PRACTICE ADVISORY[1]
January 2016

SEEKING REMEDIES FOR INEFFECTIVE ASSISTANCE OF COUNSEL IN IMMIGRATION CASES[2]

Noncitizens facing removal from the United States must be afforded a fundamentally fair hearing. Many courts have held that access to counsel and the right to seek a remedy when counsel does not provide effective assistance are critical elements of a fair hearing.

This practice advisory provides an overview of the current law on the right to effective assistance of counsel in immigration court proceedings and discusses how individuals can seek a remedy for ineffective assistance by filing a motion to reopen.[3] This advisory does not address ineffective assistance of counsel that occurs in the course of proceedings that take place before U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement, or Customs and Border Protection.

I. *Matter of Lozada* and the Motion to Reopen Requirements

In 1988, the Board of Immigration Appeals (BIA or Board) issued its seminal decision on ineffective assistance of counsel, *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).[4] The Board

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[2] Kristin Macleod-Ball and Beth Werlin were the primary authors of this practice advisory.

[3] Some courts have recognized that ineffective assistance also can be raised on direct appeal to the Board of Immigration Appeals (BIA). *See, e.g.*, *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007); *cf. Correa-Rivera v. Holder*, 706 F.3d 1128, 1130-31 (9th Cir. 2013) (noting that "an appeal is not the appropriate mechanism for raising [an ineffective assistance] claim," but nonetheless recognizing jurisdiction over a claim of ineffective assistance raised on direct appeal, because such appeals "are effectively motions to reopen"). Furthermore, in the Ninth Circuit, a noncitizen may be able to raise certain ineffective assistance claims that were not previously raised before the BIA in a petition for review. *See Hernandez-Mendoza v. Gonzales*, 537 F.3d 976, 977-78 (9th Cir. 2007); *but see, e.g.*, *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012).

[4] Although the Attorney General overruled *Matter of Lozada* in *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) ("*Matter of Compean I*"), that decision was vacated less than six months later in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) ("*Matter of Compean II*"). In *Matter of Compean II*, the Attorney General directed the immigration judges and the BIA to apply pre-*Compean I* standards to motions to reopen based on ineffective assistance of counsel, thus restoring *Matter of Lozada*. 25 I&N Dec. at 3. Moreover, the Attorney General directed the

recognized that ineffective assistance of counsel may violate due process, and it established a framework for adjudicating claims of ineffective assistance. The Board set forth procedural and substantive requirements for such claims, which are typically brought by filing a motion to reopen removal proceedings. The Board's decision and its requirements have been repeatedly challenged, both by noncitizens and advocates who have contended that the requirements are applied too stringently and by the Department of Homeland Security which has argued that the relief afforded in *Matter of Lozada* is too expansive. *Lozada*, however, generally has withstood these challenges and remains binding in immigration court proceedings.

A. Procedural Requirements

According to the Board, in order to seek a remedy from ineffective assistance of counsel, a noncitizen must file a motion to reopen removal proceedings. A motion to reopen based on ineffective assistance of counsel must comply not only with the general requirements set forth in the statute and the regulations, *see* INA § 240(c)(7); 8 C.F.R. §§ 1003.2(c), 1003.23(b), but also with the following procedural requirements:

1. The motion must be supported by an affidavit by the respondent attesting to the relevant facts. The affidavit should include a statement of the agreement between the respondent and the attorney with respect to the representation.

2. Before the respondent files the motion, he or she must inform counsel of the allegations and give counsel the opportunity to respond. Any response should be included with the motion.[5]

3. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

According to the Board, these procedures are "necessary to provide a basis for evaluating the many claims presented, to deter baseless allegations, and to notify attorneys of the standards for representing [noncitizens] in immigration proceedings." *Matter of Assaad*, 23 I&N Dec. 553, 556 (BIA 2003).

Executive Office for Immigration Review to initiate a rulemaking process to evaluate *Matter of Lozada* and publish a proposed rule for amending the *Lozada* framework, if needed. *Id*. at 2. This rulemaking process remains pending as of January 2016. *See* Federal Register Unified Agenda 1125-AA68, Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based upon a Claim of Ineffective Assistance of Counsel, http://federalregister.gov/r/1125-AA68 (last visited January 15, 2016).

[5] Even if a noncitizen provides her former counsel with notice, an immigration judge may reject her claims as failing to comply with *Lozada* if the noncitizen did not allow the former representative sufficient time to respond to the charge of ineffectiveness before the filing a motion to reopen. *See, e.g.*, *Asaba v. Ashcroft*, 377 F.3d 9, 12 (1st Cir. 2004) ("Three days does not provide [a former attorney] an 'adequate opportunity to respond' to the allegations."). If a noncitizen receives a response from former counsel after submitting her motion to reopen, she should seek to supplement the record with that response.

In the years following *Matter of Lozada*, the courts of appeals largely approved of the Board's requirements. As a result, it generally is advisable to fully comply with the requirements whenever feasible. However, on occasion, some courts have rejected the overly technical application of the requirements, particularly where ineffectiveness was clear on the record or where the policy reasons underlying the requirements were otherwise satisfied. These exceptions are discussed in more detail below in Section III.

B. Substantive Requirements

A motion to reopen based on ineffective assistance of counsel generally must establish:

1. Counsel's performance was deficient, and

2. Counsel's performance caused prejudice to the client.

See Matter of Lozada, 19 I&N Dec. at 638 (noting that, in immigration cases, an ineffective assistance claim requires noncitizen to show he "was prevented from reasonably presenting his case" and "was prejudiced by his representative's performance").

Ineffectiveness

First, with respect to deficient performance, or ineffectiveness, this means first "asking if competent counsel would have acted otherwise." *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004).[6] The Board has noted, however, that "subsequent dissatisfaction with a strategic decision of counsel is not grounds to reopen." *Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998). Noncitizens may have received deficient representation if attorneys or their staff, for example:

- Misinformed a client about a scheduled hearing or advised a client not to attend a hearing, *see Aris v. Musakey*, 517 F.3d 595, 599-601 (2d Cir. 2008); *Galvez-Vergara v. Gonzales*, 484 F.3d 798, 801-03 (5th Cir. 2007); *Fong Yang Lo v. Ashcroft*, 341 F.3d 934 (9th Cir. 2003); *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996);[7]

- Failed to timely submit relevant evidence or to submit sufficient evidence, *see Habib v. Lynch*, 787 F.3d 826, 832 (7th Cir. 2015); *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008); *N'Diom v. Gonzales*, 442 F.3d 494, 496, 499 (6th Cir. 2006); *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004);

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[6] *See also Fadiga v. Att'y Gen.*, 488 F.3d 142, 157 (3d Cir. 2007); *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994); *Paul v. INS*, 521 F.2d 194, 199 (5th Cir. 1975).

[7] These courts evaluated whether the deficient representation constituted "exceptional circumstances" sufficient to allow reopening of *in absentia* removal orders pursuant to INA § 240(b)(5)(C)(i) or a previous version of the statute.

- Failed to pursue a particular form of relief or to file an application for relief, *see Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013); *Sanchez v. Keisler*, 505 F.3d 641, 648 (7th Cir. 2007); *Figeroa v. INS*, 886 F.2d 76, 77, 79 (4th Cir. 1989); *Rabiu v. INS*, 41 F.3d 879, 883 (2d Cir. 1994);

- Made admissions or advised a client to forfeit the right to appeal with no apparent tactical advantage, *see Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920-21 (9th Cir. 2015); *Mai v. Gonzales*, 473 F.3d 162, 166-67 (5th Cir. 2006);

- Failed to file a timely notice of appeal or an appeal brief, *see Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004); *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993);

- Pressured a client to accept voluntary departure under threat of counsel's withdrawal, *see Nehad v. Mukasey*, 535 F.3d 962, 967-72 (9th Cir. 2008); or

- Failed to take action to ensure a client remained eligible for relief, *see Singh v. Holder*, 658 F.3d 879, 885-86 (9th Cir. 2011).

Practitioners should analyze applicable law in their jurisdictions regarding the scope of ineffective assistance.

Prejudice

Assuming ineffectiveness is established, the individual also usually must show that he or she was prejudiced by the counsel's performance. The primary exception to this requirement is that individuals need not show prejudice where counsel's ineffectiveness resulted in entry of an *in absentia* order of removal. *Matter of Grijalva*, 21 I&N Dec. 472, 474 n.2 (BIA 1996).

The prejudice standards differ somewhat from circuit to circuit, but often involve consideration of whether there is a "reasonable likelihood" or "reasonable probability" that the result of proceedings would have been different but for counsel's performance. *See Contreras v. Att'y Gen.*, 665 F.3d 578, 584 (3d Cir. 2012); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2004); *see also Morales Apolinar*, 514 F.3d at 898 (holding that prejudice requires showing that deficient performance "*may* have affected the outcome of the proceedings," and noncitizen "need only show *plausible* grounds for relief") (quotations omitted); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994) ("[P]roving prejudice requires the Petitioner to make a prima facie showing that had the application been filed, he would have been entitled to relief from deportation . . . ."); *but see Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) ("[A noncitizen] must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States.").

A number of courts will not recognize that ineffective assistance of counsel is a due process violation where a prior representative's deficient performance only impacted a noncitizen's efforts to obtain a discretionary form of relief. *See, e.g.*, *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 640-41 (8th Cir. 2005); *Huicochea-Gomez v. INS*, 237 F.3d 696, 700 (6th Cir. 2001); *Assaad v. Ashcroft*, 378 F.3d 471, 475-76 (5th Cir. 2004); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1146-

48 (11th Cir. 1999);[8] *but see, e.g.*, *Hernandez-Mendoza v. Gonzales*, 537 F.3d 976, 978 (9th Cir. 2007); *Hernandez v. Reno*, 238 F.3d 50, 55-56 (1st Cir. 2001); *Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994).[9] Yet even within jurisdictions that treat ineffective assistance claims related to discretionary relief differently, noncitizens may still be able to pursue these claims before the immigration courts or the BIA.[10] The Board has not taken a position on the issue in a published decision.

In general, given that many motions to reopen based on ineffective assistance fail because the individual cannot establish prejudice, it is advisable to address fully the legal authorities and relevant facts that may provide a basis for the noncitizen to prevail in reopened proceedings whenever possible.

Timing of Ineffectiveness and Commission by Non-Attorneys

In addition to these two substantive requirements, *when* the ineffectiveness occurred and *by whom* it was committed may be relevant to whether the Board or an immigration judge (IJ) will grant a motion to reopen.

Certainly, ineffective assistance that occurred while removal proceedings were pending can be remedied through a motion to reopen. Further, in *Matter of Compean II*, the Attorney General decided—pending issuance of a formal rule, *see supra* n.4—that the Board and the IJs have authority to consider claims based on conduct that occurred *after* a final order was issued. *See* 25 I&N Dec. at 3. However, where the attorney's deficient representation occurred *prior* to the

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[8] However, noncitizens' right to seek forms of relief provided for by statute is distinct from, and broader than, any right to be granted the relief they seek. *Cf. INS v. St. Cyr*, 533 U.S. 289, 325 (2001) (noting, in the context of retroactivity analysis, that "[t]here is a clear difference . . . between facing possible deportation and facing certain deportation").

[9] *See also Montanez-Gonzalez v. Holder*, 780 F.3d 720, 723-24 (6th Cir. 2014) ("The discretionary nature of certain forms of relief does not eliminate the constitutional requirement of a fair hearing for all [noncitizen]s facing removal."); *Zambrano-Reyes v. Holder*, 725 F.3d 744, 750 (7th Cir. 2013) ("[Noncitizens] in immigration proceedings . . . 'have a due-process right to a fair hearing.' . . . This is true even though a[noncitizen] may not have a protected liberty interest in discretionary relief.") (quoting *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011)); *but see Dave v. Ashcroft*, 363 F.3d 649, 652-53 (7th Cir. 2004) (finding no substantial constitutional claim raised by ineffective assistance of counsel claim where noncitizen sought only discretionary relief).

[10] *See, e.g.*, *Jose Felipe Montalvo*, A079-555-057, 2010 Immig. Rptr. LEXIS 4952 (BIA Nov. 4, 2010) (remanding based on ineffective assistance of counsel where former attorney failed to seek an INA § 212(d)(11) waiver); *Ugochukwu C. Okeke*, A091-304-575, 2008 Immig. Rptr. LEXIS 4750 (BIA Oct. 27, 2008) (remanding based on ineffective assistance of counsel where former attorney failed to file an INA § 212(c) waiver); *but see, e.g., Khurram Khan*, A076-825-814, 2015 Immig. Rptr. LEXIS 7906 (BIA Feb. 2, 2015) ("[R]espondent has not demonstrated that he was prejudiced by his prior counsel's actions or inactions. *See Gutierrez-Morales v. Homan*, 461 F.3d 605, 609 (5th Cir. 2006) (rejecting claim of ineffective assistance of counsel based on failure to pursue a discretionary waiver of relief from removal). . . .").

initiation of proceedings, the IJ and the BIA may decline to provide any remedy. At least two courts have concluded that claims of ineffectiveness before removal proceedings began do not compromise the fundamental fairness of the proceedings themselves and are not necessarily redressable in removal proceedings. *See Contreras v. Att'y Gen.*, 665 F.3d 578, 585-86 (3d Cir. 2012); *Balum-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008).[11]

Additionally, it may be possible to reopen based upon ineffective assistance that was not provided by an attorney,[12] although reopening based on a claim that a noncitizen provided ineffective assistance to herself is not likely to succeed. Courts and the BIA may recognize ineffective assistance by BIA-accredited representatives, *cf. Matter of Zmijewska*, 24 I&N Dec. 87, 94-95 (BIA 2007), attorneys whose non-attorney agents provided deficient representation, *see, e.g. Aris v. Mukasey*, 517 F.3d 595, 601 (2d Cir. 2008); *Monjaraz-Munoz v. INS*, 327 F.3d 892, 897 (9th Cir. 2003), or non-attorneys holding themselves out as attorneys, *see, e.g.*, *Avagyan v. Holder*, 646 F.3d 672, 681 (9th Cir. 2011). However, in the Ninth Circuit, representation by non-attorneys falling outside of the aforementioned categories cannot provide the basis for an ineffective assistance claim, because those non-attorneys "lack the expertise and legal and professional duties to their clients that are the necessary preconditions" for such claims. *Hernandez v. Mukasey*, 524 F.3d 1014, 1019-20 (9th Cir. 2008).[13] Regardless, even where it is the actions of third parties that adversely impact a case (i.e. there is not ineffective assistance of counsel), noncitizens still may be able to reopen their cases. Reopening is permissible based on new facts that are material, were previously unavailable and which a noncitizen could not have discovered or presented at a prior hearing, *see* 8 C.F.R. §§ 1003.2(c)(1); 1002.23(b)(3), regardless of whether those new facts amount to ineffective assistance. Additionally, a noncitizen

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[11] *Balam-Chuluc* relies upon *Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004) and describes the older case as holding that ineffective assistance had not taken place because the relevant legal services were not provided "'while proceedings were ongoing.'" 547 F.3d at 1050 (quoting *Lara-Torres*, 383 F.3d at 974). However, the Ninth Circuit had amended *Lara-Torres* to suggest that ineffective assistance prior to removal proceedings *could* be relevant if it nonetheless impacted the fairness of the proceedings. *See Lara-Torres v. Gonzales*, 404 F.3d 1105, 1105 (9th Cir. 2005) (noting that a "temporal distinction" between an allegedly ineffective act and removal proceedings "may not always be significant").

[12] Noncitizens may be able to reopen proceedings based on ineffective assistance by more than one prior attorney, *see, e.g., Jin Bo Zhao v. INS*, 452 F.3d 154 (2d Cir. 2006), but should comply with the substantive and procedural requirements for an ineffective assistance claim with regard to each prior representative who provided deficient representation. If one of the prior attorneys already sought reopening, it likely will be necessary to request tolling of the rule allowing only one motion to reopen. *See infra*, Section II.

[13] An unpublished decision of the Ninth Circuit emphasizes the limited nature of the *Hernandez* decision. *See Alvarado Cortez v. Holder*, 600 Fed. Appx. 532, 533 (9th Cir. 2015) (unpublished) (criticizing the BIA for "fail[ing] to consider whether the 'notario' . . . was an agent of an attorney, whether [the noncitizen] believed that the 'notario' . . . was an attorney or an agent of an attorney, or whether [the] case is otherwise distinguishable from *Hernandez*").

may request reopening *sua sponte* in these circumstances. *See* 8 C.F.R. §§ 1003.2(a); 1003.23(b)(1).[14]

Diligence

Finally, practitioners should be aware that some courts may impose what amounts to a diligence requirement on motions to reopen based on ineffective assistance of counsel, entirely separate from the diligence requirement for an equitable tolling claim, discussed in Section II of this practice advisory. *See Maatougui v. Holder*, 738 F.3d 1230, 1243-46 (10th Cir. 2013) (finding that motion to reopen based on ineffective assistance did not include evidence that was not previously available as required by 8 C.F.R. § 1003.2(c)(1) where alleged ineffective assistance occurred before IJ and was raised in timely motion to reopen after BIA decided appeal); *Massis v. Mukasey*, 549 F.3d 631, 636, 637 (4th Cir. 2008) (holding that "the BIA did not abuse its discretion in determining that [noncitizen] failed timely to raise his ineffective assistance of counsel claim," where basis for claim arose before the IJ and was first raised in timely motion to reopen before BIA). This is most likely to arise where ineffective assistance occurs only before the immigration judge, and, though represented by different counsel, the noncitizen does not raise the issue while appealing the IJ decision (either on direct appeal to the BIA or in a concurrent motion to reopen to the IJ).

II. Motion to Reopen Filing Deadlines and Equitable Tolling

Generally, noncitizens may file only one motion to reopen and must file it within 90 days of their final order of removal. INA §§ 240(c)(7)(A), (C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1). Where a noncitizen seeks to reopen an *in absentia* order of removal based on an exceptional circumstance that caused her failure to appear, including ineffective assistance of counsel, the motion must be filed within 180 days. INA § 240(b)(5)(C)(i); 8 C.F.R. § 1003.23(b)(4)(ii); *see also Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996) (holding that ineffective assistance of counsel is an exceptional circumstance).[15] The Board has declined to create "an exception" to the reopening deadlines where there is ineffective assistance. *Matter of A-A-*, 22 I&N Dec. 140, 143-44 (BIA 1998) (in the *in absentia* order context).

However, noncitizens may be able to file a motion to reopen that would otherwise be considered untimely based on the doctrine of equitable tolling. Tolling is a long-recognized principle through which courts extend non-jurisdictional filing deadlines when a claimant acts diligently in

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[14] However, in most cases, BIA decisions regarding *sua sponte* reopening are not reviewable by the courts of appeals. *See*, *e.g.*, *Ali v. Gonzales*, 448 F.3d 515, 517-18 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *but see*, *e.g.*, *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009) (distinguishing denial based on legal error); *Pllumi v. Att'y Gen.*, 642 F.3d 155, 159-60 (3d Cir. 2011) (same).

[15] Because the immigration statutes and regulations do not provide a filing deadline for motions to reopen *in absentia* orders in proceedings commenced prior to 1992, at least one court recognizes that there is no diligence requirement for motions to reopen such orders based on ineffective assistance of counsel. *See Rodriguez-Manzano v. Holder*, 666 F.3d 948, 954-55 (5th Cir. 2012).

pursuing his rights, but an extraordinary circumstance stood in the way of timely filing. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649 (2010). While the Board has not addressed the issue in a published decision, most courts of appeals[16] have held that one or both of the motion to reopen deadlines are subject to tolling. *See Iavorski v. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398, 404-06 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Mezo v. Holder*, 615 F.3d 616, 620 (6th Cir. 2010); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Ortega-Marroquin*, 640 F.3d 814, 819-20 (8th Cir. 2011); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187-93 (9th Cir. 2001) (en banc); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (en banc).[17]

Determining whether a motion to reopen deadline should be equitably tolled generally requires a two-part analysis: a noncitizen must demonstrate both that he pursued reopening with diligence and that the delay was due to an extraordinary circumstance. *See, e.g.*, *Ruiz-Turcios v. Att'y Gen.*, 717 F.3d 847, 851 (11th Cir. 2013).[18] Noncitizens must make the "threshold showing" of eligibility for tolling before courts are required to consider the merits of the motion to reopen. *Id*.; *cf. Ortega-Marroquin*, 640 F.3d at 820 (declining to consider whether the departure bar applied to statutory motion to reopen before the BIA determined whether the filing deadline should be equitably tolled).

Ineffective assistance can constitute an extraordinary circumstance meriting equitable tolling of the deadlines. *See, e.g.*, *Iavorski*, 232 F.3d at 134; *Mahmood v. Gonzales*, 427 F.3d 248, 251-52 (3d Cir. 2005); *Mezo*, 615 F.3d at 620; *Pervaiz*, 405 F.3d at 490-91; *Valencia v. Holder*, 657 F.3d 745, 748 (8th Cir. 2011); *Singh v. Holder*, 658 F.3d 879, 884 (9th Cir. 2011); *Riley*, 310 F.3d at 1258; *Ruiz-Turcios*, 717 F.3d at 851; *Davies v. INS*, 10 Fed. Appx. 223, 224 (4th Cir. 2001) (unpublished); *cf. Reyes Mata*, 135 S. Ct. at 2153 (describing a BIA decision "reaffirm[ing] prior decisions holding that it had authority to equitably toll the 90-day period in certain cases involving ineffective representation"). Noncitizens generally must comply with the

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[16] The First and Fifth Circuits have not yet addressed whether the deadlines are subject to tolling in a published decision.

[17] Some courts also have recognized that the rule allowing only one motion to reopen can be equitably tolled or waived. *See, e.g.*, *Jin Bo Zhao v. INS*, 452 F.3d 154, 159-60 (2d Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1224 (9th Cir. 2002).

[18] In at least some cases, certain courts of appeals appear to apply a different standard, *see, e.g.*, *Kuusk*, 732 F.3d at 307 (allowing equitable tolling "only when (1) the Government's wrongful conduct prevented the petitioner from filing a timely motion; or (2) extraordinary circumstances beyond the petitioner's control made it impossible to file within the statutory deadline"), or utilize a more detailed test to determine if tolling is appropriate, *see, e.g.*, *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (considering five factors). To the extent that these tests appear more stringent, practitioners may wish to argue that they should be interpreted as applying the standard for equitable tolling that the Supreme Court repeatedly has articulated over the past ten years. *See, e.g.*, *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014) (tolling is appropriate "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action"); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (tolling is appropriate where a litigant "has been pursuing his rights diligently, and . . . some extraordinary circumstances stood in his way").

Lozada procedural requirements, *see*, *e.g.*, *Singh*, 658 F.3d at 884; *Riley*, 310 F.3d at 1258, and show that they were prejudiced by ineffective assistance, *see*, *e.g.*, *Mezo*, 615 F.3d at 620, in order to toll the filing deadlines.

Noncitizens also must demonstrate that they have pursued their claims with due diligence, because tolling is permitted only until the extraordinary circumstance that prevented filing "is, or should have been, discovered by a reasonable person in the situation." *Iavorksi*, 232 F.3d at 134. However, in general, an individual seeking equitable tolling must pursue his claim only with "reasonable diligence," not "maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotations omitted). Analyzing diligence requires a "fact-intensive and case-specific" inquiry. *Avagyan v. Holder*, 646 F.3d 672, 679, 682 n.9 (9th Cir. 2011) (requiring "assess[ment of] the reasonableness of petitioner's actions in the context of his or her particular circumstances," rather than some "magic period of time"); *see also Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (noting that "the mere passage of time—even a lot of time—before [a noncitizen] files a motion to reopen does not necessarily mean she was not diligent" because "the analysis ultimately depends on all of the facts of the case, not just the chronological ones"). As one court held, "the test for equitable tolling . . . is not the length of the delay in filing the complaint or other pleading; it is whether the claimant could reasonably have been expected to have filed earlier." *Pervaiz*, 405 F.3d at 490. As a result, the periods of time over which courts find noncitizens diligent vary widely. *Compare Borges*, 402 F.3d at 407 (finding due diligence where motion was filed four years after deadline); *Gaberov v. Mukasey*, 516 F.3d 590, 596-97 (7th Cir. 2008) (same); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (finding no due diligence where motion was filed 16 days after deadline).

A noncitizen must "exercise due diligence both before *and* after he has or should have discovered" cause for equitable tolling, *Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008), but there are varying interpretations as to what constitutes due diligence after that discovery. A 2014 Supreme Court decision noted that a litigant "pauses the running of, or 'tolls,'" the relevant statute of limitations by diligently pursuing his rights in an appropriate circumstance, *Lozano*, 134 S. Ct. at 1231-32. In line with this decision, some courts of appeals recognize that equitable tolling essentially "stops the clock" on the filing deadline. *Socop-Gonzalez*, 272 F.3d at 1194-96; *see also Mezo*, 615 F.3d at 622 (noting that "[t]he clock would start again when [the noncitizen] discovered [the former attorney's] fraudulence"). As a result, a noncitizen within those jurisdictions generally would merit equitable tolling if she filed within 90 days of when she learned, or should have learned, of the ineffective assistance that prevented timely filing, less any time prior to the discovery during which she was not diligent. Several other courts expressly reject that proposition and provide noncitizens with only "some additional time" following the discovery of ineffective assistance or another extraordinary circumstance. *Rashid*, 533 F.3d at 131; *see also Yuan Gao*, 519 F.3d at 378-79. As a result, even where equitable tolling may be available, motions to reopen should be filed as promptly as possible. In at least some jurisdictions, time spent complying with the *Lozada* procedural requirements will not be tolled. *See*, *e.g.*, *Galvez Pineda v. Gonzales*, 427 F.3d 833, 839 (10th Cir. 2005) (noting that, "had the [noncitizens] been unable to fulfill all the *Lozada* requirements within 90 days, they could still have filed the motion and explained any unavoidable delay"); *but see Avagyan*, 646 F.3d at 679 n.6 (describing as "an open question whether the tolling period extends until the [noncitizen] complies with the requirements of *Lozada*").

Noncitizens in the First and Fifth Circuits—the two courts of appeals that have not recognized the availability of equitable tolling—will face additional challenges seeking to reopen removal orders based upon ineffective assistance outside of the 90- or 180-day deadlines. The First Circuit has "not yet decided whether equitable tolling applies to the statute's ninety-day deadline, despite multiple opportunities to do so," *Bolieiro v. Holder*, 731 F.3d 32, 39 (1st Cir. 2013), but has directed the BIA to determine in the first instance whether tolling applies in particular cases. *See, e.g.*, *Romer v. Holder*, 663 F.3d 40, 43 (1st Cir. 2011). The Court finds "notabl[e]" that "every circuit that has addressed the issue thus far has held that equitable tolling applies to either or both the time and numerical limits to filing motions to reopen." *Bolieiro*, 731 F.3d at 39 n.7.

The Fifth Circuit also has not addressed whether the filing deadlines for motions to reopen are subject to equitable tolling in a precedent decision. Previously, the Court determined that a request for equitable tolling is "in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling," and that it therefore lacked jurisdiction to review BIA decisions not to toll the filing deadlines. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (quotation omitted). However, the Supreme Court abrogated that holding in 2015, finding that the Fifth Circuit "may reach whatever conclusion it thinks best as to the availability of equitable tolling," but that it may not "wrap such a merits decision in jurisdictional garb." *Reyes Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015). The Fifth Circuit has not addressed equitable tolling of the motion to reopen filing deadline in a published decision since *Reyes Mata* was decided, although several cases involving tolling currently are pending before the court.

Regardless of whether they are in a jurisdiction that has acknowledged the availability of equitable tolling, noncitizens seeking reopening after the motion to reopen deadline has passed also may request *sua sponte* reopening. *See* 8 C.F.R. §§ 1003.2(a); 1003.23(b)(1). By regulation, immigration courts and the BIA may reopen *sua sponte* at any time, even if a noncitizen did not meet the motion to reopen filing deadline.[19] However, since federal courts have found that they have limited or no jurisdiction to review *sua sponte* reopening decisions, *see supra* n.14, noncitizens generally should request it in the alternative to—rather than in place of—filing a statutory motion to reopen.

III. Compliance with and Exceptions to the *Lozada* Procedural Requirements

For an individual seeking a remedy for ineffective assistance of counsel, complete and timely compliance with the *Lozada* procedural requirements, *see* Section I.A. *supra*, is the best practice. However, if a client has already filed a motion to reopen based on ineffective assistance, either pro se or through a different representative, and failed to fully comply, it may be necessary to argue that the agency may waive or flexibly interpret some of the procedural requirements to allow for review of the merits of the ineffective assistance claim.

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[19] *See, e.g.*, *Maria Guadalupe Ochoa-Alcantar*, 076-610-961, 2013 Immig. Rptr. LEXIS 1740 (BIA Apr. 30, 2013); *Maria Hernandez-Rodriguez*, A089-566-220, 2012 Immig. Rptr. LEXIS 6005 (BIA Oct. 25, 2012).

Bar Complaints

Despite some suggestions to the contrary, on its face, *Lozada* does not require filing a bar complaint in all circumstances. Filing is required only "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities," and the motion "should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and *if not, why not*." *Lozada*, 19 I&N Dec. at 639 (emphasis added). Some noncitizens are excused from filing a bar complaint by providing a sufficient explanation for their failure to do so. *See, e.g.*, *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896-97 (9th Cir. 2008) (finding bar complaint would have been futile where former attorney was suspended by state bar after failing to respond to previous ineffective assistance charges); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 156-57 (3d Cir. 2007) (excusing failure to file complaint "where counsel acknowledged the ineffectiveness and made every effort to remedy the situation"); *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993) (finding noncitizen's belief that former counsel had been suspended from practice of law sufficient); *Matter of Zmijewska*, 24 I&N Dec. 87, 94-5 (BIA 2007) (finding noncitizen who was represented by an accredited representative "satisf[ied] the concerns underlying the *Lozada* requirements" without filing bar complaint); *cf. Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (holding that *Lozada* only requires an explanation of whether a bar complaint was submitted, not proof that the complaint was filed).

However, seeking reopening without a bar complaint against previous counsel increases the risk of denial on procedural grounds. Circuit courts, the BIA and IJs reject motions where an individual does not provide an explanation for her failure to file a disciplinary complaint or where they find the reason provided inadequate. *See, e.g.*, *Pepaj v. Mukasey*, 509 F.3d 725, 727 (6th Cir. 2007) (holding that a noncitizen who failed to file a bar complaint or provide an explanation would "forfeit[] her ineffective-assistance-of-counsel claim"); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134-35 (3d Cir. 2001) (finding noncitizen's desire not to file complaint against counsel who represented him pro bono insufficient); *Lara v. Trominski*, 216 F.3d 487, 497-499 (5th Cir. 2000) (finding noncitizen's explanation that former counsel's error was not a violation of legal or ethical responsibilities under relevant state law insufficient); *Matter of Rivera-Claros*, 21 I&N Dec. 599, 606 (BIA 1996) (finding noncitizen's statement that former counsel's error was inadvertent insufficient).

"Substantial Compliance"

More broadly, in some jurisdictions, noncitizens need only demonstrate "substantial compliance" with, rather than "slavish adherence to," the *Lozada* requirements in order to merit review of the underlying motion. *Yi Long Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *see also Fadiga*, 488 F.3d at 156; *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002).[20]

[20] *Cf. N'Diom v. Gonzales*, 442 F.3d 494, 505 (6th Cir. 2006) (Gilman, J., dissenting) (noting that majority adjudicated the case with no reference to noncitizen's failure to comply with *Lozada* requirements); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2004) (requiring noncitizens to demonstrate "substantial, if not exact, compliance with the procedural

Under a substantial compliance test, some courts have excused, for example:

- failure to provide a sufficiently detailed affidavit, *see Piranej v. Mukasey*, 516 F.3d 137, 142-44 (2d Cir. 2008) (remanding for further fact finding where "the exact parameters of [the] attorney-client relationship [were] unclear");

- failure to provide notice to former counsel, *see Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1125 (9th Cir. 2000) (excusing failure to provide notice where noncitizen did not receive information relevant to his claim until shortly before filing deadline); *Ray v. Gonzales*, 439 F.3d 582, 589 (9th Cir. 2006) (finding that noncitizen provided sufficient notice to prior attorneys by filing bar complaints against them); and

- failure to provide sufficient explanation for not submitting a bar complaint, *see Rranic v. Att'y Gen.*, 540 F.3d 165, 173-75 (3d Cir. 2008) (finding *Lozada* compliance, despite insufficient explanation for lack of bar complaint, where noncitizen satisfied policy concerns motivating complaint requirement).

The viability of these arguments varies widely—some courts of appeals have suggested that noncitizens must show strict compliance with the procedural requirements. *See Hernandez-Ortez v. Holder*, 741 F.3d 644, 647-48 (5th Cir. 2014); *Lin Xing Jiang v. Holder*, 639 F.3d 751, 755 (7th Cir. 2011).

The BIA has not issued a precedent decision on whether to apply a substantial compliance standard; rather, it applies the law regarding whether to "mandat[e] strict adherence to all of the *Lozada* steps in every case . . . as is appropriate in each circuit." *Matter of Assad*, 23 I&N Dec. 553, 559 n.6 (BIA 2003); *cf. Matter of D-R-*, 25 I&N Dec. 445, 457 n.8 (BIA 2011) ("We do not intend to suggest that [the Ninth Circuit's] exception to the *Lozada* requirements should be applied outside of [the Ninth C]ircuit."); *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007) ("[W]e have not yet decided the question whether the *Lozada* requirements should be strictly applied to an accredited representative . . . ."). [21]

Moreover, even where courts have recognized flexibility in the application of the requirements, the immigration courts and the BIA regularly reject claims of substantial compliance with *Lozada*. *See, e.g.*, *Debeatham v. Holder*, 602 F.3d 481, 485-86 (2d Cir. 2010) (noncitizen complied with *Lozada*, but not with regard to the ineffectiveness claim that prejudiced his case); *Azanor v. Ashcroft*, 364 F.3d 1013, 1023 (9th Cir. 2004) (noncitizen's affidavit provided

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requirements of *Lozada*"); *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001) (holding that the BIA acted arbitrarily where a pro se individual was not permitted to cure his failure to comply with *Lozada* requirements).

[21] In *Matter of Compean I*, the Attorney General expressly required strict compliance with all legal and evidentiary requirements for ineffective assistance of counsel claims. *Matter of Compean*, 24 I&N Dec. at 739 (stating that "[e]xcusing [a noncitizen] from compliance with a particular requirement, or deeming 'substantial compliance' adequate . . . would hinder the development of a complete record . . . ."). However, that decision was vacated. *See supra* n.4.

insufficient detail about the scope of her agreement with prior counsel). Furthermore, the Board may be unwilling to apply a substantial compliance standard unless "the record reflects a 'clear and obvious case of ineffective assistance of counsel.'" *Matter of D-R-*, 25 I&N Dec. at 457 (quoting *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000)).

Thus, while practitioners can argue that their clients have sufficiently complied with *Lozada*, even without strict adherence to all of the procedural requirements outlined by the Board, there are risks inherent in this strategy. Different courts have reached contrary conclusions about whether apparently similar factual scenarios constitute sufficient compliance with *Lozada*. For example, providing notice to former counsel several days before filing the motion to reopen may or may not constitute sufficient compliance, *compare Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993) *with Asaba v. Ashcroft*, 377 F.3d 9, 12 (1st Cir. 2004);[22] similarly, noncitizens may or may not be excused from filing a bar complaint when they believe prior counsel's error was inadvertent, *compare Fong Yang Lo v. Ashcroft*, 341 F.3d 934, 938 (9th Cir. 2003) *with Matter of Rivera-Claros*, 21 I&N Dec. 599, 606 (BIA 1996). Wherever possible, individuals should fully comply with all procedural requirements for ineffective assistance of counsel claims and consider supplementing the record if additional evidence of compliance becomes available.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS

Most courts of appeals recognize a due process right to effective assistance of counsel in removal proceedings. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Iavorski v. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *cf. Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) ("[The Fifth Circuit] has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment.").

However, there is adverse case law. The Eighth Circuit held that there is no such due process right, *see Rafiyev v. Mukasey*, 536 F.3d 853, 860-61 (8th Cir. 2008), and the Fourth Circuit did the same, although its decision was later vacated on other grounds. *See Afanwi v. Mukasey*, 526 F.3d 788, 796-99 (4th Cir. 2008), *vacated on other grounds*, 558 U.S. 801 (2009).[23] Panels of the

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[22] Practitioners who receive a response from prior counsel after filing a motion to reopen should submit the response as a supplemental filing. *Cf. Patel v. Gonzales*, 496 F.3d 829, 832 (7th Cir. 2007) (faulting noncitizen for failing to supplement his motion to the BIA after receiving prior counsel's response).

[23] The Fourth Circuit has only cited its due process holding from *Afanwi* in one published decision, *Massis v. Mukasey*, 549 F.3d 631 (4th Cir. 2008). *Massis* describes due process claims as "foreclose[d] by" *Afanwi*, but was published before *Afanwi* was vacated. 549 F.3d at 637 ("[O]ur recent decision in *Afanwi* forecloses Massis's due process claim based on ineffective assistance of counsel. . . . Under *Afanwi*, Massis cannot assert an ineffective assistance of counsel claim to challenge his concession of deportability in 1998."). In a more recent decision, the Fourth Circuit noted without criticism that "the BIA has recognized that '[i]neffective

Seventh Circuit have taken varying positions on the issue. *Compare Mojsilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998) ("[W]e have held that 'counsel at a deportation hearing may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.'") (quoting *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993)); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (noting that "there is no constitutional ineffective-assistance doctrine" in immigration proceedings); *Jezierski v. Mukasey*, 543 F.3d 886, 889 (7th Cir. 2008) ("[N]o statute or constitutional provision entitles [a noncitizen] who has been denied effective assistance of counsel in his . . . removal proceeding to reopen the proceeding on the basis of that denial," but "[t]he complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the [noncitizen] to proceed without the assistance of a competent lawyer would deny him due process of law by preventing him from 'reasonably presenting his case.'") (quoting *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993)); *Solis-Chavez v. Holder*, 662 F.3d 462, 466 (7th Cir. 2011) (noting that noncitizens "have a due-process right to a fair hearing" and that "[t]he BIA has a body of caselaw holding that a[noncitizen]'s due-process rights can be violated by his attorney's ineffective assistance in removal proceedings").[24]

Noncitizens can pursue motions to reopen based on ineffective assistance of counsel even in cases originating within the jurisdiction of courts of appeals that have found no due process right to effective assistance exists.[25] The BIA has established a framework for evaluating motions to reopen in cases of ineffective assistance, which the immigration courts and the BIA can apply regardless of the doctrine's constitutional basis. *Cf. Matter of Compean*, 25 I&N Dec. 1, 2 (AG 2009) (noting that determining whether there is a "constitutional right to effective assistance of counsel in removal proceedings . . . is not necessary either to decide . . . cases under [the *Lozada* framework] or to initiate a rulemaking process" to establish a new framework for ineffective assistance claims). As with any ineffective assistance-based motion, it is critical that motions to

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assistance of counsel in a deportation proceeding is a denial of due process.'" *Xing Yang Yang v. Holder*, 770 F.3d 294, 299 n.6 (4th Cir. 2014) (quoting *Matter of Lozada*, 19 I&N Dec. at 638).

[24] Notably, subsequent Seventh Circuit decisions rely upon *Stroe v. INS*, 256 F.3d 498 (7th Cir. 2001) for the proposition that there is no due process right to effective assistance of counsel. *See, e.g.*, *Jezierski*, 543 F.3d at 889; *Magala*, 434 F.3d at 525. However, while *Stroe* noted that "whether there is ever a constitutional right to counsel in immigration cases is ripe for reconsideration," the Court ultimately did not undertake such a reconsideration in the case. 256 F.3d at 501; *see also id*. ("[A]llow[ing noncitizens] to claim ineffective assistance of counsel as a basis for reopening deportation proceedings . . . *probably* is not compelled by statute or the Constitution") (emphasis added).

[25] The BIA continues to grant motions to reopen based on ineffective assistance that comply with the *Lozada* requirements in cases originating within the jurisdiction of the Fourth, Seventh, and Eighth Circuits, *see, e.g.*, *Daniel Rolando Ortega-Marroquin*, A072-519-426, 2012 Immig. Rptr. LEXIS 7980 (BIA Jan. 20, 2012); *Jakub Ksiazek*, A042-123-935, 2010 Immig. Rptr. LEXIS 4728 (BIA Dec. 2, 2010); *Hibst Nitkin*, A072-732-653, 2010 Immig. Rptr. LEXIS 5016 (BIA Nov. 4, 2010), although before the Supreme Court vacated *Afanwi*, the BIA noted in an unpublished decision that it had no basis to grant motions "under the theory of ineffective assistance of counsel" in "the territorial jurisdiction of the United States Court of Appeals for the Fourth Circuit," *see Matter of* _____, 2008 Immig. Rptr. LEXIS 25127, *2 (BIA Oct. 31, 2008).

reopen before the immigration court or BIA comply with the substantive and procedural *Lozada* requirements.

Furthermore, in many circumstances, noncitizens will be able to obtain federal court review of denials of ineffective assistance based on motions to reopen even in courts of appeals that have rejected a due process right to effective assistance of counsel.[26] The courts can continue to review those ineffective assistance of counsel reopening decisions that are based on "non-constitutional deficiency claim[s]" for abuse of discretion. *Singh v. Lynch*, 803 F.3d 988, 993-94 (8th Cir. 2015). *See also Ortiz-Puentes v. Holder*, 662 F.3d 481, 484 (8th Cir. 2011) (reviewing decision to deny ineffective assistance based motion to reopen under an abuse of discretion standard, using *Lozada* "as a 'substantive and procedural compass'") (quoting *Ochoa v. Holder*, 604 F.3d 546, 548 n.1 (8th Cir. 2010)); *Habib v. Lynch*, 787 F.3d 826, 831-33 (7th Cir. 2015) (reviewing denial of ineffective assistance based motion to reopen for abuse of discretion); *Adeaga v. Holder*, 548 Fed. Appx. 68, 69-70 (4th Cir. 2013) (unpublished) (reviewing denial of ineffective assistance based motion to reopen for abuse of discretion and noting that the Fourth Circuit requires substantial compliance with the substantive and procedural *Lozada* requirements). Furthermore, despite decisions suggesting that it does not recognize a due process right to effective assistance of counsel, some Seventh Circuit decisions review constitutional ineffective assistance of counsel claims, at least where the ineffective assistance may have prevented a noncitizen from reasonably presenting her case. *See, e.g.*, *Solis-Chavez*, 662 F.3d at 466; *cf. Jezierski*, 543 F.3d at 890. However, where a court does not recognize ineffective assistance in a given case as a due process violation, federal court review may be more limited if the case is subject to jurisdictional bars permitting such review only for constitutional or legal questions. *See, e.g.*, *Choo v. Lynch*, 614 Fed. Appx. 791, 792 (5th Cir. 2015) (unpublished); *Minga v. Holder*, 409 Fed. Appx. 942, 944-45 (7th Cir. 2011) (unpublished); *cf. Zambrano-Reyes v. Holder*, 725 F.3d 744, 749-51 (7th Cir. 2013).

[26] While practitioners also may challenge the holding that no due process right to effective assistance of counsel exists, such arguments are beyond the scope of this practice advisory.