Deferral.

Smith was granted deferral of removal under the Convention Against Torture on March 19, 2021. The IJ found that Smith would more likely than not be tortured by or with the acquiescence of Mexican government officials if deported. (*See id.* at 2.) The IJ made the following factual findings.

Smith is a 34-year-old citizen of Mexico who has lived in the United States since the age of 9. (Ex. 1 at 1, 3.)

[REDACTED]

He will not be safe anywhere in Mexico because cartel members have infiltrated the Mexican government and have informants working with the Mexican government. (*Id.* at 5, 6.) For example, he learned that “the Sinaloa Cartel contacted a federal agent and threatened to murder the agent when Joaquin Guzman’s son was arrested.” (*Id.* at 6.)

 As detailed extensively in the IJ’s decision, there is “well-established, successful, and extensive collusion between the Sinaloa Cartel and public officials.” (*Id*. at 10; *see also id.* at 11, 13-23.) “[N]early every level of the Mexican government has been depicted as being on the take: Prison guards, airport officials, police officers, prosecutors, tax assessors and military personnel” have all been compromised. (*Id*. at 10.) Through bribery or threats, the “Sinaloa Cartel has [the] power to carry out violent acts with impunity.” (*Id.* at 13.)

The Sinaloa Cartel has a national reach, through direct influence in over half of the Mexican states, and through alliances with other cartels. (*Id.* at 22.)Smith also does not have anyone to live with or protect him in Mexico, and he has not been in Mexico in decades, since he was a young child. (*Id.* at 5.) He cannot live with his mother because he does not want to put her in danger. (*Id.*)Even in areas controlled by cartels other than the Sinaloa Cartel, Smith is at risk. The Sinaloa Cartel is sophisticated and routinely uses family networks, private investigators, property records, GPS trackers, and cell phone tracking to locate individuals it targets. (*Id.*)There is no place in Mexico where Smith is safe.

Based on the totality of these findings, the IJ concluded that Smith would more likely than not be tortured or killed by or with the acquiescence of Mexican government officials if removed, could not safely relocate within Mexico to avoid harm, and met his burden for deferral of removal under the Convention Against Torture. (*Id.* at 20, 22–23.)

## The BIA Reversed the IJ’s Decision, Without Any Independent Reasoning or Analysis.

On DHS’s appeal, the BIA reversed the IJ on December 3, 2021, generally “discern[ing] clear error in the Immigration Judge’s predictive findings, and legal error in the Immigration Judge’s application of the law.” (Ex. 2 at 1.) The BIA found, without further explanation, that, “[a]s DHS asserts, the Immigration Judge based her decision on a chain of hypothetical events.” (*Id.* at 2.) The BIA further found that the IJ “engaged in speculation as to what these facts meant for future conduct and legal error in concluding that the future harm would lead to torture;” “erred in concluding that the government of Mexico would acquiesce to or be directly involved in torture;” and “erred in determining that the respondent had shown that it was not safe or reasonable for him to internally relocate.” (*Id.* at 2–3.)

Based on numerous errors in the BIA’s decision, Smith filed the instant Petition for Review, along with a motion to reconsider at the BIA. (Ex. 5.)

# THE COURT SHOULD STAY PETITIONER’S REMOVAL

 A motion for stay of removal requires consideration of four factors: (1) whether the applicant demonstrates a strong likelihood of success; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties; and (4) public interest. *N**ken v. Holder*, 556 U.S. 418, 434 (2009). All factors weigh in favor of a stay.

## Petitioner Is Likely to Succeed on the Merits.

“Whether the BIA followed its regulations, refrained from independent factfinding, and applied the correct standard of review are legal questions that we review de novo.” *A**bdi Omar v. Barr*, 962 F.3d 1061, 1064 (8th Cir. 2020); *see also W**aldron v. Holder*, 688 F.3d 354, 360 (8th Cir. 2012). Predictive findings of fact, including the probability of future torture, are reviewed for clear error. *Miranda v. Sessions*, 892 F.3d 940, 943 (8th Cir. 2018).

The BIA’s decision is erroneous for several reasons. First, the BIA failed to review the IJ’s factual findings under the standards of review required by law. Second, the BIA engaged in improper, *de novo* fact-finding. Third, the BIA did not meaningfully consider the IJ’s reasoning or Smith’s briefing and instead merely repeated DHS’s arguments. Fourth and finally, there is substantial evidence to support the IJ’s decision and not to support the BIA’s. Each error independently and collectively necessitates remand.

### The BIA Failed to Properly Apply the Clear Error Standard of Review.

At the outset, the BIA recited the regulatory standards of review and then stated, “We discern clear error in the Immigration Judge’s predictive findings, and legal error in the Immigration Judge’s application of the law.” (Ex. 2 at 1.) This is the only time in the decision that the standard of review is referenced.

It is well established “that an agency, in adjudicating the rights of individuals, must follow its own procedures and regulations.” *Garcia-Mata v. Sessions*, 893 F.3d 1107, 1109 (8th Cir. 2018); *see also Abdi Omar*, 962 F.3d at 1064. Further, the BIA “must describe its reasoning ‘with such clarity as to be understandable.’” *Garcia-Mata*, 893 F.3d at 1109 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Because the BIA never specified which standard of review it was employing when reversing each part of the IJ’s decision, it is impossible to analyze whether the proper standard of review was followed. The BIA generalizes that “[t]he record does not support the conclusion” (Ex. 2 at 3), and “[t]he events in the United States do not support the attenuated determination” (*id.* at 2), but, as this Court has made clear, this language is not sufficient to demonstrate that the BIA applied the correct standard of review, much less applied it correctly. *See Garcia-Mata*, 893 F.3d at 1110.

While *Mencia-Medina v. Garland*, 6 F.4th 846 (8th Cir. 2021), and *Lasu v. Barr*, 970 F.3d 960 (8th Cir. 2020), ordinarily require administrative exhaustion, Smith has sufficiently exhausted this argument in his briefing before the BIA, by arguing throughout, in response to DHS’s brief, that the IJ’s findings must be reviewed for clear error but are not clearly erroneous. *See, e.g.*, Ex. 4 at 7–8, 11–12, 14.

Alternatively, this issue is before the BIA on the motion to reconsider. If the BIA denies reconsideration, this Petition will be consolidated with the petition for review from the denial of the motion for reconsideration. The Court can still determine, for purposes of this motion, whether this claim is likely to succeed. Mr. Smith should not be denied a stay because a clear legal error must first be exhausted with the agency through a collateral process. As discussed *infra* in section III.B.2, if he is removed, the BIA will reject his motion for reconsideration, and he will not be able to pursue judicial review before this Court. In other words, this Court’s decision on this motion should be determined by the likelihood of success, not the other way around. Thus, the *Nken* test should be applied flexibly to the situation here.

### The BIA Engaged in Improper, De Novo Fact-Finding.

“Facts determined by the immigration judge . . . shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.” 8 C.F.R. § 1003.1(d)(3)(i). “This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.” *A**nderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). The IJ’s findings of fact “‘may not be overturned simply because the BIA would have weighed the evidence differently or decided the facts differently had it been the factfinder.’” *W**aldron*, 688 F.3d at 360 (quotation omitted).

Here, the BIA engaged in *de novo* factfinding and failed to engage with the Immigration Judge’s findings or provide a reasoned basis why they were clearly erroneous. This is reversible error. *See W**aldron*, 688 F.3d at 361 (“[T]here is a difference between weighing the factual findings of the IJ and reweighing the underlying evidence and testimony behind those factual findings to reach new factual conclusions.”); *R**amirez-Peyro v. Gonzales*, 477 F.3d 637, 641 (8th Cir. 2007) (vacating and remanding because the BIA applied the wrong law and “engaged in its own factfinding”). The IJ’s decision should not have been disturbed, and the BIA exceeded its authority to choose new facts and reweigh the facts it chose to reach different factual conclusions and order Smith removed.

The IJ made nineteen pages of factual findings demonstrating the likelihood that Smith would be tortured if returned to Mexico. (Ex. 1 at 3–6, 9–23.) The BIA failed to review the IJ’s factual findings for clear error and instead disregarded the IJ’s factual findings without explanation and supplanted them with its own. (*Id.*) Rather than even consider the factual findings of the IJ and weigh them differently, the BIA instead just paraphrased DHS’s characterization of the facts and nothing more. (*Id.*; *see* Ex. 3 at 10–12.)

For instance, the BIA determined that “the Immigration Judge erred in concluding that the government of Mexico would acquiesce to or be directly involved in torture of the respondent by the Sinaloa cartel.” (Ex. 2 at 2.) The BIA focused on selected facts identified by DHS and used those to reach a decision. This is a clear case of improper fact-finding by the BIA. The BIA ignored hundreds of pages of country conditions evidence[[3]](#footnote-4) showing corruption throughout all levels of the Mexican government. (*See* Ex. 1 at 10–11.)

The BIA instead claimed that “those engaged in corruption—from police officers to high-ranking officials—have been arrested, prosecuted, and imprisoned,” and therefore “corruption is not happening with the Mexican government’s consent.” (Ex. 2 at 2.) In support of this claim, the BIA referenced only four pages of country conditions evidence, from DHS’s country conditions submission, which DHS pointed to in its brief. These four pages do not support the conclusion that the BIA reaches. On the contrary, this Court has previously noted that “the Mexican police force is rife with corruption at all but the highest level of government and that attempts to reign in such corruption have been unsuccessful. Furthermore, it is the precise authority with which the Mexican government vests these police officers that provides them with the means and opportunity to harm people such as [the applicant].” *Ramirez-Peyro v. Holder*, 574 F.3d 893, 904 (8th Cir. 2009).

Smith again has sufficiently exhausted this claim before the BIA. Smith’s brief addressed DHS’s arguments and alternative, proposed findings of fact (*see* Ex. 3 at 10–12), and preemptively warned the BIA against independent fact-finding. (*See, e.g.*, Ex. 4 at 6, 9, 16.) As the BIA adopted DHS’s alternative fact-finding wholesale (*see* Ex. 2 at 2–3), he has adequately exhausted these arguments and they are ripe for consideration by this Court.

Alternatively, this Court may, and should, still decide there is a significant likelihood of success, as the legal error is clear, it is currently before the BIA, and the BIA’s decision on the motion to reconsider would either moot the issue or be raised in a subsequent petition for review; however, without a stay, Smith will be removed, triggering the departure bar, and preventing judicial review of blatant legal error by the BIA. Smith has a significant likelihood of prevailing on the merits, because the BIA plainly engaged in *de novo* fact-finding, and should be granted a stay of removal to maintain the status quo and allow meaningful judicial review. *See W**aldron*, 688 F.3d at 355-61 (“Although the BIA set forth the correct standard of review at the outset of its decision, we agree with Waldron that it deviated from this standard.”).

### The BIA Did Not Meaningfully Consider the IJ’s Reasoning or Petitioner’s briefing and Instead Merely Repeated DHS’s Arguments.

“[T]he BIA must consider the issues raised and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.” *Camarillo-Jose v. Holder*, 676 F.3d 1140, 1143 (8th Cir. 2012). The BIA, like all other appellate courts, must “exercise [its] independent judgment and discretion in considering and determining the cases coming before [it].” 8 C.F.R. § 1003.1(d)(1)(ii). The BIA must also “describe its reasoning ‘with such clarity as to be understandable.’” *Garcia-Mata*, 893 F.3d at 1109 (quoting *Chenery*, 332 U.S. at 196). “The Board must adequately explain why it rejected the IJ's finding and identify reasons grounded in the record that are sufficient to satisfy a reasonable mind that there was clear error.” *Abdi Omar*, 962 F.3d at 1064. The BIA has not done so here.

The BIA’s decision does little more than parrot and paraphrase DHS’s arguments on appeal and exercises no independent judgment. Many of the BIA’s factual findings and conclusions are taken, nearly verbatim and in order, from DHS’s brief, without any independent analysis or reasoning provided. (*Compare* Ex. 2 at 2–3, *with* Ex. 3 at 10–12.) Nothing in the decision suggests that the BIA truly considered the IJ’s factual findings or reasoning, the full body of evidence in the case, or even Smith’s briefing on appeal. The BIA not once quoted the IJ’s decision or deviated in any way from DHS’s arguments. Deferring entirely to one party’s brief in this way, rather than the IJ below, without adding any of its own insight or reasoning or citing to any exhibit or page in the record not cited by that party, does not demonstrate the necessary independent judgment and discretion.

The BIA’s discussion of the facts of the case provides only part of the IJ’s factual findings—and recites only DHS’s characterization of the facts—and analysis but treats it as if it were the whole; moreover, it does not acknowledge that Smith submitted briefing that addressed these very issues. Further, the BIA’s decision pretends that the country conditions evidence in this case—upon which the IJ relied—does not exist. Rather than address the findings of fact, lengthy discussion of country conditions, or reasoned and thorough analysis, the BIA simply but crudely swept it all away and supplanted her decision with DHS’s brief. *See Waldron*, 688 F.3d at 360 (“Nor did the BIA squarely address the evidence on which the IJ based its finding.”).

By failing to even acknowledge the substance of the IJ’s decision or Smith’s defense of the decision on appeal, and instead deferring exclusively to DHS’s summary of the case, the BIA committed reversible legal error. It has provided insufficient justification for its decision and no independent reasoning, therefore remand is necessary.

### Substantial Evidence Supports the IJ’s Decision but Not the BIA’s.

Finally, the BIA’s decision is not supported by substantial evidence, while the IJ’s decision is. Even if Smith is precluded by *Mencia-Medina* and *Lasu* from raising the previous issues here, he has a substantial likelihood of prevailing on this claim. *See Etchu-Njang v. Gonzales*, 403 F.3d 577, 582–84 (8th Cir. 2005).

The standard of review for the agency’s factual findings is substantial evidence. “The agency's ‘findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.’” *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020) (quoting 8 U.S.C. § 1252(b)(4)(B)). “When the Board does apply the clear error standard, however, we do not review *de novo* whether the immigration judge's findings were clearly erroneous. Instead, we consider whether the Board provided sufficient justification for its determination.” *Abdi Omar*, 962 F.3d at 1064.

Here, assuming that the BIA reversed the IJ’s factual findings under the clear error standard, it provided very little justification or reasoning to support its decision; its strongest authority, other than four pages of country conditions evidence that do not support the BIA’s conclusion, is DHS’s brief itself. While the decision cites to several pages of the IJ’s decision, these citations do not indicate that the BIA considered the IJ’s entire decision; the BIA merely repeated DHS’s assertions from its brief, along with DHS’s identical citations to the IJ’s decision, and the BIA decision never deviates from DHS’s brief nor quotes the IJ’s decision. Such a decision does not assuage doubts that the BIA even looked at the IJ’s decision. This insufficient reasoning and lack of independent review of the IJ’s decision and the record cannot support the BIA’s decision under the substantial evidence standard.

Despite well over 500 pages of country conditions evidence, the BIA only considered four pages, and even then only at the direction of DHS. (*See* Ex. 2 at 2 (twice citing “Exh. 5 at 21-22, 27-27”); Ex. 3 at 11 (citing to “Exh. 5 at 27–28” and “Exh. 5 at 21–22”).) Meanwhile, the IJ considered the entire record and drafted a lengthy and thorough report on the situation in Mexico, corruption between Mexican government officials and the cartels, the torture and murder of individuals similarly situated to Smith, and the application of these factors to his circumstances. (*See generally* Ex. 1.)

Similarly, the BIA ignored extensive factual findings and record and testimonial evidence about Smith’s situation, threats he received, and his fear of return to Mexico, and again limited its review to DHS’s version of self-selected facts. (*See* Ex. 2 at 2; Ex. 3 at 10–12.) No reasonable adjudicator could have reviewed the same evidence the IJ considered and reached the conclusion that the BIA did. *Cf. Ademo v. Lynch*, 795 F.3d 823, 831 (8th Cir. 2015) (“A reasonable adjudicator could have found the evidence insufficient to establish a likelihood of torture.”).

Conversely, substantial evidence—the entirety of the record—supports and dictates the IJ’s factual conclusions. This is underscored by two other decisions by the BIA reviewing decisions in similar cases by the *same IJ*. In one, the IJ found that the Mexican government would not acquiesce to the noncitizen’s torture, but the BIA reversed and remanded, citing *Ramirez-Peyro*, 574 F.3d at 904; in the other, the IJ granted deferral of removal under the Convention Against Torture and DHS appealed, raising materially similar arguments, and the BIA held that the decision was not clearly erroneous. (Ex. 5 at 49–57.)

Because of the lack of evidence supporting the BIA’s reversal of the IJ, and the IJ’s extensive factual findings and citations to the voluminous record, the BIA’s decision must be reversed and remanded. Smith is thus able to demonstrate a substantial likelihood of success on the merits, and his removal must be stayed.

## Petitioner Will Suffer Irreparable Harm Absent a Stay.

Absent a stay, Smith will suffer irreparable harm. Forced deportation would subject Smith to torture by the Sinaloa Cartel with the acquiescence of the government of Mexico.

### Forced Deportation Would Subject Petitioner to Torture By the Sinaloa Cartel.

The IJ made extensive factual findings documenting the clear probability that Smith will be tortured if returned to Mexico. Notwithstanding the BIA’s erroneous decision reversing the IJ, these findings demonstrate the extraordinary injury he is likely to face if a stay is not granted. Such harm is qualitatively different from what a deported noncitizen would ordinarily suffer.

### Removal of Petitioner Will Frustrate Judicial Review.

Smith is required to exhaust administrative review of all issues prior to judicial review, and certain errors in the BIA’s decision may require that he file a motion to reconsider before the BIA before this Court may review them. *See Mencia-Medina v. Garland*, 6 F.4th 846, 848–49 (8th Cir. 2021); *Lasu v. Barr*, 970 F.3d 960, 965 (8th Cir. 2020). Smith has filed a motion to reconsider at the BIA. (*See* Ex. 5.) Judicial economy is best served by the consolidation of this Petition with a petition for review of the decision on the motion to reconsider. 8 U.S.C. § 1252(b)(6) (“[A]ny review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.”).

However, if Smith is removed, his removal will trigger the so-called “departure bar,” which prohibits consideration of motions to reconsider by noncitizens physically outside the United States. 8 C.F.R. § 1003.2(d) (“Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.”); *see Matter of Armendarez*, 24 I. & N. Dec. 646 (BIA 2008) (affirming departure bar). Every Circuit Court—except this Court—has struck down the departure bar. *See* *Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. Att’y Gen.*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. U.S. Att’y Gen.*, 681 F.3d 1236 (11th Cir. 2012). This Court has not addressed the validity of the departure bar, and so the departure bar remains in place in this Circuit. *See, e.g.*, *Payeras v. Sessions*, 899 F.3d 593, 596 (8th Cir. 2018) (“[T]he validity of the departure bar is not before us.”); *Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011) (“[W]hether the departure bar conflicts with 8 U.S.C. § 1229a(c)(7) is a hypothetical question not properly before this court.”). Thus, if he is removed to Mexico, the BIA will no longer have jurisdiction to decide his motion to reconsider and it will be deemed withdrawn.

This factor strongly militates in favor of a stay of removal, in order to preserve the status quo and this Court’s ability to review administrative decisions. Allowing Smith to be removed would be to permit the agency itself to circumvent the “the presumption favoring judicial review of administrative action.” *See Kucana v. Holder*, 558 U.S. 233, 251 (2010); *see also Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008).

## A Stay Will Not Substantially Injure the Government, and the Public Interest Lies in Staying Petitioner’s Removal.

The *N**ken* Courtfound that the last two stay factors, injury to other parties in the litigation and the public interest, merge in immigration cases because respondent is both the opposing litigant and the public interest representative. *N**ken*, 556 U.S. at 435. The Court noted that the interest of the public in the “prompt execution of removal orders” is heightened where “the alien is particularly dangerous” or “has substantially prolonged his stay by abusing the process provided to him.” *I**d.* at 436 (citations omitted). Here, neither of these factors nor any other factors suggest that the Respondent or the public have any interest in Smith’s removal beyond the general interest noted in *N**ken*.

Smith is not a threat to the community and has made rehabilitation efforts. While he has been convicted of first-degree drug possession, his involvement in drug trafficking stems from substance abuse issues he has completed treatment for while incarcerated. (Ex. 1 at 4.) He has never received a bond hearing, and thus has never been determined by an impartial adjudicator to constitute a danger to the community.

Nor has he “abus[ed] the process provided to him,” as he won his case before the IJ but remained detained for over eight more months as a result of DHS’s appeal.

To the extent that Respondent may claim that the cost of Smith’s future detention harms its interests or the public interest, it is important to note that the Government here has inherent discretion whether to detain him or not. *See Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“A principal feature of the removal system is the broad discretion entrusted to immigration officials.”). Thus, the Government could reasonably release Smith on an order of supervision with conditions to ensure he remains law-abiding and is not a flight risk at much lower cost than further detention, and likely lower cost than deporting him as well.

*N**ken* also recognized the “public interest in preventing aliens from being wrongfully removed,” which must weigh heavily in this Court’s consideration. *See N**ken*, 556 U.S. at 436. Respondent cannot make any particularized showing that granting Smith a stay of removal would substantially injure its interests or conflict with the public interest in preventing a wrongful removal, such that the third and fourth *N**ken* factors would outweigh the hardship Smith would face if removed. Moreover, this risk of wrongful deportations is heightened where, as here, the IJ granted humanitarian protection to the petitioner but the BIA reversed without remand.

# CONCLUSION

For the foregoing reasons, the Court should grant this motion and stay Smith’s removal to Mexico pending the resolution of his Petition for Review.

Dated: January 5, 2022 Respectfully submitted,

 s/John Bruning

 John Bruning

Refugee & Immigrant Program

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 *Pro Bono Counsel for Petitioner*

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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| --- | --- |
| **John Smith,** **Petitioner,** **v.****Merrick B. GARLAND,****Attorney General,** **Respondent.** | **No. 22-1234**Immigration File No. A012-345-678Petition for Review from the Decision of the Board of Immigration Appeals[DETAINED] |

**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: January 5, 2022 Respectfully submitted,

 s/John Bruning

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**UNITED STATES COURT OF APPEALS**

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that PETITIONER’S MOTION FOR STAY OF REMOVAL:

1. was prepared using Times New Roman 14-point font; and
2. contains 5,196 words of text.

Dated: January 5, 2022 Respectfully submitted,

 s/John Bruning

 John Bruning

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1. He has not filed a motion for a stay of removal at the BIA, because such motion will not be adjudicated timely and the BIA does not apply *Nken* or any other standard for stay motions. A request for an administrative stay to DHS would also be futile. [↑](#footnote-ref-2)
2. The citations are to the March 19, 2021 IJ decision (Ex. 1), the December 3, 2021 BIA decision (Ex. 2), the DHS Brief on Appeal (Ex. 3), Respondent’s Brief in Opposition to DHS’ Appeal (Ex. 4), and Respondent’s Motion to Reconsider, filed January 3, 2022 (Ex. 5). [↑](#footnote-ref-3)
3. Once the Administrative Record is produced by the Respondent, Petitioner can direct the Court to this evidence. [↑](#footnote-ref-4)