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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 18, 2017

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00073
FRIMMEL MANAGEMENT, LLC Respondent.	)	

ORDER DENYING MOTION FOR STAY OF ENFORCEMENT PENDING RESOLUTION OF PETITION FOR JUDICIAL REVIEW

I. INTRODUCTION

This case arose pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012), based on a complaint filed with the Office of the Chief Administrative Hearing Officer (OCAHO) by the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE, Complainant, or the government) against Frimmel Management, LLC (Frimmel Management, Respondent, or the company). The undersigned presumes the parties' familiarity with the procedural history, background, and pertinent facts and law of this case, which are thoroughly set forth in four prior published decisions. *See generally United States v. Frimmel Mgmt., LLC*, 12 OCAHO nos. 1271, 1271a, 1271b, 1271c (2016) (hereinafter *Frimmel I*, *Frimmel II*, *Frimmel III*, and *Frimmel IV*, respectively).[1] On October 14, 2016, Administrative Law Judge (ALJ) Robert J. Lesnick, who previously presided over this matter,

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

issued a Final Decision and Order finding Respondent liable for 380 violations of 8 U.S.C. § 1324a(a)(1)(B) and directing it to pay a civil monetary penalty of $347,500. *Frimmel IV*, 12 OCAHO no. 1271c at 25.

Respondent subsequently filed a petition for review of Judge Lesnick's Final Decision and Order with the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) on December 15, 2016, pursuant to 8 U.S.C. § 1324a(e)(8). *Frimmel IV*, 12 OCAHO no. 1271c, *appeal docketed*, No. 16-73906 (9th Cir. Dec. 15, 2016). Presently pending before the undersigned[2] is Respondent's Motion for Stay of Enforcement Pending Resolution of Petition for Judicial Review (Motion for Stay), which was filed on December 19, 2016, and requested a stay of enforcement of Judge Lesnick's decision pending the resolution of its petition for review.[3] Complainant has not responded to the Motion for Stay, despite having an opportunity to do so.[4] *See* 28 C.F.R. §§ 68.8(c)(2), 68.11(b) (allowing ten days for a response after a written motion is served, plus an additional five days if served by ordinary mail). For the reasons provided below, Respondent's Motion for Stay will be denied.

II. DISCUSSION AND ANALYSIS

A. OCAHO's Authority to Stay Enforcement of a Final Decision Pending Judicial Review

[2] The instant case was reassigned to the undersigned on December 22, 2016, pursuant to 28 C.F.R. § 68.26.

[3] Respondent avers that ICE also issued a Final Order to Cease Violation and Pay Fine (ICE Order) on October 31, 2016, two weeks after Judge Lesnick's decision. Motion for Stay at 2. As a matter of policy, ICE issues its own "final order" even after an OCAHO ALJ's final decision and order, though the legal basis for doing so is unclear. *See generally* 8 U.S.C. § 1324a; 8 C.F.R. parts 274a, 1274a; 28 C.F.R. part 68 (all allowing for ICE or an OCAHO ALJ to issue a final order for violations of 8 C.F.R. § 1324a, but distinguishing between ICE orders, which are issued when a hearing is not requested, and OCAHO orders which are issued after a hearing). At most, the ICE Order is merely cumulative or repetitive and does not have any independent legal effect as a discrete order separate and apart from Judge Lesnick's decision. Thus, the granting of a stay of enforcement of Judge Lesnick's Final Decision and Order would, *de facto*, stay the ICE Order as well.

[4] ICE's silence regarding the Motion for Stay could be interpreted multiple ways, both for and against Respondent's position. Accordingly, the undersigned cannot simply make any assumptions regarding the government's position on Respondent's request, though its lack of a response necessarily makes an assessment of that request considerably more difficult as discussed below.

Preliminarily, before even considering the merits of Respondent's Motion for Stay, the undersigned must consider whether OCAHO has authority to issue the stay sought by Respondent. The relevant provisions of the INA which establish OCAHO's jurisdiction are silent regarding its authority to stay the enforcement of its own final decisions and orders pending judicial review, as are the implementing regulations of those provisions. *See* 8 U.S.C. §§ 1324a, 1324b, 1324c; 8 C.F.R. parts 270, 274a, 1270, 1274a; 28 C.F.R. part 68.[5] OCAHO case law also appears to be silent on the issue, and the undersigned has not found a published decision in this forum directly confronting the question.[6]

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[5] Although Respondent's case arises under 8 U.S.C. § 1324a, OCAHO's jurisdiction encompasses other statutes as well, and the undersigned has considered all relevant statutes, regulations, and case law in analyzing OCAHO's authority to issue a stay of enforcement pending judicial review.

[6] In a different procedural context, at least one OCAHO ALJ has broadly stated "that there is no ability [for OCAHO] to accept or act upon a party's filings received subsequent to the issuance of a final decision." *United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1098, 2 (2003). That decision was based, in part, on the regulatory definition of a "final order" which "is an order by an [ALJ] that disposes of a particular proceeding or a distinct portion of a proceeding, thereby concluding the jurisdiction of the [ALJ] over that proceeding or portion thereof." 28 C.F.R. § 68.2; *see Diversified Tech.*, 9 OCAHO no. 1098 at 2-3. That regulation, however, clearly contemplates that OCAHO proceedings may have "distinct portions," that an ALJ has jurisdiction over such distinct portions, and that an ALJ may issue an order disposing of a portion of a proceeding that is separate from disposing of the proceeding as a whole. 28 C.F.R. § 68.2. Thus, the language of the regulation itself does not necessarily preclude post-hearing consideration of Respondent's stay request as a distinct portion of the proceeding; to the contrary, its distinguishment of whole proceedings from portions of proceedings provides some, albeit modest, support for the conclusion that OCAHO does have jurisdiction over certain post-hearing portions of proceedings, which would include stay requests pending judicial review. Furthermore, the language in *Diversified Tech.* was put forth in the context of whether OCAHO can consider motions to reopen or reconsider in cases arising under 8 U.S.C. § 1324b, which is a markedly different question than the one presented by Respondent's motion. *See Diversified Tech.*, 9 OCAHO no. 1098 at 2-3. Additionally, in contrast to *Diversified Tech.*, other OCAHO decisions have considered post-decision filings, *see e.g., United States v. Workrite Unif. Co., Inc.*, 5 OCAHO no. 755, 266 (1995), and one of the statutes administered by OCAHO clearly contemplates post-decision proceedings involving attorney's fees. *See* 8 U.S.C. § 1324b(h). Therefore, the general comments in *Diversified Tech.*, which have not been cited in any subsequent published OCAHO decision, are largely inapposite to assessing the specific question raised by Respondent's Motion for Stay. Moreover, neither *Diversified Tech.* nor any other published OCAHO decision of which the undersigned is aware directly addresses the applicability of 5 U.S.C. § 705 to OCAHO proceedings and the concomitant implications of Fed.

Nevertheless, several considerations point toward the conclusion that OCAHO does possess authority to administratively stay enforcement of a final order it issued pending judicial review.

First, and perhaps most significantly, federal law generally authorizes an agency to stay its own action pending judicial review. 5 U.S.C. § 705 ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."). Moreover, federal law also generally commands a party seeking judicial review of an agency decision to seek a stay from the agency first before seeking a stay from the reviewing court. Fed. R. App. P. 18(a)(1) ("A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order."). These rules do not apply when a statute authorizing judicial review of an agency action prohibits a stay pending review. *Id*. advisory committee's note. As noted above, however, the relevant statutes authorizing judicial review of OCAHO decisions are silent regarding a stay pending review and certainly do not prohibit such an action. *See* 8 U.S.C. §§ 1324a(e)(8), 1324b(i), 1324c(d)(5); *cf*. 8 U.S.C. § 1252(b)(3)(B) (explicitly noting—in contrast to 8 U.S.C. §§ 1324a(e)(8), 1324b(i), and 1324c(d)(5)—that the filing of a petition for review does *not* stay the execution of a final removal order against an individual alien).

Furthermore, Chapter 7 of Title 5, which includes 5 U.S.C. § 705, was enacted in 1966, two decades before IRCA and, later, the Immigration Act of 1990, established judicial review provisions for OCAHO decisions. *Compare* Pub. L. No. 89-554, *with* Pub. L. Nos. 99-603 (establishing OCAHO jurisdiction under IRCA and judicial review provisions for cases arising under 8 U.S.C. §§ 1324a, 1324b), 101-694 (establishing OCAHO jurisdiction under the Immigration Act of 1990 and judicial review provisions for cases arising under 8 U.S.C. § 1324c). No statue subsequent to Chapter 7 of Title 5 may modify or supersede it, however, unless done so "expressly." *See* 5 U.S.C. § 559. Again, as noted above, neither IRCA nor the Immigration Act of 1990 contained an express provision that would otherwise override the language of 5 U.S.C. § 705 regarding stays of an OCAHO decision. In short, 5 U.S.C. § 705 and, by implication, Fed. R. App. P. 18(a)(1) authorize an agency to stay its own decision pending judicial review unless another statute expressly prohibits such an action. The relevant provisions administered by OCAHO do not contain such an express provision. Accordingly, it appears that OCAHO possesses the general authority to stay enforcement of its own decisions pending judicial review in accordance with 5 U.S.C. § 705.

Second, the authority vested in OCAHO ALJs by statute and regulation is also consistent with the conclusion that OCAHO can stay enforcement of a decision pending judicial review. By

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R. App. P. 18(a)(1) regarding the question of whether a stay of enforcement of an order issued under 8 U.S.C. § 1324a can be granted pending judicial review of that order. In short, the request made by Respondent appears to raise an issue of first impression within OCAHO's published jurisprudence.

statute, Respondent's proceeding was conducted by ALJs in accordance with the requirements of 5 U.S.C. § 554. *See* 8 U.S.C. § 1324a(e)(3)(B); *see also* 28 C.F.R. § 68.28(a)(1) (authorizing an ALJ to conduct formal hearings in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559). For purposes of 5 U.S.C. § 554, an ALJ is a presiding employee. *See* 5 U.S.C. §§ 556(a), (b)(3). As such, an ALJ may, *inter alia*, dispose of "procedural requests or similar matters." *Id*. § 556(c)(9). Although the phrase "procedural requests or similar matters" is not defined, it would appear to encompass procedural requests such as a request for a stay of enforcement.

Relatedly, an ALJ may take any other action authorized by agency rule. *Id*. § 556(c)(11). In turn, by agency regulation, an OCAHO ALJ may take any action authorized by the APA, which includes issuing orders. 28 C.F.R. § 68.28(a)(6). Such an order may take an injunctive form, which would also appear to encompass the issuance of an order in the form of a stay of enforcement pending judicial review. *See* 5 U.S.C. § 551(6).[7]

Similarly, by agency regulation, an OCAHO ALJ possesses certain other relevant enumerated authorities, though the regulatory list is not exhaustive. *See* 28 C.F.R. § 68.28(a) (delineating an OCAHO ALJ's general powers but noting that they are not limited to the ones listed). For example, an OCAHO ALJ is authorized to, *inter alia*, issue decisions and orders; take any action authorized by the APA; exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Attorney General as are necessary and appropriate therefore; and, take other appropriate measures necessary to enable him or her to discharge the duties of the office. *Id*. §§ 68.28(a)(5)-(8). Although the issuance of a stay of enforcement pending judicial review is not specifically enumerated among this nonexhaustive list of authorities, it is nevertheless fully consonant with them, particularly the authority to regulate the conduct of a proceeding and the authority to take appropriate measures to discharge the duties of an OCAHO ALJ. Accordingly, the statutory and regulatory authorities of an OCAHO ALJ also support the conclusion that that OCAHO possesses the authority to administratively stay enforcement of a final order it issued pending judicial review.

Finally, the structure of the INA itself and revisions to its other stay provisions reinforces the conclusion that OCAHO can issue a stay of enforcement of a final decision pending judicial review. In addition to providing for OCAHO proceedings under 8 U.S.C. §§ 1324a, 1324b and 1324c, the INA also prescribes proceedings for the removal of individual aliens from the United

[7] As discussed, *infra*, a stay and an injunction are separate legal concepts, though they share significant overlap. Nevertheless, the APA's particular phrasing, indicating that an order may be "injunctive. . .in form" rather than simply listing an injunction as a discrete type of order, suggests an intent to consider injunctive orders in a broad, general sense, which would include stays, rather than in a narrow sense limited solely to a legal injunction directed at a particular party.

States. *See generally* 8 U.S.C. § 1229a. Notably, unlike the judicial review provisions for OCAHO decisions, the INA expressly provides that the filing of a petition for review does *not* stay the execution of a final removal order against an individual alien unless the reviewing Circuit Court of Appeals orders otherwise. *See* 8 U.S.C. § 1252(b)(3)(B); *cf. Matter of Correa-Garces*, 20 I&N Dec. 451 (1992) (noting that once a final order of deportation is entered against an alien, an immigration judge and the Board of Immigration Appeals generally lack jurisdiction to stay that order except in connection with a motion to reopen or reconsider or an appeal related to such a motion). Thus, in its current state, the language of the INA clearly proscribes administrative stays pending judicial review for removal orders but, tellingly, says nothing regarding stays pending judicial review of OCAHO final decisions. *Compare* 8 U.S.C. § 1252(b)(3)(B) *with id*. §§ 1324a(e)(8), 1324b(i), 1324c(d)(5). [8]

Additionally, prior to 1996, the filing of a petition for review did automatically stay the deportation of an alien. 8 U.S.C. § 1105a(a)(3) (1994). Amendments to the INA in 1996, however, expressly changed this provision to its current language. *See generally* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Div. C, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Title III, Subtitle A, Sec. 306, 110 Stat. 3009 (hereinafter IIRAIRA). In contrast, statutes providing for judicial review of OCAHO decisions have been largely unchanged since enactment and were not amended by IIRAIRA. *See* 8 U.S.C. §§ 1324a(e)(8), 1324b(i), 1324c(d)(5); IIRAIRA, Title IV. Thus, not only did Congress enact judicial review provisions in the INA regarding OCAHO decisions that were silent on the issue of stays—in contrast to the language elsewhere in the INA which provided an automatic stay of removal upon the filing of a petition for review—it also left that language unaltered, and conspicuously silent about stays, when it amended the INA in 1996 to preclude a stay of removal solely based on the filing of a petition for review.

The Supreme Court has "long held" and reiterated that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Sebelius v. Cloer*, 133 S.Ct. 1886, 1894 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Consequently, within the INA, Congress's shifting treatment of the issue

[8] The INA also allows stays of removal orders in other contexts unrelated to the pendency of a petition for review. *See, e.g.*, 8 U.S.C. §§1229a(b)(5)(C) (providing that, in certain circumstances, the filing of a motion to reopen and rescind an *in absentia* removal order automatically stays the removal order pending the disposition of the motion), 1231(c)(2) (authorizing a stay of removal for aliens ordered removed upon arrival at a port of entry when immediate removal is not practicable or proper or the alien is needed to testify in a criminal prosecution). An alien can also request an administrative stay of removal from DHS at any time after the entry of a final order of removal. 8 C.F.R. §§ 241.6, 1241.6. None of these additional stay provisions, however, sheds any appreciable light regarding OCAHO's authority to issue a stay of its own decision pending judicial review.

of a stay connected to judicial review of removal orders compared to its consistent silence regarding that same issue connected to judicial review of OCAHO decisions appears to have been intentional and purposeful. Thus, Congress's decision to amend the INA to explicitly proscribe stays of removal pending judicial review unless the reviewing Circuit Court of Appeals rules otherwise while, simultaneously, not imposing such a limitation regarding judicial review of OCAHO decisions strongly suggests, by implication, that OCAHO retains authority to stay enforcement of its decisions pending any judicial review, particularly under 5 U.S.C. § 705. *Compare* 8 U.S.C. § 1252(b)(3)(B) *with id*. §§ 1324a(e)(8), 1324b(i), 1324c(d)(5).

Overall, although the issue is not free from all doubt, the weight of the pertinent authority supports a finding that OCAHO possesses authority to issue a stay of its own orders pending judicial review. Indeed, in the absence of any clear statutory prohibition or precedential case law, the plain text of 5 U.S.C. § 705, the necessary implications of Fed. R. App. P. 18(a)(1), the established statutory and regulatory authority of OCAHO ALJs, and the structure of the INA all point strongly to the conclusion that OCAHO does possess authority to administratively stay enforcement of a final order it issued pending judicial review. Accordingly, I find that Respondent's request for such a stay is properly before me and can be considered on its merits.

B. Standard for a Stay of Enforcement of a Final Decision Pending Judicial Review

Having found that OCAHO possesses the authority to stay enforcement of its orders pending judicial review, the next issue to determine is what standard to apply in adjudicating such stay requests. On this point, the law is clearer as the standard for evaluating a stay request has, at the federal level, generally been "distilled into consideration of four factors: '(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.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Moreover, because this standard is well-established, it does not exist in a vacuum and is informed by several background principles. First, "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). Indeed, "[a] stay . . . is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right." *Nken*, 556 U.S. at 437 (Kennedy, J., concurring). Rather, a stay is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry.*, 272 U.S. at 672-73; *see also Hilton*, 481 U.S. at 777 (noting that "the traditional stay factors contemplate individualized judgments in each case"). Overall, "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34.

Furthermore, "[t]he first two factors of the traditional standard are the most critical," though "[i]t is not enough that the chance of success on the merits be 'better than negligible.'" *Id*. at 434 (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). Similarly, "simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Id*. at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest"; however, "[t]hese factors merge when the Government is the opposing party." *Id*. at 435. The government's role as the complainant in every case under 8 U.S.C. § 1324a, however, does not necessarily render the public interest in such cases negligible, for the public does have an interest in the prompt execution of lawful administrative orders, particularly involving compliance with the well-established employment authorization verification requirements. *See id*. at 435-36.

This four-factor standard, informed by the relevant interpretive legal principles summarized above, has been adopted by almost every other federal judicial or administrative forum in considering stay requests, and the undersigned sees no basis not to adopt it as the relevant standard for assessing stay requests of OCAHO decisions pending judicial review. Thus, the undersigned will apply that standard in addressing Respondent's stay request.

Finally, the undersigned notes that although the standard for a stay is well-established, individual Circuit Courts of Appeals may have added an additional gloss or interpretation to one or more of the elements through case law, and such interpretations must also be considered where appropriate. *See* 28 C.F.R. § 68.56. For instance, the Ninth Circuit utilizes a "continuum" or "balancing" approach in addressing the four stay factors, such that a stronger showing of one factor may offset a weaker showing of another factor. *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011). The Ninth Circuit also interprets the factor of a strong showing of likelihood of success on the merits to mean "a substantial case for relief on the merits"; however, a showing that success is more likely than not is not required. *Id*. at 967-68. It further interprets the irreparable injury factor as requiring a showing that the irreparable harm is "probable" or "the more probable or likely outcome" if the stay is not granted. *Id*. at 968. Consequently, it also finds that the burden on the party seeking a stay is higher on the irreparable injury factor than it is on the likelihood of success on the merits factor. *Id*. As Respondent has filed a petition for review with the Ninth Circuit, precedent from that Circuit provides appropriate guidance. *See* 28 C.F.R. § 68.56. Accordingly, the undersigned is necessarily mindful of the Ninth Circuit's approach to stay requests and will evaluate the relevant factors as applied to Respondent's stay request consistent with that approach.

C. Application to Respondent

1. Respondent's Position

Frimmel Management argues that it is likely to prevail on the merits of its petition for review, that it will suffer irreparable harm if a stay is not granted, that the balance of equities tips in its favor, and that granting a stay would be in the public interest. Motion for Stay at 3-6.[9]

2. Analysis

The four stay factors are considered below, in turn. After a thorough consideration of those factors and the record, however, the undersigned ultimately concludes that Respondent has not made a sufficient showing to warrant the issuance of a stay of Judge Lesnick's Final Decision and Order pending judicial review. Accordingly, for the reasons set forth below, Respondent's Motion for Stay will be denied.

a. Irreparable Injury

A showing of irreparable harm is a necessary, but not sufficient, condition for granting a stay request. *Leiva-Perez*, 640 F.3d at 965. Thus, the undersigned considers that factor first, as a failure to establish it would necessarily be fatal to any request for a stay. *Id*. ("[S]tays must be denied to all petitioners who [do] not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.").

Frimmel Management asserts that the payment of a civil money penalty of $347,500 would render it insolvent, even under "the most modest of payment plans." Motion for Stay at 2. To that end it asserts that irreparable injury will ensue if it is forced to begin payment of that penalty pending the resolution of its request for judicial review. *Id*. at 5. It has presented no evidence in support of its contention, however. Moreover, Judge Lesnick noted that Respondent previously failed to put forth evidence regarding its financial situation and ability to pay a civil monetary penalty, despite raising a conclusory and generalized inability to pay defense in its Answer. *See Frimmel IV*, 12 OCAHO no. 1271c at 21-22.

For purposes of a request for a stay or injunction, monetary injury generally does not constitute irreparable injury. *See L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir.

[9] Relying on *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), Respondent cites these four factors as the basis for its stay request. Motion for Stay at 2-6. These factors, however, are more properly applicable to considering a request for a preliminary injunction, rather than a request for a stay of enforcement of an administrative order pending judicial review. *See Nken*, 556 U.S. at 428-431 (discussing the differences between injunctions and stays); *see also Leiva-Perez*, 640 F.3d at 966 (same). Thus, although there is "substantial overlap" between the two standards, *Nken*, 556 U.S. at 434, the undersigned has applied the factors as articulated in *Nken*, which also postdates *Winter*, in considering Respondent's motion. Nevertheless, case law regarding the preliminary injunction factors may be instructive in considering analogous stay request factors. *See Leiva-Perez*, 640 F.3d at 966.

1980). Indeed, a loss of income likely to be recovered does not usually constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 89 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough[, for] [t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958))). Financial losses that would be unrecoverable, however, may constitute irreparable injury, and Respondent has alleged that once insolvent it could not be made whole by the return of money from ICE. Motion for Stay at 5.

Respondent's assertions tacitly indicate that it cannot or will not comply with Judge Lesnick's Final Decision and Order. Motion for Stay at 2, 5. Thus, whether it will suffer an irreparable injury without a stay also depends, in part, on the government's intentions regarding enforcement of Judge Lesnick's decision. Indeed, there can be no irreparable injury if the government elects not to enforce the decision. ICE did not respond to the Motion for Stay and, thus, did not address the question of enforcement.[10] Moreover, although ICE represents the government at the administrative level in this case, the Department of Justice (DOJ) represents it before the Ninth Circuit regarding the petition for review, and the DOJ has not weighed in with its position on Respondent's case, including regarding enforcement, as its brief is not due until April 4, 2017. *Frimmel Mgmt., LLC v. United States*, No. 16-73906 (9th Cir. Dec. 15, 2016) (Time Schedule Order). Consequently, the record is unclear as to both how quickly, if at all, the government is seeking to enforce the penalty imposed against Respondent and whether, if the government is not currently seeking compliance with Judge Lesnick's order, it will seek compliance at some point in the future. Moreover, the undersigned cannot draw any conclusive inferences or make any assumptions about this issue from the government's silence. *See supra* n.4. Thus, although analysis of the probability of irreparable injury to Respondent depends, in part, on whether enforcement of the order is or will be sought, present or future enforcement cannot simply be assumed in the absence of any statement from the government on that issue. [11]

[10] As noted above, ICE issued its own "final order" two weeks after Judge Lesnick's decision, which Respondent views as evidence that ICE is endeavoring to enforce that decision quickly; however, there is no evidence of any further action taken by ICE to actually compel Respondent's compliance with the decision, and the mere issuance of the ICE Order, which is of doubtful legal significance, does not conclusively demonstrate an active enforcement effort which would culminate in irreparable harm or otherwise make such harm probable. *See supra* n.3.

[11] Although ICE and the DOJ may have various mechanisms for seeking compliance with Judge Lesnick's decision, the undersigned cannot assume that they will be utilized because neither agency has commented on its intentions. *See supra* nn. 4, 10. For example, if an entity fails to comply with an order issued under 8 U.S.C. § 1324a, the DOJ "shall" file a suit to seek compliance "in any appropriate district court of the United States." 8 U.S.C. § 1324a(e)(9).

Additionally, although Respondent averred that even a "modest" payment plan would render it insolvent, it did not define a specific monetary threshold encompassed by that term. Motion for Stay at 2. Judge Lesnick explicitly noted that the parties were "free to establish a payment schedule in order to minimize the impact of the penalty on the operations of [Frimmel Management]." *Frimmel IV*, 12 OCAHO no. 1271c at 25. Thus, Judge Lesnick's decision certainly contemplates the possibility that a payment plan could minimize the harm to Respondent's business, which undercuts its argument on the irreparability of harm somewhat. Furthermore, there is no evidence that Respondent has even put forth a proposed payment plan in response to Judge Lesnick's decision. Moreover, to the extent that Respondent asserts that it could not pay the penalty under *any* payment plan, the record contains no financial evidence to support such a blanket assertion.

Overall, the record regarding the irreparability-of-harm factor is meager. Respondent has put forth little evidence regarding its potential for financial injury, and its bare assertion that it could not pay the penalty even under a modest payment plan is not supported by the record. *See United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 6 n.6 (2016) (noting that "assertions of counsel and unsupported allegations made in a brief or motion are not evidence and may not be considered as such") (citations omitted). The government's failure to respond to the Motion for Stay also makes the irreparability analysis more difficult. Indeed, the extent to which the government is even actively seeking payment of the penalty—or will seek payment in the future—is unclear, as is whether Respondent could recover any money paid should its petition for review be granted. Nevertheless, the undersigned presumes that a penalty of $347,500 would, almost self-evidently, inflict some injury on Respondent's business that may be irreparable if it is unable to recover that money if its petition for review is granted, though the evidence of irreparability provided by Respondent in seeking a stay is otherwise minimal. Thus,

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Although this statute uses the command "shall," the undersigned has found no case, reported or unreported, invoking jurisdiction under that provision since it was enacted over thirty years ago, and it strains credulity to believe that there has been no noncompliance with a final order since IRCA was enacted in 1986. To the contrary, in at least one case, the DOJ apparently declined to invoke 8 U.S.C. § 1324a(e)(9) and seek compliance with a final order under 8 U.S.C. § 1324a assessing a civil money penalty of approximately $188,000, even after a petition for review of that order was dismissed by a Circuit Court of Appeals and notwithstanding both the "shall" command of 8 U.S.C. § 1324a(e)(9) and the related preclusion under that statute of any further review of the validity and appropriateness of the underlying final order. *See, e.g., Alpha Nursing Servs., Inc. v. DHS*, No. 10-11752 (11th Cir. 2010) (docket reflecting dismissal of a petition for review, denial of a motion for reconsideration, and no further related procedural actions). Therefore, as neither ICE nor the DOJ have commented on the government's intentions regarding the likelihood of enforcing Judge Lesnick's decision, the undersigned cannot draw any inferences or make any assumptions regarding that issue in analyzing Respondent's assertion of a probable irreparable injury if a stay is not granted.

although the likelihood of irreparable injury may—perhaps just barely—meet the "probable" threshold to tip this factor in Respondent's favor, the record only weakly supports its contentions overall. Consequently, on balance, the undersigned finds that this factor weighs in favor of the Respondent's stay request, albeit not particularly strongly due to the dearth of evidence regarding Respondent's financial situation and the unrefuted possibility that a payment plan could be implemented "to minimize the impact of the penalty on the operations of [Respondent's] company." *Frimmel IV*, 12 OCAHO no. 1271c at 25.

b. Likelihood of Success on the Merits

Respondent has put forth three arguments in support of its assertion that it has a likelihood of success on the merits of its petition for review. Regarding OCAHO decisions under 8 U.S.C. § 1324a, the Ninth Circuit reviews findings of fact for substantial evidence and conclusions of law *de novo*. *Mester Mfg. Co. v. INS*, 879 F.2d 561, 565 (9th Cir. 1989). Mindful of that standard of review and after a thorough consideration of Respondent's arguments and the record, I find that none of those arguments is persuasive or puts forth a sufficient showing that Respondent has a reasonable case for relief on the merits. Thus, this factor does not support Respondent's request for a stay.

i. Application of the Exclusionary Rule

First, Respondent asserts that it is likely to prevail on its claim that the government's evidence of its violations of 8 U.S.C. § 1324a should be suppressed or excluded as fruit of the poisonous tree. Motion for Stay at 3. That argument stems from assertions that the Maricopa County Sheriff's Office (MCSO) committed violations of the Fourth Amendment against Respondent and that information obtained from those violations was obtained by ICE and used in its investigation of Respondent that ultimately culminated in the instant proceedings. *Id*. Respondent's contentions on this point have been extensively argued in this forum and found unavailing. *See Frimmel I*, 12 OCAHO no. 1271 at 6-8, *Frimmel II*, 12 OCAHO no. 1271a at 3-6, *Frimmel IV*, 12 OCAHO no. 1271c at 12-15. Respondent does not cite any authority from the Ninth Circuit to support its argument that it will likely succeed on this issue or that the prior adjudicators considering the issue erred. To the contrary, the soundness of the legal reasoning of the prior decisions combined with well-established precedent from the Supreme Court and the Ninth Circuit suggests that Respondent's likelihood of success on this argument is considerably less than a "reasonable probability," a "fair prospect," or a "substantial case for relief on the merits." *See Leiva-Perez*, 640 F.3d at 967-68.

OCAHO case law has not definitively resolved whether the exclusionary rule is applicable in its proceedings, *see United States v. Carpio-Lingan*, 6 OCAHO no. 909, 1019, 1025-26 (1997) (collecting cases pointing to different conclusions, but only assuming the applicability of the exclusionary rule), or if it is applicable, what type or level of violation would trigger its application. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (declining to extend the

exclusionary rule to civil immigration proceedings but leaving open the possibility that "egregious" or "widespread" violations of the Fourth Amendment implicated in such proceedings could trigger application of the rule). The prior adjudicators who presided over this case appear to have concluded that it was potentially applicable, and I will assume so as well. *See Frimmel I*, 12 OCAHO no. 1271 at 6-8, *Frimmel II*, 12 OCAHO no. 1271a at 3-6, *Frimmel IV*, 12 OCAHO no. 1271c at 12-15. Nevertheless, assuming that the exclusionary rule is applicable in the instant proceeding, Respondent has not identified any error in the reasoning of these prior decisions or contrary law that would lead to a conclusion that it has a substantial case on the merits of this issue for purposes of its stay request and underlying petition for review. *See Frimmel I*, 12 OCAHO no. 1271 at 6-8, *Frimmel II*, 12 OCAHO no. 1271a at 3-6, *Frimmel IV*, 12 OCAHO no. 1271c at 12-15.

Moreover, the Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials," including grand jury proceedings, civil tax proceedings, and civil deportation proceedings, and there is no expectation that the exclusionary rule would be extended into the civil OCAHO proceeding context on the facts of Respondent's case. *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 363-64 (1998) ("again declin[ing] to" extend the exclusionary rule beyond the criminal trial context); *see also United States v. Janis*, 428 U.S. 433, 447 (1976) ("In the complex and turbulent history of the [exclusionary] rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding, federal or state."). Although lower courts have, on occasion, extended the exclusionary rule to civil proceedings, this extension does not include federal-state intersovereign situations in which the federal civil proceeding is beyond the state officers' "zone of primary interest." *Janis*, 428 U.S. at 458 (holding that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign" and, thus, provides insufficient justification for the application of the exclusionary rule in such intersovereign civil cases); *see also Lingo v. City of Salem*, 832 F.3d 953, 959 n.4 (9th Cir. 2016) (interpreting *Janis* to hold that "the purposes of the exclusionary rule are not served by imposing the rule in a civil intersovereign case" and that "even in those limited civil cases in which some courts might be inclined to apply the [exclusionary] rule, they may not do so in the intersovereign context" while also describing the proposition that "the exclusionary [rule] *never* applies in intersovereign civil cases" as a "fact" (emphasis in original)). As the prior adjudicators have clearly articulated, the instant case arises in a civil proceeding which implicates an intersovereign context involving the MCSO, a county entity in Arizona, and ICE, a division of DHS, which is a federal agency, and OCAHO's civil administrative proceedings are far beyond the MCSO's zone of interest; accordingly, there is simply no basis to apply the exclusionary rule in the instant case. *See Frimmel I*, 12 OCAHO no. 1271 at 6-8; *Frimmel IV*, 12 OCAHO no. 1271c at 12-15. Consequently, the relevant law on this issue appears settled, and Respondent has not established a likelihood of success on the merits of this point.

ii. Consideration of the Civil Money Penalty Amount

Second, Respondent asserts that it will likely prevail on its claim that the civil money penalty amount was not properly before Judge Lesnick at the summary decision stage. Motion at 3-4. More specifically, it argues that ICE did not argue the penalty amount in its Motion for Summary Decision filed on May 26, 2016, and only belatedly raised the issue in a separate filing on July 11, 2016.[12] Motion for Stay at 3-4. Respondent contends that ICE's second filing did not allow it sufficient time to respond and was also improperly considered by Judge Lesnick. *Id.*

This argument is unsupported by both applicable regulations and the procedural record and, thus, also does not appear to have a likelihood of success on the merits. On February 11, 2016, ALJ Stacy S. Paddack, who presided over this case prior to Judge Lesnick, set deadlines for the parties to file dispositive motions by June 10, 2016, with responses due July 11, 2016. ICE filed a Motion for Summary Decision on May 26, 2016. In its Motion for Summary Decision, ICE reserved addressing the issue of an appropriate penalty amount until later; however, because ICE believed Respondent would contest the penalty amount even though it had not filed a dispositive motion, ICE nevertheless filed a Statement Regarding the Appropriateness of the Proposed Fine (Statement) on July 11, 2016, in order to comply with Judge Paddack's deadlines. Respondent did not file a dispositive motion by the deadline set by Judge Paddack, though it filed a Response to Complainant's Motion for Summary Decision (Response) on July 11, 2016, in which it advanced several arguments, including ones regarding the civil money penalty amount.

OCAHO rule 68.9(e) provides:

> If a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order based on the complaint.

Pleadings include motions. *Id.* § 68.2. Thus, although ICE's approach was perhaps procedurally unconventional, Judge Lesnick was authorized to consider the issue of an appropriate civil money penalty based on both ICE's Statement—treating it as, in essence, an amendment to ICE's Motion for Summary Decision— and Frimmel Management's Response, particularly in order to facilitate a decision on the merits of the case.

Furthermore, his decision to do so did not work any prejudice to Respondent. Although Respondent claims that it had insufficient time to respond to ICE's Statement, it neither moved to strike that Statement nor requested an extension of time to respond after ICE filed it. It received the Statement on July 7, 2016, which it claimed was one day before it needed to mail its

[12] Respondent indicates that it received this filing on July 7, 2016, though it was not deemed filed until it was received by OCAHO on July 11, 2016. *See* 28 C.F.R. § 68.8(b).

Response. Motion for Stay at 4. The record shows, however, that Respondent nevertheless took additional time and filed its Response by facsimile on July 11, 2016, as it was allowed to do under 28 C.F.R. § 68.6(c). Moreover, Respondent specifically addressed the penalty issue by putting forth arguments regarding the proposed civil monetary penalty in its Response; indeed, it asserted that mitigation was warranted for good faith and for its lack of a history of previous violations, though it did not make any argument regarding the presence of unauthorized workers. Response at 7-8. Furthermore, Judge Lesnick also expressly gave Respondent until August 15, 2016, to supplement its Response, but it elected not to do so. *Frimmel III*, 12 OCAHO no. 1271b at 6. Respondent's assertion that it "had no meaningful opportunity to respond to ICE's arguments" regarding the penalty amount is wholly belied by the record. Motion for Stay at 4.

Respondent's failure to supplement its Response, despite being given an explicit opportunity to do so, and its failure to otherwise further argue the penalty issue prior to Judge Lesnick's October 14, 2016 Final Decision and Order arguably waived the issue from Judge Lesnick's consideration, and it appears that Respondent's failure to exhaust its administrative remedies regarding this issue may deleteriously affect its petition for review. Nevertheless, to the extent that Respondent has properly preserved this issue, the record is clear that Judge Lesnick appropriately considered the civil money penalty issue in his resolution of ICE's Motion for Summary Decision and that his consideration of that issue worked no prejudice against Respondent. Moreover, Respondent has not identified any pertinent authority to suggest otherwise. Thus, overall, Respondent has not established a likelihood of success on the merits of this issue.

iii. Aggravation of the Civil Money Penalty Based on the Presence of Unauthorized Workers

Third, Respondent asserts that it will likely prevail on its claim that the civil money penalty was improperly aggravated because ICE did not meet its burden of proof of showing the presence of fifty-five unauthorized workers. Motion for Stay at 4-5. For this argument, too, Respondent has failed to establish a likelihood of success on the merits.

An ALJ is required to give due consideration to five statutory factors in determining the amount of a civil money penalty for violations of 8 U.S.C. § 1324a(a)(1)(B), and one of those factors is the presence of unauthorized aliens. 8 U.S.C. § 1324a(e)(5). Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), ICE must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

In the context of a motion for summary decision, "[o]nce the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10

OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Although in adjudicating a motion for summary decision all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party, *United States v. Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, 7 (2016) (internal citations and quotations omitted), the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings and must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § § 68.38(b). Moreover, after the government has introduced evidence to meet its burden regarding a penalty factor in 8 U.S.C. § 1324a(e)(5), the burden of production shifts to the respondent to counter the government's evidence; however, if the respondent fails to put forth any evidence, the government's unrebutted evidence may satisfy its burden. *Muniz Concrete*, 12 OCAHO no. 1278 at 7.

As Judge Lesnick found, the government's submission of evidence regarding the unauthorized status of fifty-five individuals charged in the complaint was sufficient to meet the preponderance standard warranting aggravation of the penalty amount. *Frimmel IV*, 12 OCAHO no. 1271c at 19-21. That finding appears well-supported by applicable law. *See Mester Mfg. Co.*, 879 F.2d at 566 (concluding that a computer search of immigration records is sufficient to establish a *prima facie* showing of an alien's unauthorized status and, in the absence of any evidence to the contrary, constitutes substantial evidence—for purposes of judicial review—supporting a finding that such an individual is unauthorized); *see also Split Rail Fence Co., Inc. v. United States*, 844 F.3d 880, 2016 WL 7367767, at *10, *14 n.14 (10th Cir. 2016) (observing that "Ninth Circuit and OCAHO case law agree that when a computer search of DHS's records system demonstrates an employee's documentation is false—making the employee's authorization suspect—the government establishes a prima facie showing of unauthorized status" and that "the Ninth Circuit and OCAHO have relied on unauthorized status established by a search of one computer system"), *aff'g* 11 OCAHO no. 1216a (2015); *accord United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 10 (2013) ("ICE is not required to present 'conclusive evidence' of the employee's unauthorized status; . . . [rather,] [w]hen the government makes a prima facie showing that a document is false based on a computer search of its records system, and the employer fails to provide any evidence to the contrary, substantial evidence supports a finding of lack of authorization." (internal citations omitted)).

As discussed above, Respondent did not respond or otherwise object to ICE's evidence regarding the presence of unauthorized aliens in its employ, despite being given an opportunity to do so, and it could not simply rely on generalized denials in its earlier pleadings to defeat a motion for summary decision.[13] In other words, ICE met its initial burden in establishing a penalty factor

[13] In its Response to ICE's Motion for Summary Decision, Respondent addressed the proposed penalty amount, but did so only regarding ICE's consideration of the "good faith" and "history of previous violations" factors under 8 U.S.C. § 1324a(e)(5). Response at 7-8. Notably, it did not address the factor related to the presence of unauthorized aliens, either in its Response or at any subsequent time prior to Judge Lesnick's Final Decision and Order.

under 8 U.S.C. § 1324a(e)(5), and Respondent declined to put forward any contravening evidence; thus, ICE met its burden of proof regarding enhancement of the civil monetary penalty due to the presence of unauthorized aliens, and Judge Lesnick appropriately granted it summary decision on that issue based on Respondent's failure to put forth any contravening evidence to create a genuine issue of fact.

To be sure, Respondent now asserts that "a multitude of alternative inferences" could explain the discrepancies in the evidence about its employees presented by ICE. Motion for Stay at 4. Even setting aside whether this argument has been waived or is otherwise unexhausted for the same reasons discussed, *supra*, that its second argument is waived or unexhausted, Respondent has still not put forth any specific facts showing that there is a genuine issue of material fact regarding the unauthorized status of the fifty-five individuals at issue. Its continued generalized denials and vague allegations, unsupported by any specific factual assertions or evidence, are simply insufficient to defeat summary decision based on ICE's evidentiary support for its position. *See* 28 C.F.R. § 68.38(b). Therefore, it has not established a likelihood of success on the merits regarding this issue either.

Overall, none of the arguments put forth by Respondent in its Motion for Stay shows a strong likelihood of success on the merits, regardless of whether that factor is articulated as a "reasonable probability," a "fair prospect," a "substantial case on the merits," or raising "serious legal questions." *Nken*, 556 U.S. at 434; *Leiva-Perez*, 640 F.3d at 966-68; *see also Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (discussing the different formulations of the standard for the likelihood-of-success-on-the-merits stay factor and noting they are "largely interchangeable"). It is not clear that Respondent's chance of success is even better than negligible, *Nken*, 556 U.S. at 434, but at a minimum, Respondent's arguments do not evince a substantial case for relief on the merits. Accordingly, this factor cuts strongly against its request for a stay of enforcement pending judicial review.

c. Substantial Injury to the Other Party and the Public Interest

As noted, the final two stay factors merge when the government is the opposing party, as it is in Respondent's case. *Nken*, 556 U.S. at 435. Because the government did not respond to Respondent's Motion for Stay, evidence regarding both injury and public interest is scant. Moreover, for the same reasons discussed, *supra*, regarding the irreparability-of-harm factor, the government's silence regarding Respondent's stay request means that the undersigned also cannot simply assume injury to the government if a stay is granted. Nevertheless, there is a public interest in the enforcement of the Final Decision and Order, and that interest is not negligible. Indeed, there is a public interest in the prompt execution of orders against companies that have violated employment authorization verification laws, particularly in cases involving the presence of unauthorized alien workers. Consequently, the undersigned cannot simply presume that the public interest necessarily tips in favor of preserving the *status quo* for an employer who has violated 8 U.S.C. § 1324a(a)(1)(B). *See id.*at 435-36 (discussing the problems associated

with assuming that the public interest is negligible or generally tips away from enforcement of an order pending judicial review). Therefore, the undersigned concludes that the last two factors ultimately cut against Respondent's stay request; however, they do so only marginally based on the generalized public interest in the execution of administrative orders and the lack of any further specified showing of harm to the government or the public.

III. CONCLUSION

Overall, three of the four stay factors cut against Respondent's request for a stay. Moreover, considered on a continuum and balancing the four factors—and even disregarding the somewhat marginal nature of the third and fourth factors—Respondent's lack of likelihood of success on the merits strongly outweighs its modest, at most, showing of irreparable injury. Accordingly, for the foregoing reasons and following a thorough consideration of the record, Respondent's Motion for Stay of Enforcement Pending Resolution of Petition for Judicial Review is **DENIED**.

SO ORDERED.

Dated and entered on January 18, 2017.

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James R. McHenry III
Administrative Law Judge