

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

**RESPONDENT'S SUBMISSION IN RESPONSE TO
COURT'S APRIL 16, 2009 ORDER
Agency No. A008 237 417**

I. INTRODUCTION

On April 16, 2009, this Court directed Respondent Attorney General to “address on the merits each of the four factors governing a stay of removal, directing further that “[i]n so doing, the government should inform the court of its plans for the transportation of the petitioner to Germany and provide the court with the report of the doctor which forms the basis for its conclusion that the petitioner’s medical condition is such that he is stable enough to travel safely.”

After fully a decade of denaturalization and removal litigation in which Petitioner has twice appealed unsuccessfully to this Court and in which it has been established, *inter alia*, that Petitioner “contributed to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide” in the gas chambers at the Sobibor extermination center, in Nazi-occupied Poland, *Demjanjuk*, 2002 U.S. Dist. LEXIS 6991 (N.D. Ohio Feb. 21, 2002) at *21, he has succeeded during the past three weeks in obtaining last-minute stay orders from courts lacking jurisdiction, all in the hope of reopening his removal case so that he might achieve further delay in the execution of a removal order that has been affirmed by both the Board of Immigration Appeals and this Court. His stated goal is to win consideration of his preposterous and unprecedented contention that his removal to Germany, where an arrest order awaits him on suspicion of participation in at least 29,000 murders, would subject him to conditions that would somehow constitute “torture” as defined by the Convention Against Torture. As is set forth below, Petitioner’s last-ditch effort to avoid the considered judgments of the courts – an effort that includes blatant prevarication about his health status – cannot survive scrutiny on either the law or the facts.

Respondent respectfully submits this memorandum of law opposing Petitioner John Demjanjuk’s motion for a stay of removal, in compliance with the

April 16 Order. This Court should not reach the merits of the petition because it lacks jurisdiction to do so. Per the Court's order, however, Respondent will address the four elements governing a request for a stay of removal. The petition is meritless. None of the four factors governing a stay of removal weigh in Petitioner's favor. Indeed, the first prong of the test, the likelihood of success on the merits, by itself squarely forecloses Petitioner's claim. Accordingly, this Court should dismiss the petition for review and dissolve the stay that was issued.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS.

A. Prior Proceedings¹

Petitioner John Demjanjuk was born in Ukraine on April 3, 1920. During World War II, he served as an armed SS guard of civilians at several Nazi-operated concentration and death camps, including the notorious Sobibor extermination center and the Majdanek and Flossenbürg Concentration Camps. Petitioner immigrated to the United States on February 9, 1952 from Germany and was naturalized as a United States citizen in 1958.

In 1999, the United States ("Government") filed a civil complaint seeking to revoke Petitioner's citizenship. On February 21, 2002, the district court revoked

¹ This Court is well versed in the facts and the long procedural history concerning Petitioner, so the facts will be presented in brief.

Petitioner's naturalized U.S. citizenship on the basis that he procured his citizenship by concealing and misrepresenting his SS guard service at Nazi-operated concentration camps and an extermination center during World War II and because his assistance in Nazi persecution rendered him ineligible to enter the United States. *United States v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002) (unpublished). In particular, the district court found that Petitioner "contributed to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide" in the gas chambers at the Sobibor extermination center in Nazi-occupied Poland. *Demjanjuk*, 2002 WL 544622 at *21. The district court also found that he assisted in Nazi persecution by serving as an armed guard at the Majdanek and Flossenbürg concentration camps. *Id.* at *27. On April 30, 2004, this Court affirmed the revocation of Petitioner's U.S. citizenship. *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied*, 543 U.S. 970 (2004).

On June 16, 2005, an Immigration Judge ("IJ") found that Petitioner was removable from the United States for, among other reasons, his participation in Nazi persecution under the Holtzman Amendment, sections 237(a)(4)(D) and 212(a)(3)(E)(I) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1227(a)(4)(D) and 1182(a)(3)(E)(I). The IJ found that Petitioner was statutorily

barred from all forms of relief from removal except Convention Against Torture (“CAT”) deferral because of his assistance in Nazi persecution, and designated Ukraine, Germany, or Poland as the countries of removal. In December 2005, the IJ denied Petitioner’s application for deferral of removal to Ukraine under CAT and ordered him removed from the United States to either Ukraine, Germany, or Poland. The Board of Immigration Appeals (“BIA” or “Board”) dismissed his appeal on December 21, 2006, and on January 30, 2008, this Court affirmed the BIA decision. *Demjanjuk v. Mukasey*, 514 F.3d 616 (6th Cir.), *cert. denied*, 128 S. Ct. 2491 (2008).

B. Current Proceedings

On March 10, 2009, a German judge issued an arrest order (announced publicly the next day) for Petitioner on suspicion of assistance in the murder of at least 29,000 Jews at the Sobibor extermination center during World War II. The German government subsequently notified U.S. Immigration and Customs Enforcement (“ICE”) that it would admit Petitioner onto its territory pursuant to the order of removal.

On April 2, 2009, Petitioner filed a motion with the Arlington, Virginia, Immigration Court to stay his removal and reopen his case to hear a new CAT claim, alleging changed country conditions in Germany. This petition was filed

more than three years after he was ordered removed to Germany, Ukraine, or Poland, and over three weeks after Germany issued an order for his arrest and announced publicly that Petitioner would be admitted as a deportee from the United States. The Government opposed these motions primarily on jurisdictional grounds in that the immigration court did not possess jurisdiction to entertain motions to reopen since only the Board could consider matters on which it had previously ruled. Despite lacking jurisdiction, the IJ granted a stay of removal on April 3, 2009. On April 6, 2009, the IJ reversed himself, finding the immigration court did not possess jurisdiction to consider Petitioner's motions, but he nevertheless ordered that the stay of removal be kept in place until April 8, 2009.

ICE had been prepared to remove Petitioner on April 5, 2009. It had a Gulfstream IV aircraft, owned by the Federal Aviation Administration, standing by to transport him to Germany accompanied by ICE agents and medical personnel including a physician. The IJ's erroneous grant of a stay of removal frustrated this effort, and the IJ compounded the problem by maintaining the stay in place even after acknowledging he had no jurisdiction to issue it in the first instance.

On April 7, 2009, Petitioner filed motions to reopen his case and for a stay of removal with the BIA, alleging that due to his age, health, and prior experiences as a defendant in U.S. and Israeli court proceedings, removal to Germany for

possible trial and incarceration somehow constituted “torture” under the CAT. On April 8, 2009, Respondent filed its opposition to these motions. Among other things, Respondent argued that Petitioner failed to articulate a *prima facie* case that he would be tortured in Germany and that medical documentation he submitted, on its face, did not indicate that he was unable to travel to Germany.

On April 10, 2009, the Board denied Petitioner’s application for a stay of removal, concluding “[a]fter consideration of all the information” “there is little likelihood” that the motion to reopen would be granted.

On April 14, 2009, Petitioner filed a “motion for stay pending review” with this Court. Petitioner requested “entry of an order staying his removal from the United States pending this Court’s review of the April 10, 2009 decision of the Board of Immigration Appeals denying” his request for a stay of removal.² The Government filed its response within two hours, asserting that Sixth Circuit precedent clearly established that the Court lacked jurisdiction to review the BIA’s order. Nonetheless, the Court granted the stay on the basis that Petitioner was about to be removed. Indeed, ICE was again prepared to remove Petitioner. It had contracted with a commercial aviation charter company for an aircraft and crew to

² Petitioner also requested, in a footnote, that the Court stay removal until it could review a non-existing BIA order disposing of his motion to reopen.

transport Petitioner that evening to Germany and had taken Petitioner into custody for the purpose of executing the final order of removal after this Court ruled upon Petitioner's stay motion. Once again, for cautionary reasons, medical personnel, including a physician, were in place to accompany Petitioner on the flight. The Court's stay once again frustrated the Government's efforts.

On April 15, 2009, the BIA denied Petitioner's motion to reopen the removal proceedings, on the bases summarized *infra*. Petitioner again waited until the eleventh hour, filing a petition for review of that order – with yet another stay request – on the morning that the instant pleading is due, April 23, 2009. The Court has instructed the Attorney General to respond to the new stay petition the following day, on April 24, 2009.

On April 16, this Court issued its briefing order. Thereafter the Government filed a Fed.R.App.P. 28j letter to advise the Court of the BIA's April 15, 2009 ruling. Petitioner filed a motion to strike part of that letter, and the Government filed a motion to dismiss this case for mootness.

C. Compliance with the Court's Order to Produce, Dated April 16, 2009

In response to the Court's April 16, 2009 Order, the Government submits under seal as Attachment I the report produced by Captain Carlos M. Quinones,

MD. He is a certified flight surgeon and as a result of his examination has cleared Petitioner for a flight to Germany.

Also in response to the Court's April 6, 2009 Order, the Government submits as Attachment A the Declaration of Marc J. Moore, Assistant Director for Field Operations for the Office of Detention and Removal Operations at ICE. This declaration sets forth the conditions under which Petitioner will be transported to Germany.

D. The BIA Opinion Denying Petitioner's Motion to Reopen

In its opinion denying Petitioner's motion to reopen the removal proceedings, the BIA noted that CAT deferral does not fall within the statutory exception to the deadline for motions to reopen and held that Petitioner, in any event, had not met his burden of showing either a likelihood that he would be tortured if removed to Germany or changed conditions pertaining to his CAT claim:

[Petitioner's claim] is not supported by evidence showing a likelihood that, if his proceedings were reopened, he would be able to meet his burden of proving that it is more likely that not that he will face torture in Germany or than any law enforcement actions would "defeat the object and purpose of the Convention Against Torture."

BIA Decision Denying Motion to Reopen at 3 (April 15, 2009) ("BIA Reopen Denial").

In so holding, the Board made two findings. At the outset, the BIA rejected Petitioner's torture claim as nothing more than rank speculation:

[The] argument that Germany's intent in seeking to charge him is to inflict pain and suffering on him that, due to his age and physical condition, would now amount to torture within the meaning of 8 C.F.R. § 1208.18(a) is entirely speculative.

Id. at 2.

Next, the Board rejected Petitioner's argument regarding the conditions in Germany for those awaiting criminal trial:

[Petitioner] has not provided any objective evidence establishing that Germany's criminal justice system does not consider a defendant's physical capacity to stand trial . . . or that, if he is detained, appropriate medical care will not be provided or he will otherwise be subjected to conditions that reach the "extreme form of cruel and inhumane treatment" necessary to constitute torture.

Id. at 2-3.

Citing this Court's ruling in *Haddad v. Gonzales*, 437 F.3d 515 (6th Cir. 2006), the Board also noted that, as a Nazi persecutor, Petitioner may seek only CAT deferral (rather than withholding), and that this protection is not referenced in the 8 C.F.R. § 1003.2(c)(3)(ii) exception to the general 90 day deadline for filing motions to reopen. (BIA Reopen Denial at 1). The Board found that even if an exception for CAT deferral exists, Petitioner had not met his burden of showing

changed circumstances relevant to his previous CAT petition—a prerequisite to fall under the narrow § 1003.2(c)(3)(ii) exception to the filing deadline. *Id.* at 3.

The Board also found that Petitioner’s argument concerning the Israeli proceedings was not relevant to his motion to reopen. *Id.* at 3. While refraining on jurisdictional grounds from adjudicating Petitioner’s contention that his possible criminal prosecution in Germany would violate the double jeopardy clause of the U.S. Constitution³, the BIA found that it had jurisdiction “to the extent that this argument relates to the issue of deferral of removal . . . [and] we do not find that it provides any meaningful support for the petitioner’s Convention Against Torture claim.” *Id.* Finally, the Board determined that “we have no jurisdiction to review the DHS physician’s medical determination regarding the respondent’s physical fitness to travel.” *Id.*

III. ARGUMENT

The Government submits that the Court ought not reach the merits of Petitioner’s stay application because it lacks the jurisdiction to do so. Even if this jurisdictional hurdle could be overcome, however, the stay fails on the merits.

³ The dual sovereignty exception to the double jeopardy principle does not bar successive prosecutions by different states or countries. *See United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000); *see also United States v. Wheeler*, 435 U.S. 313 (1978); *Abbate v. United States*, 359 U.S. 187 (1959).

A motion to reopen removal proceedings requires the movant to establish *prima facie* eligibility for that relief, which in turn requires him to produce objective evidence showing a reasonable likelihood that he can establish that he is entitled to relief. See *INS v. Abudu*, 485 U.S. 94, 104 (1988); *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002); accord *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003).

As a matter of course, motions to reopen deportation proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.” *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94, 107-108 (1988)). The reasons are clear: “There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.” *Abudu*, 485 U.S. at 107. Moreover, as the Supreme Court has observed, “every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.” *Doherty*, 502 U.S. at 323; accord, *Jaber v. Mukasey*, 274 Fed. Appx. at 473. Indeed, as the Supreme Court has repeatedly advised, “[a] stay is not a matter of right, even if irreparable injury might otherwise result. . . . It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the

circumstances of the particular case.” *Nken v. Holder*, 556 U.S. ___, 2009 WL 1065976 at *11 (April 22, 2009) (citations and internal quotation marks omitted).

To prevail on a motion for a discretionary stay of removal, a movant must show more than that his case raises serious or complex issues, but rather must demonstrate: (1) “a strong showing” that he is likely to succeed on the merits; (2) irreparable injury absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) that the public interest lies in granting the requested stay. *Id.* at *11. The Supreme Court has held that the first two factors are the “most critical.” *Id.* Petitioner utterly fails to satisfy this standard—most notably in failing to make “a strong showing” that he is likely to succeed on the merits.

As the Board found, Demjanjuk has failed to meet his burden of proving that he is likely to succeed on the merits of a motion to reopen. (BIA Reopen Denial at 3). His argument that, in light of his age, purported state of health, and prior experiences with law enforcement authorities in the United States and in Israel, incarceration and prosecution in Germany would amount to torture is wholly deficient both legally and factually.

A. This Court Lacks Jurisdiction to Review the Petition

This Court should not reach the merits of Petitioner's claim. As explained more fully in three previous pleadings, this case must be dismissed for lack of jurisdiction.

First, the petition for review filed on April 14, 2009, seeks review of a *preliminary* order from the Board of Immigration Appeals (the "Board" or "BIA"). Specifically, Petitioner asked this Court to review "an Order of the Board of Immigration Appeals denying petitioner's Emergency Stay of Removal." (Pet. Rev. at 1). Courts of appeals have statutory jurisdiction only to review *final* orders of removal in immigration cases. *See* 8 U.S.C. §§ 1252(a)(1) and (b)(1). Because there was no reviewable final order of removal, this Court lacks jurisdiction. The petition for review and related motion for a stay of removal must be dismissed under this Court's binding precedent. *See Prekaj v. INS*, 384 F.3d 265, 267 (6th Cir. 2004).

Second, the petition is now moot. Here, the relief Petitioner seeks is no longer available, namely, review of the BIA's discretionary denial of his request for a stay of removal pending resolution of his motion to reopen. On April 15, 2009, the BIA denied Petitioner's motion to reopen and declined to grant a stay of removal. Thus, there is no present, live controversy on which this Court can rule,

and the case is moot as a result. *See Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007).

B. Petitioner's Request for a Stay is Meritless

In the event he is able to overcome two separate jurisdictional hurdles, Petitioner's request for a stay of removal fails on the merits. Petitioner cannot sustain his "burden of showing that the circumstances justify an exercise of . . . discretion" in granting a stay. *Nken*, 2009 WL 1065976 at *11.

A motion to reopen removal proceeding requires the movant to establish *prima facie* eligibility for that relief, which in turns requires him to produce objective evidence showing a reasonable likelihood that he can establish that he is entitled to relief. *See INS v. Abudu*, 485 U.S. 94, 104 (1988); *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002); *accord Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir. 2003).

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held that the first two factors are the “most critical.” *Id.* Demjanjuk utterly fails to satisfy this standard—most notably in failing to make “a strong showing” that he is likely to succeed on the merits.

1. As the BIA Correctly Found, Petitioner has “Little Likelihood” of Success on the Merits, Let Alone the Necessary “Strong Showing” of Likely Success

The first of the four factors in the standard formulated by the Supreme Court to guide a court’s discretion in granting a stay of removal is “whether the stay applicant has made a strong showing that he is likely to succeed on the merits.” *Nken*, 2009 WL 1065976 at *11 (internal citation omitted). In order to succeed on the merits, Petitioner must convince the Court to overturn the BIA’s decision by persuading this Court that the BIA abused its discretion when it denied his motion to reopen. *See Nwakanma v. Ashcroft*, 352 F.3d 325, 327-28 (6th Cir. 2003); *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001), *abrogated on other grounds*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Nken*, 2009 WL 1065976 at *11. Petitioner is not entitled to a stay as he cannot meet this burden, as explained *infra*.

“The decision whether to grant or deny a motion to reopen...is within the discretion of the Board” 8 C.F.R. § 1003.2(a). A circuit court accordingly

reviews the Board's denial of a motion to reopen under an abuse of discretion standard. *E.g.*, *Barry v. Mukasey*, 524 F.3d at 724; *Haddad v. Gonzales*, 437 F.3d 515, 517 (6th Cir. 2006) (collecting authorities). *See INS v. Doherty*, 502 U.S. 314, 323-24 (1992). This standard requires the appellate court to decide whether the "denial of the motion to reopen was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group." *Barry*, 524 F.3d at 724; *Haddad*, 437 F.3d at 517 (quoting *Allabani v. Gonzales*, 402 F.3d 668, 675 (6th Cir. 2005)). Legal issues are reviewed *de novo*.

The Board's finding that Demjanjuk has failed to demonstrate that he is likely to succeed on the merits of a motion to reopen (BIA Reopen Denial at 3), is not an abuse of discretion. Petitioner's argument that, in light of his age, purported health and prior experiences with law enforcement authorities in the United States and in Israel, incarceration and prosecution in Germany would amount to torture is wholly deficient both legally and factually.

1. **Demjanjuk Relies Upon Subjective Fears**

In order to obtain deferral of removal under CAT, one must prove that it is more likely than not that he will be tortured if removed to a particular country. 8 C.F.R. §§ 208.16(c)(2) and 207.17(a). It is not sufficient for an applicant to claim a subjective fear that torture might occur. Rather, the applicant must prove, through objective evidence, that he or she is likely to be tortured in a particular country. *Abeshi*, 259 Fed.Appx. at 778; *Sevoian v. Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002); *Matter of J-E-*, 23 I. & N. Dec. 291, 302 (BIA 2002). Moreover, to the extent that Demjanjuk attempts to predicate his CAT claim upon the “torture” that he will supposedly suffer en route to Germany while in U.S. custody, such a claim must fail. *See Renkel v. United States*, 456 F.3d 640, 644 (6th Cir. 2006)

As the BIA found (BIA Reopen Denial at 2-3), Demjanjuk has not offered objective evidence that he is more likely than not to be tortured in Germany. In fact, he has utterly failed to provide any evidence that he would suffer torture upon removal to Germany. Rather, he relies merely upon his own alleged subjective fear of physical and psychological suffering and discomfort due to the ailments of old age and prior legal proceedings against him and the alleged physical difficulty of the trip to Germany and subsequent incarceration. This Court has made clear on several occasions that subjective fears cannot form a basis for a motion to reopen removal proceedings based upon changed conditions: “[A]n alien filing a motion

to reopen based on changed country conditions ‘cannot rely on speculative conclusions or mere assertions of fear’ *Jaber*, 274 Fed.Appx. at 474 (alleging fear of possible persecution and torture), quoting *Harchenko*, 379 F.3d at 410.

Thus, the BIA’s conclusion that Demjanjuk was unlikely to prevail on the merits of his torture claim was not clearly erroneous.

2. Germany’s Intent

Demjanjuk cites Germany’s intention to (possibly) try him on criminal charges as “changed circumstances.” Yet, as the Board recognized (BIA Reopen Denial at 2), Demjanjuk’s mere speculation that he will suffer in Germany if forced to stand trial and serve a prison term does not state a CAT claim as a matter of law. Fundamentally, as the BIA found, “[t]he definition of ‘torture’ at 8 C.F.R. § 1208.18(a)(3) expressly provides that ‘[t]orture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’ including ‘judicially imposed sanctions and other enforcement actions authorized by law’” (BIA Reopen Denial at 2). *See also Pavlyk v. Gonzalez*, 469 F.3d 1082, 1090-91 (7th Cir. 2006) (possibility of conviction for bribery and prison term in Ukraine do not constitute “torture” under CAT because they fall within the exception for “lawful sanctions”); *Celaj v. Ashcroft*, 121 Fed.Appx. 608, 611-12, 2005 WL 221497 (6th Cir. Feb. 10, 2005) (Sixth Circuit affirmed immigration judge’s

finding that the fact that an alien might have to serve the remaining balance of a prison term in Albania does not constitute torture under CAT).

Indeed, even if the possibility of trial and imprisonment did not fall within the legal sanctions exception to CAT, torture is defined as “an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment” 8 C.F.R. § 1208.18(a)(2). Moreover, as has been explained by the Third Circuit, CAT requires “a showing of specific intent before the Court can make a finding that a petitioner will be tortured.”

Pierre v. Attorney General, 528 F.3d 180, 189 (3d Cir. 2008) (*en banc*); see 8 C.F.R. § 1208.18(a)(5) (requiring that the act “be specifically intended to inflict severe physical or mental pain or suffering”); *Auguste v. Ridge*, 395 F.3d 123, 139 (3d Cir. 2005) (“[T]his is a ‘specific intent’ requirement and not a ‘general intent’ requirement” (quoting *Matter of J-E-*, 23 I. & N. Dec. 291, 300-01 (BIA 2002))).

An applicant for CAT protection therefore must establish that “his prospective torturer will have the motive or purpose” to torture him. *Pierre*, 528 F.3d at 189; *Auguste*, 395 F.3d at 153-54 (“The mere fact that the Haitian authorities have knowledge that severe pain and suffering may result by placing detainees in these conditions does not support a finding that the Haitian authorities intend to inflict severe pain and suffering. The difference goes to the heart of the distinction

between general and specific intent.”). Poor prison conditions (Demjanjuk has not – and cannot with any credulity – alleged that German prison conditions are poor) are not a basis for deferral unless they are deliberately created and maintained for the purpose of inflicting extreme pain or suffering. *J-E-*, 23 I. & N. Dec. at 301; *accord Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005); *Auguste*, 395 F.3d at 152-53; *Cadet v. Bulger*, 377 F.3d 1173, 1193-95 (11th Cir. 2004).

Like the applicant in *Pierre*, Petitioner protests his anticipated detention upon removal, claiming that his physical condition will be harmed by the fact of detention. As the BIA correctly held (BIA Reop. Den. at 2-3), even accepting this assumption and the existence of all of Petitioner’s claimed maladies, confinement of individuals with medical needs clearly does not constitute torture.

Further, even assuming, *arguendo*, that Germany, a developed Western democracy, maintains a prison system with limited medical provisions for detainees (and Petitioner has made no such argument), he has failed to claim, let alone establish, that German authorities have deliberately created and maintained prison conditions intended to cause severe pain or suffering. To the extent that German authorities may inadvertently cause Petitioner to experience any degree of discomfort during the course of a criminal prosecution or incarceration, this is not

cognizable under CAT. See 8 C.F.R. § 1208.18(a)(5) (act causing unintended or unanticipated severity of pain and suffering not torture).

In its most recent annual human rights report, the U.S. Department of State noted that torture has not been reported in Germany. See Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Germany Country Reports on Human Rights Practices – 2008* (Feb. 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119081.html> (“The law prohibits such practices, and there were no reports that government officials employed them.”). Prison conditions in Germany also “generally met international standards, and the government permitted visits by independent human rights observers.” *Id.* According to the World Factbook of Criminal Justice Systems, prisoners in Germany enjoy a variety of rights and amenities. “The prison is responsible for providing for the physical and mental well-being of the inmate. Religious services and other religious events or meetings are a right. The prison must provide for medical and dental care of inmates.” Alexis A. Aronowitz, *WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjger.txt>.

As for possible trial in Germany, the State Department has noted, “The law provides for an independent judiciary, and the government generally respected this

provision in practice.” Petitioner’s complaint about the stress of trial in Germany (Pet. Stay Mot. at 2-3) is unavailing. His medical capacity to stand trial abroad is, of course, irrelevant in a removal proceeding. Moreover, German courts have the authority to dismiss prosecutions on health grounds. Indeed, in the Nazi cases, such outcomes have been commonplace in Germany for many decades.⁴

In sum, Demjanjuk has failed to produce any evidence indicating that Germany intends to subject him to extreme pain and suffering, or that, if incarcerated or tried, he will be held under conditions that are inappropriate either medically or in any other respect. This leads to the same inexorable conclusion reached by the BIA on Demjanjuk’s petition to reopen: Demjanjuk has failed to make out a *prima facie* showing that he is entitled to CAT deferral. (*See* BIA Reopen Denial at 2-3).

3. Demjanjuk Has Failed To Show That His Removal Should Be Stayed Due To His Health

⁴ Already thirty years ago, the German government's then-chief investigator of Nazi crimes, Dr. Adalbert Ruckerl, wrote that "[i]n many cases, the incapacity of the accused and defendants to stand trial as determined by a court-approved medical practitioner ruled out fresh proceedings at a later date or brought about the suspension of an on-going trial." Adalbert Ruckerl, *The Investigation of Nazi Crimes 1945-1978* (Heidelberg: C.F. Muller, 1979) at 78. (*See also* BIA Reop.Den. At 2, n.2.)

Neither Respondent's health nor the conditions of his flight to Germany are cognizable under CAT, which concerns intentional treatment amounting to torture by the country to which an alien is deported. *See Renkel*. Moreover, Demjanjuk has failed to support his contention that he will undergo a "cruel and inhumane condition of transport" and that "the rigors of arrest, incarceration and trial in Germany will inflict pain and suffering on him that rise to the level...[of] torture."

a. Petitioner will travel comfortably and with medical care

Petitioner offers nothing but surmise in support of his complaints about ICE transport. For this reason alone, this claim should be denied. Further, Attachment A, a Declaration by ICE Field Office Director Marc J. Moore, who is the operational lead for Petitioner's removal, demonstrates the *bona fides* of the Government's previous representation to the immigration judge ("IJ"), BIA, and this panel that Petitioner will be made comfortable during his flight and that he will be accompanied by medical personnel. (Moore Decl. ¶¶ 1-8). Mr. Moore attests that on April 14, 2009, ICE was scheduled to transport Petitioner on a Gulfstream chartered jet equipped with a bed and linens for reclining and accompanied by medical personnel. (*Id.* at ¶¶ 2-7). Field Office Director Moore added that ICE intends to use the same or a similar chartered aircraft with medical personnel for Petitioner's removal, and he "will be able to lie down during the flight once the

aircraft reaches cruising altitude.”) (*Id.* at ¶¶ 3, 6-7). Clearly, Petitioner’s expression of concern for his physical ability to withstand the flight is predicated upon misinformation.

b. Petitioner’s health is stable

None of the medical reports submitted by Petitioner support his claims that his physical condition would subject him to torture if transported or incarcerated. Indeed, Petitioner’s claims of inability to travel, personal hardship if incarcerated, or danger of receiving inadequate medical care in Germany are actually belied by all the medical reports he submitted in support of his filings with the Board.

Nowhere do those medical reports state that he is unable to travel or participate in possible legal proceedings. The exhibits filed with this pleading, which include affidavits of ICE officials who have encountered Petitioner and also ICE surveillance video recordings that show Petitioner walking briskly, smiling and animatedly conversing, and otherwise engaging in conduct that belies his health claims, offer further support for the conclusion that he is fit to fly.

The report by DHS medical doctor and Clinical Director at Attachment I fully supports the Attorney General’s conclusion that Petitioner’s medical condition is stable enough to allow him to travel safely. As was set out in

Respondent's Motion filed April 21, 2009, the Attorney General would prefer that the medical record not be sealed. However, since the medical record potentially implicates the statutory privacy interests of Petitioner, and he has chosen not to authorize the Attorney General to unseal his medical record so that it can be in the "public view," the report must be submitted under seal without discussion of the details of its content. As the Court can see, however, Petitioner has been cleared for transport, and the medical report defeats his contention that he is too ill to travel.

c. The Addendum to this brief demonstrates Petitioner's prevarication regarding his health

In light of both the video recording with affidavit submitted by Petitioner as Attachment 3 to his stay motion and this Court's indication that it will assess Petitioner's medical condition, the Government's exhibits and Addendum evidence Petitioner's ongoing prevarication regarding his health in this judicial proceeding.

It should be noted, however, that Petitioner's medical condition and the circumstances of his anticipated flight to Germany bear solely on his CAT claim. The courts do not have jurisdiction to review ICE's medical determination regarding a deportee's physical fitness to travel (BIA Reopen Denial at 3).

B. A Stay Will Not Cause Irreparable Harm

In *Nken*, the Supreme Court stated that a party seeking a stay must do more than show “some ‘possibility of irreparable injury.’” *Nken*, 2009 WL 1065976 at *11 (internal quotes and citations omitted). This Demjanjuk cannot do.

The Supreme Court declared just yesterday that removal in and of itself “is not categorically irreparable.” *Id.* at 15. Indeed, to the extent that Demjanjuk bases his irreparable injury claim on an assertion that removal will deny him judicial review (Pet. Stay Mot. at 6-8), such an argument fails wholly and completely, both because of the facts of this case and also as a legal matter. First, the Attorney General has agreed to refrain from removing Demjanjuk up to and including April 30, 2009, affording him time to litigate his appeal of the BIA’s denial of his motion to reopen. More to the point, though, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) specifically repealed the prohibition of judicial review after an alien had been removed from the country, *see* IIRIRA § 306(b), thereby enabling aliens to continue to litigate their petitions for review from abroad. This key statutory change accordingly precludes any argument that Demjanjuk’s removal, by foreclosing judicial review, will result in irreparable injury.

Moreover, to the extent that Demjanjuk suggests that he will suffer the usual hardships attendant to an alien's removal, such hardships are insufficient to establish irreparable harm. The hardships of leaving friends, family, and a life established in the United States do not constitute the type of irreparable harm that stays of removal aim to prevent. *See Ignacio v. INS*, 955 F.2d 295 (5th Cir. 1992); *Lucacela v. Reno*, 161 F.3d 1055, 1059 (7th Cir. 1998). To be sure, removal is a statutorily mandated consequence of Demjanjuk's illegal presence in the United States. Removal is "nonpunitive," *Linnas v. INS*, 790 F.2d v. *INS*, 790 F.2d 1024, 1030 (2d Cir. 1986), and thus it cannot be the basis of an individual's claim of harm. *See also* S. Rep. No. 104-249, at 7 (1996), (*reprinted at* 1996 WL 180026) ("[t]he opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement"). Thus, Demjanjuk has failed to show that removal would cause him irreparable injury.

C. The Balance of Harm Weighs Against Granting a Stay and the Public Interest Will be Served by Effecting the Removal Order Against Demjanjuk

The third and fourth factors of the stay inquiry – balancing the harms and determining the public interest – are merged when the Government is the party opposing a stay. *Nken* 2009 WL 1065976 at *12. In evaluating these related and consolidated factors, the Court stated in *Nken* that "[a] court asked to stay removal

cannot simply assume that “[o]rdinarily, the balance of hardships will weigh heavily in the applicant’s favor,” (citing *Andreiu v. Ashcroft*, 253 F.3d 477, 484 (9th Cir. 2001) (en banc)), and that “courts must be mindful that the Government’s role as the respondent does not make the public interest in each individual one negligible” *Id.*

Indeed, in *Nken* the Court made clear that there is a strong public interest in effecting removal orders quickly and efficiently so as not to allow an alien, who, it has been determined, has no right to continue to live here, to stay in the country.

There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA [Illegal Immigration Reform and Immigrant Responsibility Act of 1996] established, and “permit[s] and prolong[s] a continuing violation of United States law.”

Id., quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999). In this case, it is clear that after nearly ten years of litigation, staying the removal order will injure the public interest by needlessly further delaying a removal that has been determined to be lawful and justifiable by an immigration judge, the BIA, and this Court. Petitioner’s instant petition is devoid of any legal or evidentiary support and should be seen for what it is: a meritless last-ditch

effort to avoid the judgments of numerous courts, including this one, that have heard his case.

Moreover, the Court in *Nken* stated that certain circumstances could strengthen the already significant public interest in prompt removals. *Nken*, 2009 WL 1065976 at *12. Such circumstances exist here, where the individual to be removed is one whom several courts, including this one, have determined participated in Nazi-sponsored persecution of thousands of innocent civilians during World War II,⁵ and therefore is one whom the INA specifically mandates must be removed. *See* INA § 237(a)(4)(D), 8 U.S.C. § 1227(a)(4)(D). Petitioner, it will be recalled, has been proved to have “contributed” to the process by which thousands of Jews were murdered by asphyxiation with carbon monoxide” in the gas chambers at the Sobibor extermination center in Nazi-occupied Poland. *Demjanjuk*, 202 WL 544622 at *8. Indeed, Congress believed it was so important to remove those who assisted in Nazi persecution, that it afforded them no form of

⁵ *United States v. Demjanjuk*, 2002 WL 544622 (N.D. Ohio Feb. 21, 2002), *United States v. Demjanjuk*, 367 F.3d 623 (6th Cir.), *cert. denied*, 543 U.S. 970 (2004); I.J. merits decision (June 16, 2005); *In re: John Demjanjuk*, A008 237 417 (BIA Dec. 21, 2006).

relief except deferral under CAT.⁶ As the Second Circuit Court of Appeals has stated:

Deportation furthers the non-punitive legislative purpose of protecting the citizenry from persons harmful to the public good. In the case of Nazi persecutors, it borders on sophistry to deny the legitimate legislative purposes of excluding known mass murderers from the United States. It was certainly reasonable for the citizens of the United States, through their elected representatives, to conclude that they did not wish to share their communities with persons who ordered the wholesale extermination of innocent men, women and children. It is also reasonable for the United States, apart from any punitive intent, to wish not to be known in the family of civilized nations as a haven for the refuse of the Nazi abomination.

Linnas, 790 F.2d at 1030.

Against this weighty public interest is the supposed harm that will befall Petitioner, which consists of his wholly unsupported claim that incarceration in a German prison will cause him pain and suffering so severe as to amount to torture

⁶ Any alien who assisted in Nazi-sponsored acts of persecution is barred as a matter of law from virtually all forms of relief from removal except CAT deferral, including cancellation or removal, registry, asylum, withholding of removal (whether based on the likelihood of persecution or the likelihood of torture), and voluntary departure. *See* INA § 240(A)(c)(4), 8 U.S.C. § 1229b(c)(4); INA § 101(f)(9), 8 U.S.C. 1101(f)(9); INA § 249, 8 U.S.C. § 1259; INA § 208(b)(2)(A)(I), 8 U.S.C. 1158(b)(2)(a)(I).

– a claim that the Board soundly rejected. (*See* BIA Reopen Denial at 2-3)
(Petitioner failed to “provide[] any objective evidence establishing that Germany’s criminal justice system does not consider a defendant’s physical capacity to stand trial, that he will likely be detained pending trial, or that, if he is detained, appropriate medical care will not be provided or he will otherwise be subjected to conditions that reach the ‘extreme form of cruel and inhumane treatment’ necessary to constitute torture.”). Surely, Petitioner’s speculative harm does not and cannot outweigh the public interest in removing an alien who participated in Nazi-sponsored mass murder.

III. CONCLUSION

For all the foregoing reasons, this Court should dismiss Petitioner's Motion for Stay of Removal.

Respectfully submitted,

s/Robert Thomson

ROBERT THOMSON

Deputy Director

U.S. Department of Justice

Criminal Division

Office of Special Investigations

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CERTIFICATION OF COMPLIANCE WITH
Fed. R. App. P. 32(a)(7)(C) AND 6 Cir. R. 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing Respondent's Second Opposition to Petitioner's Motion for Stay of Removal complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7) and 6 Cir. R. 32(a). The brief contains 7032 words, and the main text is printed in 14 point "Times Roman" typeface. I further certify that the five CDs filed separately were scanned and are virus free.

s/Robert Thomson

Robert Thomson

Deputy Director

Office of Special Investigations

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Dated: April 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2009, the foregoing Respondent's Submission in response to Court's April 16, 2009 Order with Attachments A-H were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

I also hereby on certify on this 23rd day of April, 2009, that five CDs (Exhibits 1-5) were served on counsel for Petitioner via overnight courier Federal Express to:

John Broadley
John H. Broaley & Associates, P.C.
1054 31st Street, N.W., Suite 200
Washington, D.C. 20007

/s/ Robert Thomson
Robert Thomson
Deputy Director
Office of Special Investigations
Criminal Division
10th & Constitution Avenue, N.W.
John C. Keeney Building
Washington, D.C. 20530
(202) 616-2492
(202) 616-2491 (fax)

ADDENDUM

Court Ordered Attachments:

Attachment A

In response to the Court's April 16, 2009 Order, Respondent submits as Attachment A the Declaration of Marc J. Moore, Assistant Director for Field Operations for the Office of Detention and Removal Operations at ICE. This declaration sets forth the conditions under which Mr. Petitioner will be transported to Germany.

Attachment I

Also in response to the Court's April 16, 2009 Order, Respondent submits under seal as Attachment I the report produced by Captain Carlos M. Quinones, MD. He is a certified flight surgeon and as a result of his examination has cleared Petitioner to fly.

Other Attachments and Exhibits:

Attachment D

Attachment D is a sworn declaration by Joseph P. Laws, a Deportation Officer (DO) for ICE Office of Detention and Removal Operations (DRO). On April 6, 2009, unknown to Petitioner, a video recording was made by DO Laws of Petitioner exiting a vehicle and entering a medical building. The details of the

making of that video are set forth in Attachment D. The recording is submitted on the CD marked as Exhibit 1 and playable as a WMV file on a personal computer.

Attachment E

Attachment E is a sworn declaration by Charles Winner, Supervisory Detention and Deportation Officer for ICE DRO. On April 6, 2009, unknown to Petitioner, a video recording was made by Winner of Petitioner exiting a medical building and entering a vehicle. The details of the making of that video are set forth in Attachment E. The recording is submitted as a conventional DVD marked as Exhibit 2 and playable on a home DVD player.

Attachment F

Attachment F is a sworn declaration by Bradley Crellin, a DO for ICE DRO. On April 13, 2009, unknown to Petitioner, a video recording was made by Crellin of Petitioner exiting a vehicle and entering a medical building and of him thereafter exiting the building and entering the same vehicle. The details of the making of that video are set forth in Attachment F. The recording is submitted as a conventional DVD marked as Exhibit 3 and playable on a home DVD player.

Attachment B

Attachment B is a sworn declaration by Donald Haverty, Immigration Enforcement Agent (IEA) for ICE DRO. On April 14, 2009, IEA Haverty went to

Petitioner's residence and assisted in removing him from the residence. IEA Haverty also accompanied Petitioner to the DRO office and unknown to Petitioner made a video recording of him during his stay at the DRO office. The details of what IEA Haverty saw and the making of that video are set forth in Attachment B. The recording is submitted as a conventional DVD marked as Exhibit 4 and playable on a home DVD player.

Attachment C

Attachment C is a sworn declaration by Aaron Roby, IEA. On April 14, 2009, IEA Roby went to Petitioner's residence and assisted in removing him from the residence. IEA Roby also accompanied Petitioner to the DRO office and remained with him throughout the time he was there. Roby is shown in part of the recording marked as Exhibit 4. The details of what IEA Roby saw and heard are set forth in Attachment C.

Attachment G

Attachment G is a sworn declaration by Captain Quinones. On April 14, 2009, Captain Quinones went to Petitioner's residence and assisted in removing him from the residence. He also remained with Petitioner during the time he was at the DRO office. Some of his observations are detailed in Attachment G.

Attachment H

Attachment H is a statement under seal received by Respondent from the German Embassy in Washington, D.C.

Exhibit 5

Exhibit 5 is a video recording that the government has been informed was made by IEA Saher Abouhmoud on April 20, 2009. IEA Abouhmoud was accompanied by DO Laws while making this recording. The government only received this recording on April 22, 2009. Both IEA Abouhmoud and DO Laws are on official government travel outside of the North America and are unavailable to prepare or sign a declaration. Exhibit 5 is a CD unknown to Petitioner; it is a video recording made by Winner of Petitioner exiting a medical building and entering a vehicle. The details of the making of that video are set forth in Attachment E. Exhibit 5 is submitted as a CD playable as a WMV file on a personal computer.

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF MARC J. MOORE

Attachment A

DECLARATION OF MARC J. MOORE

Pursuant to 28 U.S.C. § 1746, I, Marc J. Moore, being first duly sworn, say that:

1. I am the Assistant Director for Field Operations for the Office of Detention and Removal Operations at U.S. Immigration and Customs Enforcement (ICE) at the Department of Homeland Security in Washington, D.C. I oversee and supervise ICE's field operations. I have specific oversight over and am the operational lead for Mr. John Demjanjuk's removal.
2. I am familiar with the charter aircraft upon which John Demjanjuk was scheduled to be transported to Munich, Germany, on April 14, 2009.
3. ICE intends to utilize the same or a similarly equipped aircraft for any future removal of John Demjanjuk.
4. The charter aircraft is a Gulfstream IV jet leased by Advanced Air Ambulance, Inc. (AAA), of Miami, Florida.
5. This aircraft with state-of-the art equipment was chosen due to the fact that it is capable of flying nonstop from Cleveland, Ohio, to Munich, Germany.
6. On the flight, Mr. Demjanjuk will be accompanied by ICE officers, two medical personnel, one of whom is a flight surgeon, and the flight crew.
7. The aircraft is equipped with its own automatic external defibrillator and oxygen. This medical air ambulance includes a standard bed with pillows and linen. Mr. Demjanjuk will be able to lie down during the flight once the aircraft reaches cruising altitude.

8. Upon arrival in Munich, ICE has arranged to immediately transfer Mr. Demjanjuk directly to German authorities, who will assume the responsibility for his medical care.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of April, 2009, in Washington, District of Columbia.



Marc J. Moore
Assistant Director for Field Operations
Office of Detention and Removal Operations

No. 09-3416

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF DONALD HAVERTY

Pursuant to 28 U.S.C. § 1746, I, Donald Haverty, do hereby declare:

- 1) I am an Immigration Enforcement Agent (IEA) for U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), located at 1240 E. 9th St., Room 535, in Cleveland, Ohio.
- 2) On April 14, 2009, I went to John Demjanjuk's residence at 847 Meadowlane Road, Seven Hills, Ohio 44131, with other ICE employees for the purpose of executing the final order of removal against him.
- 3) Mr. Demjanjuk was lying in bed when I first saw him. He appeared to be completely immobile, bedridden, and in constant pain. Other ICE employees and Division of Immigration Health Services lifted him off of the bed and put him into a wheelchair. Mr. Demjanjuk was rigid and unbending while we lifted him; he moaned and groaned continuously until after he was placed in an ICE vehicle for transport to the ICE office.
- 4) After arriving at the ICE office, I used a commercially available DVD camcorder, a Hitachi model DZ-MV580A NTSC with a zoom lens, to make a digital video recording of Mr. Demjanjuk in the ICE office. A copy of that recording is attached hereto as Government Exhibit 4.
- 5) IEA Aaron Roby stayed with Mr. Demjanjuk throughout his time in the ICE office. He is one of several persons, including Mr. Demjanjuk, identified in the video recording.

Attachment B

6) While Mr. Demjanjuk was detained at the ICE office, it did not appear that he was experiencing any discomfort or pain. He moved, i.e., he rocked back and forth, his body in the wheelchair with relative ease, turned his head and neck in various directions, and gestured with his hands and fingers to carry on a conversation. In particular, it appeared that he engaged in a conversation with IEA Roby and medical personnel present in the office.

7) When he learned that he would be going home instead of to Germany, he became quite happy, smiling and expressing a pleasant disposition.

8) While he was being wheeled in the wheelchair from the ICE office, Mr. Demjanjuk put his jacket back on and then sat back in the wheelchair and groaned twice. He then met his son, John Demjanjuk, Jr., and his ex-son-in-law. It appeared that he groaned again when he exited the building with them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of April, 2009, in Cleveland, Ohio.



Donald Haverty
Immigration Enforcement Agent

No. 09-3416

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF AARON ROBY

Pursuant to 28 U.S.C. § 1746, I, Aaron Roby, do hereby declare:

- 1) I am an Immigration Enforcement Agent for U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), located at 1240 E. 9th St., Room 535, in Cleveland, Ohio.
- 2) On April 14, 2009, I went to John Demjanjuk's residence at 847 Meadowlane Road, Seven Hills, Ohio 44131, with other ICE employees for the purpose of executing the final order of removal against him
- 3) Mr. Demjanjuk was lying in bed when I first saw him. He appeared to be completely immobile, bedridden, and in constant pain. Other ICE employees and I and Division of Immigration Health Services employees lifted him off of the bed and put him into a wheelchair. Mr. Demjanjuk was rigid and unbending while we lifted him; he moaned and groaned continuously until after he was placed in an ICE vehicle for transport to the ICE office.
- 4) On the way to the ICE office, Mr. Demjanjuk moaned and groaned every time the vehicle hit a bump.
- 5) After we arrived at the ICE office, I stayed with Mr. Demjanjuk throughout his detention that day. I am the other person (besides Mr. Demjanjuk) identified in the digital video recording that IEA Donald Haverty made while Mr. Demjanjuk was detained at the ICE office.

Attachment C

6) Mr. Demjanjuk's moaning and groaning lessened immediately upon his arrival at the ICE office. He stopped moaning and groaning entirely at some point and began carrying on an easy to follow and interesting conversation with medical personnel who were present and me.

7) While Mr. Demjanjuk was detained at the ICE office, it did not appear that he was suffering from any discomfort or pain. He turned his body in the wheelchair with relative ease, turned his head and neck in various directions, gestured with his hands and fingers to carry on a conversation, and seemed completely lucid and aware of his surroundings. He also was able to scoot himself up in the wheelchair and moved his wheelchair up with his feet while he was conversing with his son, John Demjanjuk, Jr.

8) When he learned that he would be going home instead of to Germany, he became quite happy, smiling and appearing jovial.

9) At one point, I gave him pudding to eat. He reached about 6 to 8 inches to his left to set the pudding container down on an empty bench, and then let out a groan.

10) Prior to leaving the ICE office, I observed Mr. Demjanjuk get out of the wheelchair on two occasions: first to use the restroom and second to get into the pickup truck that had arrived to take him home.

11) Mr. Demjanjuk had no apparent difficulty getting out of the wheelchair on either occasion. I saw him walk into the bathroom, again without any apparent difficulty. I helped him climb up into the pickup truck, a Ford F-150, with a rather high seat. He had no more difficulty than I would expect from someone his age in getting into the truck and scooted himself over once he climbed into the seat.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this ~~21~~²²nd day of April, 2009, in Cleveland, Ohio.



Aaron Roby
Immigration Enforcement Agent

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF JOSEPH P. LAWS

Attachment D

DECLARATION OF JOSEPH P. LAWS

Pursuant to 28 U.S.C. § 1746, I, Joseph P. Laws, being first duly sworn, say that:

1) I am a Deportation Officer for the Immigration and Customs Enforcement (ICE), Detention and Removal Operations (DRO) located at 1240 E. 9th St., Room 535, Cleveland, Ohio 44199.

2) On April 6, 2009, at approximately 3:00 p.m., I conducted surveillance on John Demjanjuk, alien registration number A08 237 417. I was accompanied on the surveillance by Supervisory Detention and Deportation Officer Charles Winner, Immigration Enforcement Agent Saher Abouhmod, and Immigration Enforcement Agent Andre Miller.

3) I saw Mr. Demjanjuk as he entered and exited the Phoenix Medical Building located at 6820 Ridge Road, Parma, Ohio, 44129.

4) Using a commercially available DVD Camcorder, a Canon ZR 600 NTSC with a zoom lens, I created a video recording of Mr. Demjanjuk entering the building. A copy of that recording is being submitted with this affidavit marked as Exhibit 1.

5) Mr. Demjanjuk arrived at the location in a brownish gray four door Lincoln sedan with Ohio license plate CIZ 3272 driven by a woman who has since been identified to me as his wife, Vera Demjanjuk.

6) I watched his arrival at the location from the public parking of the medical building.

7) Upon arrival at the building, his wife went to the passenger side of the vehicle and opened the door.

8) Mr. Demjanjuk exited from the front passenger side of the vehicle. The wife remained near the door for a short time and may have assisted Mr. Demjanjuk by holding his arm.

9) Once Mr. Demjanjuk was out of the vehicle, he walked the approximately 30-40 feet to the entrance of the building without any assistance from anyone. His wife walked ahead of him and turned her back on him as she went to the building's entrance. He used no walking assistance device.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 21st day of April, 2009 in Cleveland, Ohio.



Joseph P. Laws
Deportation Officer
Cleveland, Ohio

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF CHARLES WINNER

Pursuant to 28 U.S.C. § 1746, I, Charles Winner, do hereby declare:

- 1) I am a Supervisory Detention and Deportation Officer for U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), located at 1240 E. 9th St., Room 535, in Cleveland, Ohio.
- 2) On April 6, 2009, at approximately 3:00 p.m., I conducted surveillance on John Demjanjuk, alien registration number A08 237 417. I was accompanied on the surveillance by Immigration Enforcement Agent (IEA) Saher Abouhmod. Deportation Offer Joseph P. Laws and IEA Andre Miller conducted surveillance by a separate vehicle.
- 3) I witnessed Mr. Demjanjuk both enter and exit the Phoenix Medical Building (Building) located at 6820 Ridge Road, in Parma, Ohio.
- 4) Using a commercially available DVD Camcorder, a Hitachi DZ-MV580A NTSC with a zoom lens, I made a video recording of Mr. Demjanjuk exiting the Building. A copy of this recording which has been burned onto a digital video disc, is attached hereto as Government Exhibit 2.
- 5) At approximately 3:00 p.m., Mr. Demjanjuk arrived at the Building in a brownish-gray four-door Lincoln sedan (sedan) with an Ohio license plate CIZ 3272 affixed to the front of the vehicle. The sedan was driven by a woman who had previously been identified to me as his wife, Vera Demjanjuk. Mr. Demjanjuk was seated in the front passenger side of the vehicle.

Attachment E

- 6) I followed the sedan into the Building parking lot and parked my vehicle in the same lot.
- 7) Upon arrival at the Building, the sedan parked in a handicap spot directly across from the Building's entrance.
- 8) At about 3:00 p.m., I saw Mr. Demjanjuk walk approximately 30 feet from the sedan to the Building, and enter the Building. I did not see him receive any assistance from anyone or from a walking device.
- 9) After Mr. Demjanjuk entered the Building, I moved my vehicle to the adjacent YMCA public parking lot, which is located at 6840 Ridge Road, in Parma, Ohio
- 10) At about 3:30 p.m., I saw a person who had previously been identified to me as his son, John Demjanjuk, Jr., enter the Building.
- 11) At approximately 4:00 p.m., I saw Mr. Demjanjuk, his wife, and son exit the Building. Mr. Demjanjuk walked from the Building to the passenger side of the sedan, opened the passenger side door himself, and entered the vehicle. At no time did he receive assistance from anyone or from a walking device.
- 12) At about 4:00 p.m., the sedan departed after both Mr. and Mrs. Demjanjuk seated themselves in the car.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 22nd day of April, 2009, in Cleveland, Ohio.



Charles Winner
Supervisory Detention and Deportation Officer

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

DECLARATION OF BRADLEY CRELLIN

Pursuant to 28 U.S.C. § 1746, I, Bradley Crellin, do hereby declare:

- 1) I am a Deportation Officer for U.S. Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO), located at 1240 E. 9th St., Room 535, in Cleveland, Ohio.
- 2) On April 13, 2009, at approximately 3:00 p.m., I conducted surveillance on John Demjanjuk, alien registration number A08 237 417. I was accompanied on the surveillance by Immigration Enforcement Agent Andre Miller.
- 3) I saw Mr. Demjanjuk enter and exit the Phoenix Medical Building (Building) located at 6820 Ridge Road, in Parma, Ohio.
- 4) Using a commercially available DVD Camcorder, a Hitachi DZ-MV580A NTSC with a zoom lens, I made a video recording of Mr. Demjanjuk entering and exiting the Building. A copy of this recording is attached hereto as Government Exhibit 3.
- 5) At approximately 3:00 p.m., Mr. Demjanjuk arrived at the Building in a brownish-gray four-door Lincoln sedan (sedan) with an Ohio license plate CIZ 3272 affixed to the front of the vehicle. The sedan was driven by a woman who had been identified to me as his daughter from a previous meeting at Mr. Demjanjuk's residence on April 2, 2009. Mr. Demjanjuk was seated in the front passenger side of the vehicle.

Attachment F

6) I watched the sedan arrive at the Building from the adjacent YMCA public parking lot, which is located at 6840 Ridge Road in Parma, Ohio.

7) After the sedan arrived at the Building, Mr. Demjanjuk's daughter went to the front passenger side of the vehicle and opened the door.

8) Mr. Demjanjuk exited from the front passenger side of the vehicle. The daughter remained near the door for a short time. He then walked approximately 30-40 feet to the entrance of the Building without any assistance from anyone or from any walking device.

9) Approximately 20 minutes later, Mr. Demjanjuk and his daughter exited the Building. Mr. Demjanjuk walked to the sedan without assistance from anyone or from any walking device.

10) Mr. Demjanjuk's daughter opened the front passenger door and appeared to hold Mr. Demjanjuk's arm and for a brief moment, help move one of his legs into the sedan. At approximately 3:20 p.m., the sedan departed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of April, 2009, in Cleveland, Ohio.


Bradley Crellin
Deportation Officer

No. 09-3416

**IN THE UNITED STATES COURT OF APPEALS
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JOHN DEMJANJUK,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

**DECLARATION OF
CAPT. CARLOS M. QUINONES, MD**

Pursuant to 28 U.S.C. § 1746, I, Carlos M. Quinones, do hereby declare:

- 1) I am a certified flight surgeon employed by the Division of Immigration Health Services (DIHS). I hold the positions of Program Manager and Clinical Director for DIHS Special Operations. My current duty station is Krome Service Processing Station, which is in Miami, Florida.
- 2) On April 2, 2009, I conducted a physical examination of John Demjanjuk at which time he complained of severe back pain. During his physical examination, I touched his back lightly. When I touched his back lightly, he moaned in apparent pain and verbally complained of severe pain.
- 3) On Tuesday, April 14, 2009, I accompanied John Demjanjuk from his home in Cleveland, Ohio, to the detention area of the fifth floor of the AJ Celebrezze Federal Building located at 1240 East 9th Street, Room 535, in Cleveland, OH. I was the physician responsible for his care while he remained in the custody of U.S. Immigration and Customs Enforcement.
- 4) Mr. Demjanjuk was offered food and agreed to eat. He took several bites of a lasagna plate, ate two chocolate puddings in their entirety, and drank one apple juice box, all on his own with minimal assistance and without complaint.
- 5) While he was drinking his apple juice, he was seated in a wheelchair. He was sitting erect in the wheelchair facing forward.

Attachment G

- 6) The wheelchair he was sitting in was located near a bench.
- 7) When Mr. Demjanjuk finished drinking his apple juice, he turned to put the juice box on the bench nearby. I noticed that he turned his back with apparent ease in completing this task. I took notice of Mr. Demjanjuk's movement because during my physical examination of him on April 2, 2009, he expressed pain when moving his back.
- 8) Upon his turning motion, I said, "looks like you're moving better now", he immediately returned to his original sitting position.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this day of 22 April, 2009, in San Juan, Puerto Rico.



CAPT. CARLOS M. QUINONES, MD
Clinical Director, DIHS Special Operations



Embassy
of the Federal Republic of Germany
Washington

The Federal Government ensures that upon his removal from the United States to the Federal Republic of Germany, Mr. John Demjanjuk of Seven Hills, Ohio, will be confined at the medical facility (Krankenabteilung) of the prison (Justizvollzugsanstalt) in Munich-Stadelheim.

Preparations have already been made at that facility to ensure that Mr. Demjanjuk receives appropriate medical care at all times.

Furthermore, the Federal Government assures that Mr. Demjanjuk will be treated in accordance with all relevant international standards for the treatment of prisoners, especially of the United Nations and the European Convention on Human Rights.

Washington, D.C., April 3, 2009



Attachment H