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Thomas G. Snow
U.S. Department of Justice
Executive Office for Immigration Review
Office of the Director
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

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Dear Director Snow,

We, the American Immigration Council (formerly the American Immigration Law Foundation (AILF)) and the American Immigration Lawyers Association, write to express our recommendations for the new rules on ineffective assistance of counsel that EOIR currently is considering pursuant to *Matter of Compean*, 25 I&N Dec. 1, 2 (AG 2009).¹ This letter, which we hope will assist in the rulemaking process, outlines the deficiencies of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), suggests ideas that will reduce the number of ineffective assistance claims, and recommends revisions to the regulatory system and framework. We hope this will begin a continuing dialog with EOIR to improve the administrative process and to raise the competence of the bar. We welcome any opportunities to discuss our recommendations with you and participate in the regulatory revisions.

Our recommendations are in two parts: 1) recommendations for the procedures for filing an ineffective assistance claim and for EOIR's consideration of those claims, and 2) recommendations for ameliorative measures that EOIR could take to reduce attorney and respondent mistakes and resulting ineffective assistance claims.

I. EOIR Should Be Guided by Certain Principles, to Uphold Integrity and Ensure a Fair and Full Opportunity to be Heard, with Special Consideration for the Unique and Challenging Circumstances of the Removal System

The new rules and procedures must be guided by the Department of Justice's goal of upholding the integrity of the removal process and should strive to achieve the following:

¹ The American Immigration Council and the American Immigration Lawyers Association (AILA) have been involved for many years in these matters, appearing as amicus curiae in *Matter of Compean* and *Matter of Assaad*, and submitting comments to proposed professional responsibility regulations.

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- Ensure that all noncitizens in removal proceeding have a fair opportunity to be heard – a central principle Congress codified in Section 240 of the INA;
- Promote quality representation and ensure that the immigration bar meets ethical and professional standards of practice; and
- Discourage the filing of unnecessary motions and promote judicial efficiency.

At the same time, the new procedural rules will be most effective if they acknowledge the well-documented, unique circumstances and challenges respondents and counsel face in removal proceedings, including:

- Many respondents compelled to appear in removal proceedings cannot afford an attorney and there are insufficient pro bono lawyers for all who need one;
- Many respondents are unfamiliar with our legal system and the exceedingly complex immigration laws;
- Immigration courts and the BIA handle hundreds of thousands of cases, with inadequate resources;
- The BIA’s appeal procedures are extremely detailed, requiring extensive knowledge of the record and the hearing, without an easily-accessed “discovery” system;
- Removal is often a more dire consequence than negative results in other types of civil or even criminal proceedings – to and including banishment from home, family, employment, and safety;
- Respondents are more vulnerable to unscrupulous people, less likely to seek a remedy for their victimization; and remedies are less likely to make them “whole” – that is, restore the victim’s immigration status or their opportunity to apply for that status;
- Many respondents are detained, further eroding their ability to hire and work with counsel or to represent themselves adequately; detained respondents often are moved far away from family and resources, usually without warning to themselves, their families or their attorneys.

II. The New Framework Should Include Flexible Requirements for Motions to Reopen Based on Ineffective Assistance of Counsel

Regardless whether there is a constitutional right to effective assistance of counsel, as the Attorney General has acknowledged, it is important to provide a measure of protection

for individuals who are harmed by someone else's conduct.² The *Lozada* framework, intended to provide, in part, a measure of protection, has proven unworkable in some cases and unnecessary in others.

Unfortunately, immigration judges and the BIA too often resort to an overly mechanistic application of *Lozada* that elevates form over substance; results in protracted litigation and unnecessary expenditure of resources by EOIR, respondents and counsel alike; and most significantly, deprives respondents of their only opportunity to present their cases. Simply put, *Lozada's* mandatory procedures do not adequately protect the integrity of the immigration court system. Therefore, we encourage EOIR to adopt a framework that sets forth reasonable, flexible standards for motions to reopen based on ineffective assistance of counsel and non-lawyer misconduct.

Requiring absolute compliance with a set of requirements fails to account for the particular, unique circumstances of each case and the realities of immigrants' situations. For example, in some situations, the record of proceedings on its face demonstrates ineffective assistance of counsel. Other cases may require particular documentation that may not be anticipated in a rule making process. Furthermore, impending filing deadlines or the threat of imminent removal³ may make it impossible to comply with involved requirements prior to filing the motion to reopen, particularly where current counsel may have limited access to the record.

As is the case with all motions, a person filing a motion to reopen based on ineffective assistance of counsel bears the burden of establishing that the immigration judge or BIA should reopen the case. By holding the respondent to his or her burden, EOIR will discourage baseless allegations and provide immigration judges and the BIA with

² We therefore agree with the Attorney General that it is not necessary to decide whether there is a constitutional right to effective assistance of counsel in revisiting the framework for ineffective assistance of counsel claims. *See Matter of Compean*, 25 I&N Dec. 1, 2 (AG 2009).

Moreover, regardless whether there is a constitutional right to effective assistance of counsel, providing a remedy for ineffective assistance of counsel is a good policy and the necessary corollary to EOIR's recently enhanced professional responsibility rules. *See* Department of Justice, Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearance, 73 Fed. Reg. 76914 (Dec. 18, 2008). One of EOIR's objectives in adopting new rules was "to preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute misconduct." *Id.* at 76915.

³ Motions generally must be filed within 90 days of the order of removal. INA § 240(c)(7)(C)(i). In addition, the BIA has held that an individual loses his opportunity to file a motion to reopen after he has been deported from the United States. *Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008); *see also* 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1).

standards for evaluating claims. A complicated set of mandatory filing requirements is not needed.

A. EOIR Should Not Require Respondents to File Bar Complaints

We urge EOIR to exclude any bar complaint requirement from its rules for ineffective assistance of counsel claims. The bar complaint requirement is one of the most contentious and problem-ridden aspects of *Matter of Lozada*, and importantly, it is not needed to further the BIA's intended objectives, namely, to increase confidence in the claim; reduce the likelihood that a hearing will be needed; help police the immigration bar; and protect against possible "collusion" between the client and the lawyer. *Matter of Rivera*, 21 I&N Dec. 599 (BIA 1996). Each of these intended benefits is addressed below.

First, instead of increasing confidence in the claim, the bar complaint requirement has contributed to the filing of baseless and frivolous state bar complaints.⁴ Filing a complaint against a lawyer who is disbarred or is no longer practicing is an unnecessary burden to the complaining party and to the state. In addition, filing a bar complaint before an immigration judge or the BIA has made a determination that counsel was at all ineffective is premature and may be insufficient to trigger any action on the part of the state bar. Thus, the bar complaint requirement unnecessarily strains the state bars. Some state bars are so inundated with *Lozada*-based complaints against immigration lawyers that it is difficult or impracticable for them to identify meritorious complaints and impose sanctions.⁵

Even if the state bar does investigate the allegations, it is unrealistic for EOIR to wait for the state to conclude its investigation before adjudicating a motion to reopen. Thus, it is very unlikely the state's findings will be available to corroborate the respondent's claims.

Second, there are other, more effective ways in which to test the validity of a claim and reduce the likelihood that a hearing will be needed. For example, as discussed below, we recommend that in most cases, the respondent notify his or her allegedly ineffective lawyer of the claim and allow him or her to respond. Immigration judges and the BIA also can request additional information when it would assist them in adjudicating a claim.

⁴ See *Matter of Compean*, 24 I&N Dec. 710, 737 (AG 2009), *vacated*, 25 I&N Dec. 1 (AG 2009) (citing Comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the *Proposed Rule for Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (July 30, 2008)).

⁵ See *id.* Most attorneys representing respondents before EOIR are competent and dedicated professionals. The potential that a previous client would file a baseless complaint for purposes of a motion to reopen based on ineffective assistance of counsel may dissuade lawyers from representing respondents before EOIR.

Furthermore, it is important to recognize that in many cases, counsel's ineffectiveness is clear on the record, and therefore there is no further need to test the validity of the claim.

Third, requiring a state bar complaint is not necessary to police the immigration bar. Since first adopting the bar complaint requirement in *Matter of Lozada*, EOIR has expanded its role in promoting professionalism and disciplining lawyers who fail to meet minimum standards of professional conduct. In 2000, it overhauled its professional standard and discipline regulations,⁶ and in 2008 it further enhanced its police powers, expanding the list of sanctionable grounds.⁷ Importantly, under 8 C.F.R. § 3.102(k), EOIR may sanction a lawyer who engages in conduct that constitutes ineffective assistance. Thus, EOIR has ample procedures in place to police the bar without requiring a state bar complaint. Furthermore, we do not suggest that respondents be precluded from filing an appropriate state bar complaint.

Fourth, the BIA's contention that the bar complaint is needed to protect against collusion is unfounded. The BIA suggested in 1996 that there was widespread "collusion between an alien and counsel in which 'ineffective' assistance is tolerated, and goes unchallenged by an alien before disciplinary authorities, because it results in a benefit to the alien in that delay can be a desired end, in itself, in immigration proceedings."⁸ The Board, however, did not demonstrate that collusion was a serious problem. In opining that collusion was a problem, it cited only three cases, none of which involved a claim of ineffective assistance of counsel or collusion.⁹ While these cases do demonstrate how delay may benefit a respondent, over the past twelve years Congress and EOIR have sought to minimize the benefits of delay tactics.¹⁰ Therefore, concerns about delay are less relevant today than in the past. Even assuming that some lawyers would

⁶ See Department of Justice, Executive Office for Immigration Review, *Professional Conduct for Practitioners – Rules and Procedures*, 65 Fed. Reg. 39513 (June 27, 2000).

⁷ See Department of Justice, Executive Office for Immigration Review, *Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearance*, 73 Fed. Reg. 76914 (Dec. 18, 2008).

⁸ See *Matter of Rivera*, 21 I&N Dec. 599, 604 (BIA 1996).

⁹ See *id.* at 604 (citing *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Reid v. INS*, 766 F.2d 113 (3d Cir. 1985); *Cheng Fan Kwok v. INS*, 381 F.2d 542 (3d Cir. 1967), *aff'd*, 392 U.S. 206 (1968)).

¹⁰ For example, immigration court case completion goals and BIA regulations set deadlines for adjudicating cases; the "stop time rule," says that the accrual of residence and physical presence terminates either upon the initiation of removal proceedings or the commission of a crime that renders a person removable; and filing a petition for review no longer automatically stays the removal pending court of appeal's review. See Memorandum on Case Completion Goals from Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge to all Immigration Judges and Court Administrators (April 26, 2002), available at <http://www.aila.org/content/default.aspx?bc=8735|17026|9002>; 8 C.F.R. § 1003.1(e)(8); INA § 240A(d); compare former INA § 106(a)(3) (1996) with INA § 242.

purposefully provide ineffective assistance – based on an agreement with the client that the conduct would go unchallenged – in order to delay proceedings, it does not necessarily follow that the ineffective lawyer would then assist the former client in filing a motion to reopen based on the ineffectiveness. Such action would disclose the lawyer’s unethical conduct and would subject him or her to potential disciplinary action by EOIR and his or her state bar.

Further, the decision to file a bar complaint is distinct from the decision to file a motion to reopen based on ineffective assistance of counsel and may take into account different considerations. As the Fourth Circuit recognized in *Figeroa v. U.S. INS*, 886 F.2d 76, 78-79 (4th Cir. 1989), the fact that the aggrieved individual took “no action” against his former counsel did not indicate that the representation was effective:

Figeroa is an adolescent alien who speaks no English and who has only a third grade education. He is no doubt unaware of any action he might be able to take against Tellez, such as filing either a complaint with the state bar or a legal malpractice claim. Additionally, Figeroa’s new counsel probably recognized that neither a disciplinary proceeding nor a civil action against Tellez would have provided petitioner with much assistance in terms of his deportation proceedings. Their energies were properly directed at stopping the deportation, rather than pursuing Tellez.

For these reasons, we recommend that the new rule not require a respondent to file a bar complaint, but leave it to the discretion of the victim to make the decision.

B. EOIR Should Not Require that Respondents File a Detailed Attorney-Client Affidavit in Every Case

In many cases, an affidavit setting forth the lawyers’ responsibilities and what action the lawyer did or did not take will aid the immigration judge or the BIA in adjudicating the motion and may be the primary evidence in support of the claim. However, we disfavor a strict requirement that a “detailed” affidavit be filed in every case. Such a requirement unnecessarily leads to mechanistic denials for failure to comply even where other evidence and/or the record of proceedings itself sufficiently establishes the attorney-client relationship and the ineffectiveness. Therefore, if the evidence and/or the record establishes ineffective assistance, then the respondent has satisfied his burden.

C. EOIR Should Not Mandate that Respondents Always Notify the Prior Representative

Generally, respondents alleging ineffective assistance of counsel should notify their prior lawyers about the allegations. Not only does this help ensure the integrity of the process, but it serves to protect lawyers against false accusations. Nonetheless, we recommend that the new framework incorporate flexible procedures for providing notification to the former lawyer and also include exceptions where notification would be futile.

In some situations, the client and/or his or her current lawyer may be able to provide advance notification to the attorney and may even obtain a signed declaration from the prior lawyer in advance of filing the motion. Where the same lawyer continues to represent the respondent in a claim against himself or herself, it is reasonable to expect the inclusion of such a declaration in the initial filing.¹¹ This declaration may corroborate the respondent's allegations in the motion and would obviate the need for any further notification.

In other situations, notification would be futile because the ineffectiveness is clear from the record, for example, where a lawyer enters an appearance and fails to appear for a hearing. Likewise, notification may be futile where the lawyer is not reachable or already has been suspended from practice for providing ineffective assistance. If notification would be futile, the respondent may state this in his or her motion.¹²

If notification is provided and the prior lawyer has not responded, immigration judges and the BIA should not consider the non-response an adverse factor. An IJ and the BIA may wait a reasonable amount of time for a response, if he or she thinks it is necessary to adjudicate the motion, but IJs and the BIA should exercise their discretion to grant a stay of removal in such cases.

D. EOIR Must Interpret the Required Showing of Prejudice Reasonably to Reflect the Inherent Challenges in Demonstrating Prejudice

Like other procedural and substantive elements of a motion to reopen based on ineffective assistance of counsel, the new framework should incorporate a flexible standard to assess prejudice. As discussed below, different situations call for different ways of demonstrating prejudice.

If counsel's ineffectiveness caused a respondent to forfeit the opportunity to apply for relief for which he or she is prima facie eligible, this should satisfy the prejudice requirement. Establishing more than prima facie eligibility is inappropriate at the motion stage and would often require an evidentiary hearing on the application for relief.

Likewise, where counsel's ineffectiveness results in depriving a person of the opportunity to seek administrative or judicial review of a removal order (to which he or she has a statutory and/or regulatory right), the respondent has established prejudice. To require a respondent to show that he likely would prevail at the BIA and/or the court of appeals does not make sense in this context. In the case of BIA appeals, first, it is difficult to

¹¹ We urge EOIR to recognize the propriety of a lawyer who acknowledges his or her prior deficiencies, and, at the request of the client, continues representation. *Accord Matter of Compean*, 24 I&N Dec. at 739 n. 12 (recognizing that same lawyer may represent the respondent in seeking reopening based on ineffective assistance of counsel).

¹² An immigration judge could, of course, disagree about the futility of notification, and could direct the respondent to provide notification to the prior lawyer and permit the prior lawyer to respond.

predict how the BIA might decide an issue, especially where there is no precedent decision on point. Second, even where precedent indicates that the BIA would deny an appeal, a respondent may nonetheless need to file a BIA appeal to exhaust administrative remedies in order to seek judicial review. There are ample examples of courts of appeals overruling BIA decisions – even BIA precedents. Thus, there is no way to accurately predict how a court of appeals will rule in any given case, and therefore, such predictions should not be used to determine prejudice. For the same reason, where counsel’s ineffectiveness causes a person to forfeit the right to seek judicial review, he has established prejudice that warrants reissuance of the decision.

Other situations will require a more involved approach to assessing prejudice. For example, if a respondent applied for relief, but failed to submit certain key evidence, or filed an appeal brief, but left out some arguments, the immigration judge or the BIA will need to more fully consider the effect that the ineffectiveness had on the proceedings.¹³ If the IJ or BIA determines that even if the respondent had submitted the evidence or made the appeal arguments, undoubtedly the outcome of the case would have been the same, the respondent has not established prejudice.

However, if the respondent can show that the ineffectiveness may have affected the outcome of proceedings, he or she has established prejudice. This standard will allow the IJ or the BIA to assess whether reopening is warranted given the facts of the case, and also takes into account the limitations of establishing the harm to the client at the motions stage of the proceedings, particularly without needing a hearing.

For example, where a lawyer has been incompetent, the record may not reflect what a competent lawyer would have done, or the research a competent lawyer would have performed to demonstrate that the respondent is not removable or warrants relief. Although the motion can attempt to show what a competent lawyer would have done, realities, such as limited access to the record of proceedings, particularly if the prior lawyer is not cooperative or is unavailable, and impending filing deadlines, may make demonstrating this difficult or impossible. Requiring conclusive proof that the hearing or the result would have been different is unreasonable in this context. A prejudice standard patterned on Federal Rule of Civil Procedure 60(b) (discussed below in Section III, B) responds to these inherent challenges. Further, IJs and the BIA should be directed to use their authority to request additional evidence or deny a motion to reopen *without prejudice* where a person has not yet satisfied his or her burden of establishing prejudice.

Finally, the new rule also should reaffirm the BIA’s long standing precedent that respondents need not show prejudice where counsel’s ineffectiveness resulted in an entry

¹³ These situations also may raise the question of whether the prior lawyer was “ineffective” in the first place. IJs and the BIA, however, will have to adjudicate those questions on a case by case basis given the facts and circumstances before them.

of in absentia order of deportation or removal.¹⁴ Likewise, the BIA should continue to consider ineffective assistance of counsel claims in cases where the respondent is seeking discretionary relief.¹⁵

E. The Filing Deadline Should Be Subject to Equitable Tolling

EOIR's rule should acknowledge that the motion to reopen filing deadlines are subject to equitable tolling and that the number limitations are subject to waiver. Although the BIA has taken the position that the deadlines are not subject to tolling,¹⁶ all but one of the courts of appeals to consider this issue have reached the opposite conclusion.¹⁷ Equitable tolling of deadlines and waiver of the one-motion rule ensures that unwitting victims of ineffective assistance are not deprived their only opportunity to contest removability or apply for relief.

Deadlines should be tolled until the ineffective assistance of counsel is or should have been discovered by a reasonable person *in that situation*. While EOIR may want to incorporate a due diligence requirement, the question the IJs and the BIA should consider is “whether the claimant could reasonably have been expected to have filed earlier?”¹⁸

¹⁴ See *Matter of Rivera-Claros*, 21 I&N Dec. 599, 603 n.1 (BIA 1996) (finding that in absentia motion to reopen provision does not require showing of prejudice); *Matter of Grijalva*, 21 I&N Dec. 472, 473 n.2 (BIA 1996).

¹⁵ See *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) (seeking waiver); *Matter of Lozada*, 19 I&N Dec. 637 (1988) (seeking waiver); see also *Matter of Compean*, 24 I&N Dec. at 730 (IJs and BIA have discretion to grant motion to reopen where ultimate relief sought is discretionary). To the extent some courts of appeals have rejected ineffective assistance of counsel claims because the respondent sought discretionary relief, they did so in the context of a constitutional due process claim, *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) – a claim that need not and should not serve as the basis for EOIR's rule on ineffective assistance of counsel. Moreover, these decisions conflict with the approach of other courts, see, e.g., *Fernandez v. Gonzales*, 439 F.3d 592, 602 & n.8 (9th Cir. 2006), *Rabiu v. INS*, 41 F.3d 879, 882-83 (2d Cir. 1994), and fail to acknowledge the statutory right to apply for relief. See *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004).

¹⁶ In *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998), and *Matter of Lei*, 22 I&N Dec. 113 (BIA 1998), the Board held that the ineffectiveness of counsel does not create an “exception” to the 180-day time limit for filing a motion to reopen under former INA § 242B(c)(3)(A), and has taken the position that the deadline is not subject to equitable tolling.

¹⁷ See *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002); but see *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999).

¹⁸ See *Pervaiz*, 405 F.3d at 490.

What actions are reasonable for a respondent in removal proceedings may be quite different from the actions we would expect an immigration judge, a lawyer or even a United States citizen more familiar with government and legal processes to take. EOIR's rule should reflect that reasonableness must account for language and cultural barriers, lack of knowledge about the immigration system, and education levels.

F. EOIR Should Permit Respondents to Supplement the Motion to Reopen after the Initial Filing

In addition to equitably tolling the deadline, the new framework should recognize the challenges of timely filing a fully-documented motion to reopen, even where the ineffective assistance of counsel is discovered prior to the filing deadline. Impending filing deadlines or the threat of imminent removal¹⁹ may make it impossible to fully document the motion to reopen. This is particularly true in ineffective assistance of counsel cases where the respondent and/or current counsel may have limited access to the record. The respondent may be unable to obtain his or her files from the former lawyer in a timely manner. Even though he or she may obtain the record of proceedings under the Freedom of Information Act, doing so takes several months – often longer than the period for filing the motion.²⁰ For that reason, EOIR's new rule should acknowledge these realities and provide the respondent an opportunity to supplement the motion after the initial filing.

G. EOIR Should Recognize the Authority to Provide a Remedy Even if the Conduct of Counsel Occurred After a Final Order of Removal

EOIR's rule should adopt the Attorney General's interim ruling that the BIA has authority to reopen cases based on ineffective assistance that occurred after the entry of a removal order.²¹ The motion to reopen statute at INA § 240(c)(7), and its implementing regulation, 8 C.F.R. § 1003.2, provides the Board with authority to reopen cases based on facts that give rise to new claims and arguments that were – by definition – “new” and may have arisen after the BIA's decision. In fact, 8 C.F.R. § 1003.2, provides the Board with even broader authority to reopen or reconsider “at any time” a case in which it has issued a decision. Moreover, EOIR's lawyer disciplinary regulations allow it to sanction

¹⁹ See *supra* note 3.

²⁰ In addition to submitting a FOIA request to EOIR, a person may file a request with DHS as well. DHS often takes months or even over a year to respond if the request does not qualify as Track 1 or Track 3. Track 1 requests are simple requests that do not require DHS to review multiple pages before providing access. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge*, 72 Fed. Reg. 9017, 9017 (Feb. 28, 2007). Track 3 is intended to expedite the FOIA process for certain individuals who are in removal proceedings. 72 Fed. Reg. at 9017-18. However, Track 3 excludes requests for cases where a final order of removal has issued. 72 Fed. Reg. at 9018.

²¹ *Matter of Compean*, 25 I&N Dec. 1, 3 (AG 2009).

lawyers for conduct having nothing at all to do with the BIA, the immigration courts, immigration law, or the removal of clients.²²

H. EOIR's Ameliorative Measures Should Apply Equally to Non-Attorneys Providing Legal Services to Respondents

A respondent's inability to satisfy the bar complaint requirement sometimes has been applied to defeat valid claims of ineffective assistance by non-attorney actors. Such a result did not necessarily follow from *Lozada*, which allowed respondents to either file a complaint or explain why they did not. *Matter of Lozada*, 19 I&N Dec. 637, 639 (1988). Explaining that the respondent did not file a bar complaint because the non-attorney was not licensed by a state bar could have satisfied this requirement.

In the first *Compean* decision, Attorney General Mukasey conceded the government's "interest in ensuring that a lawyer's deficient performance does not undermine the fairness and accuracy of removal proceedings" but said that that interest

does not warrant, however, allowing a motion to reopen based on the conduct of non-lawyers (except where an alien is represented by an accredited representative pursuant to 8 C.F.R. § 1292.1(a)(4) or in the extraordinary case where an alien reasonably but erroneously believed that someone was a lawyer). The reason is that lawyers and accredited representatives are governed by rules of professional conduct and have skills, including but not limited to knowledge of immigration laws and procedures, that are directly related to furthering the interest that aliens and the Government have in fair and accurate immigration proceedings.

24 I & N Dec. 710, 729, n. 7 (AG 2009).

Respectfully, we submit that Attorney General Mukasey's reasoning does not compute. The government's and the respondents' interest in fairness and accuracy of the proceedings supports the extension of any ameliorative measure to actions of non-attorneys acting on behalf of respondents. A non-attorney operating outside the law and failing to provide competent services deprives the respondent of her day in court at least as much as a licensed attorney.

Further, exempting non-attorneys from enforcement or ameliorative measures makes little sense from a public policy perspective. Non-attorneys may be the most likely to not know or follow the rules. Not enforcing the rules against them is akin to not enforcing speed limits against people driving without a license.

Attorney General Mukasey's statement was a move in the right direction, but stopped short of an effective and realistic dividing line. Where the respondent reasonably relies

²² For example, a lawyer who is disbarred from practice by any state bar or federal court or is found ineffective by a federal court is subject to discipline. 8 C.F.R. §§ 1003.102(e) and (k).

on a non-attorney for advice or representation, adjudicators must recognize ineffectiveness claims against non-attorneys – whether the respondent believed the person to be an attorney or not.

III. EOIR Should Adopt Measures to Reduce the Number of Ineffective Assistance of Counsel Claims

Because EOIR is undergoing a comprehensive review of the *Lozada* framework, it is appropriate to look beyond the specific procedures for adjudicating ineffective assistance of counsel claims and consider some of the underlying problems that have led to the proliferation of *Lozada* motions. Already, EOIR has revised its professional conduct rules and has recommitted itself to promoting and demanding quality representation in order to protect the rights of noncitizens in removal proceedings. *See* Department of Justice, Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearance, 73 Fed. Reg. 76914 (Dec. 18, 2008). But in addition to setting standards for lawyers, EOIR should look to its own procedures and consider whether they adequately safeguard the rights of respondents and whether they can be amended to better protect the integrity of the removal system and reduce the volume of *Lozada* motions.

A review of many of EOIR’s filing procedures reveals a system that fails to forgive even minor and inadvertent mistakes made by both lawyers and pro se respondents. As a result, the procedures fail to ensure that all people in removal proceedings have a fair and full opportunity to be heard and to have their cases considered on the merits, as Congress has mandated in INA § 240. EOIR’s procedures should acknowledge the unique circumstances and challenges of removal proceedings, discussed above in Section I, should demonstrate reasonable expectations for the circumstances and resources of the system’s users.

In that vein, we submit the following changes to the immigration courts and the BIA’s procedures. These changes will help reduce the number of ineffective assistance of counsel claims; will reduce the number of motions to reopen for ineffective assistance and other reasons; will reduce the amount and duration of litigation in the administrative and federal courts over procedural and clerical mistakes; and will go a long way to ensuring that all people in removal proceedings have their day in court.²³

A. EOIR Should Adopt a “Lodging” / Deficiency Rule for Documents

²³ Our proposed changes should apply whether a respondent is represented or not. For example, the proposed “excusable neglect” rule also could be invoked by a respondent to cure some error caused by the respondent, whether represented or not. However, as these recommendations are proposed to reduce the number of ineffective assistance claims, we focus on errors by representatives.

EOIR should adopt a rule similar to the practice employed by the Supreme Court and lower federal courts that allows for the “lodging” of documents that are timely filed but deficient as to some requirement. Specifically, Supreme Court Rule 14.5 says:

If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk’s letter will be deemed timely.²⁴

By contrast, EOIR’s presumptive procedure is to reject timely filings that do not comply with even non-material requirements. Specifically, 8 C.F.R. § 1003.3(a)(1) says that an appeal is not properly filed unless it is received at the Board within 30 days, with all required documents, fees or fee waiver requests, and proof of service.

Both the BIA Practice Manual and the Immigration Court Practice Manual provide almost no flexibility for addressing even minor errors related to filing. For example, the failure to provide proof of service on the opposing party is a “common” reason for the Board to reject a filing. BIA Practice Manual, 3.1(c). If the Board rejects a filing and the corrected filing is not made within the *original* deadline, the filing is “defective.” *Id.* at 3.1(c)(ii) (parties who wish to “correct” a defect and “refile after a rejection must do so by the original deadline”). An untimely appeal will be dismissed and an untimely motion will be denied. *Id.* A party submitting an untimely filing must file a motion asking the Board to accept the filing with documentary evidence to support the motion, including evidence such as affidavits and declarations under penalty of perjury. *Id.* at 3.1(c)(iii). The Board has discretion whether to accept late filings and the Manual advises that the BIA “rarely” accepts and considers untimely briefs. *Id.* at 4.7(d).

Likewise, the Immigration Court Practice Manual states that filings should be rejected outright if they are not accompanied by proper proof of service, for example, or if a signature is missing or improper. Immigration Court Practice Manual, 3.1(d). Even more demanding, it states that filings by an attorney that do not have a cover page, are not two-hole punched, are not paginated, properly tabbed, or do not have a proposed order will be rejected. *Id.*; Memorandum from Mark Pasierb, Chief Clerk of the Immigration Court, to All Immigration Judges, et al., Part II(A) (June 17, 2008) (hereinafter *Pasierb Memo*).

If the filing is defective, the Immigration Court “should reject filings upon receipt and return filings to the party.” *Pasierb Memo*, Part II(A). If counsel is not able to correct the error and resubmit the filing before the deadline, the filing may be considered

²⁴ Likewise, Federal Rule of Civil Procedures 5(d)(4) says “The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice” and Federal Rule of Appellate Procedure 25(a)(4) says, “The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.”

untimely. Immigration Court Practice Manual, 3.1(b). Although an IJ may still accept an untimely filing, it is within the judge's discretion to accept the filing. Immigration Court Practice Manual, 3.1(d)(ii); Memorandum (OPPM) from David L. Neal, Chief Immigration Judge, to All Immigration Judges, et al. at 2 (June 20, 2008) (filings may not be rejected upon receipt for untimeliness; only a judge has the authority to make determinations regarding timeliness).²⁵

Often, ineffective assistance of counsel claims begin when a minor and/or inadvertent filing error occurs, and there is no clear remedy. If EOIR's rules permitted documents to be "timely lodged" as long as the deficiencies are corrected within a specified time, they would prevent many ineffective assistance of counsel claims stemming from *de minimus* errors.

Already, there is EOIR precedent for "lodging" documents. EOIR's asylum regulation, 8 C.F.R. § 1208.4(a)(5)(v), anticipates the situation where an asylum applicant files the application before the one-year filing deadline, but the application is rejected as not properly filed. If the applicant refiles "within a reasonable period thereafter," this qualifies as an "extraordinary circumstance" excusing the failure to meet the asylum one-year filing deadline.

The asylum application "lodging" rule is an improvement over the EOIR's general "sudden death" rule, however, the Supreme Court's rule has one major advantage: certainty. Lawyers remedying defective filings know they have only 60 days to act and they know that if they do remedy the deficiency within that time, the Court will accept the document as timely filed. Under the asylum application-filing rule, the lawyer does not know what the IJ will consider to be a "reasonable period."

Therefore, we urge EOIR to adopt a "document lodging" regulation and procedure, using as a model the Supreme Court's rule 14.5. Documents will be considered "timely lodged," but not "filed" if they are deficient. The IJ and BIA clerk's offices should retain the documents, saving EOIR the trouble and costs of mailing back the documents to the respondent or lawyer. EOIR only has to notify the respondent or lawyer that the filing was deficient and that he or she has 60 days from the date of letter to remedy the deficiencies or have the filing rejected.

²⁵ In comments filed in September 10, 2008 in response to the Immigration Court Practice Manual, the American Immigration Lawyers Association noted that, "The requirement that the defect be corrected within the original deadline is not realistic, especially if the original filing is by mail and the Court returns the filing by mail. As a result, especially for practitioners in outlying areas, it will often not be possible to make the correction and return the filing in a timely fashion." Letter from AILA to the Chief Immigration Judge, *Comments on the EOIR Practice Manual* (Sept. 10, 2008) at 7 available at <http://www.aila.org/content/default.aspx?docid=26457>. AILA further noted that the remedy for an untimely filing – a motion under § 3.1(d)(iii) – would require affidavits and declarations and would mean additional work for respondents, attorneys, and IJs. *Id.*

B. EOIR Should Adopt the Federal Rules’ “Excusable Neglect” Standard

Many errors can be remedied at an early stage, and by doing so, EOIR would avoid contributing yet another ineffective assistance case to its workload. Toward this end, in addition to the framework for handling ineffective assistance claims and adoption of the document “lodging” rule, EOIR should again follow the federal courts’ lead by adopting an “excusable neglect” rule. We contemplate that in practice, this rule would apply in immigration court and at the BIA. The rule would be invoked by the attorney who made the error. If the IJ or BIA determines not to relieve the person of the error or neglect, the respondent then would determine whether to file an ineffective assistance claim.

Specifically, Rule 60 (b)(1) of the Federal Rules of Civil Procedure provides:

b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect.

A motion for Rule 60(b) relief must be made within one year from the entry of the order or judgment, or the date of the proceeding. FRCP 60(c)(1). In the immigration context, many errors are not discovered for quite some time after the events. Therefore, the one-year limitation would be reasonable here as well.

The Supreme Court has clarified that the test for excusable neglect is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s admission.” *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 394-95 (1993). In *Pioneer*, the Court provided a non-exhaustive list of factors which may be considered, including: the danger of prejudice to the non-movant; the length of the delay and its potential impact on judicial proceedings; the reason for the delay; and whether the movant acted in good faith. *Id.* Courts have granted relief on the basis of both substantive and procedural mistakes made by counsel.²⁶

Importantly for the immigration context, the federal courts have not required the movant to show that a different result would be reached upon reconsideration. Rather, most courts require parties to show only that the requested relief would not be “an empty

²⁶ See *Odishelidze v Aetna Life & Casualty Co.*, 853 F2d 21 (1st Cir. 1988) (lower court abused discretion in denying Rule 60(b) relief where plaintiff’s complaint failed to properly state diversity jurisdiction, but sufficient evidence was included to support jurisdiction and defense counsel did not contest jurisdiction); *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F2d 6 (2d Cir. 1987) (lower court abused discretion in denying Rule 60(b) relief where plaintiff’s counsel did not receive notice in time to appear at deposition).

exercise or futile gesture.”²⁷ In order to show that the relief requested would not be futile, the moving party must show a “potentially meritorious claim” or defense which, if proven, would permit a finding for the moving party.²⁸ Several circuits have rejected a definition of “meritorious” which would require a showing of a likelihood of success, adopting a standard instead which requires only a “hint of a suggestion” which, if proven at trial, would constitute a complete defense.²⁹

C. EOIR Should Adopt the “Mailbox” Rule for Filings

EOIR’s current regulations state that the filing date for the notice of appeal and other filed documents is the date the document is *received* by EOIR. See 8 C.F.R. §§ 1003.3(a)(1), 1003.38(c), 1240.15, 1240.53(a). This rule leaves respondents and their counsel with very little effective control over timely filing. The attorney may mail or send via private delivery a notice of appeal that would be timely filed if delivered within a reasonable amount of time or even the “guaranteed” time, only to have the carrier or delivery service fail to deliver on time. Not surprisingly, there has been considerable litigation, including on the question whether a private carrier’s failure to deliver as promised is an exceptional circumstance.³⁰ That lawyers must now anticipate and plan for possible failures of private delivery services to timely deliver increases, rather than decreases, the possible ineffectiveness claims to be filed against them. Adopting the “mailbox rule” will properly put the responsibility where the lawyer has more control – over the actual mailing, rather than the delivery, of the documents.

The U.S. Supreme Court applies the “mailbox rule” to all filings³¹ and the Circuit Courts apply the mailbox rule for the filing of briefs.³² Significantly, both the Supreme Court

²⁷ See, e.g., *Pease v. Pakhoed Corp.*, 980 F.2d 995, 998 (5th Cir. 1993); *Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir. 1992); *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir. 1990); *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969).

²⁸ See *Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995).

²⁹ *Thompson v. American Home Assur. Co.*, 95 F.3d 429 (6th Cir. 1996); *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C. Cir. 1980); *Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 243 (3d Cir. 1951).

³⁰ See *Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006); *Liadov v. Mukasey*, 518 F.3d 1003 (8th Cir. 2008).

³¹ Supreme Court Rule 29.2 says, “A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.”

and the other federal courts apply an even more flexible rule for filings by prisoners because prisoners' control over the processing of their filings ceases as soon as they give the filings to prison personnel.³³

Both DHS and EOIR have rules governing filing asylum applications with DHS that incorporate the mailbox rule flexibility. Specifically, 8 C.F.R. §§ 208.4(a)(2)(ii) and 1208.4(a)(2)(ii) say that an asylum application is considered to have been filed on the date it is received by DHS, except that:

In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date.

See also Nakimbugwe v. Gonzales, 475 F.3d 281, 284-85 (5th Cir. 2007) (asylum application mailed before the deadline but received after the deadline was timely filed).

These rules should be extended to the filing of all types of filings with EOIR. If EOIR extends the asylum application mailbox rule to all filings with EOIR, respondents and their attorneys will have control over compliance with filing deadlines. We anticipate this change will reduce the number of ineffective assistance of counsel complaints and the litigation resulting from filing delays.

D. EOIR Should Extend the Period for Filing a Notice of Appeal with the BIA to 60 Days

Currently, respondents must file their Notice of Appeal of an IJ decision at the BIA within 30 days from the IJ's decision. 8 C.F.R. §§ 1003.38(b), 1240.15, and 1240.53(a). Unlike notices of appeal and petitions for review in other contexts, which are a simple one-paragraph notices,³⁴ to avoid summary dismissal of the appeal, the EOIR-26 Notice

³² FRAP 25(a)(2)(B) says that a brief or appendix is timely filed if, on or before the last day for filing, it is mailed to the clerk by first class mail or other class of mail that is at least as expeditious, or "dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days."

³³ *See* Supreme Court Rule 29.2 (document "is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid"); FRAP 25(a)(2)(C) (document must be "deposited in the institution's internal mailing system on or before the last day for filing"); *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pro se petitioner's notice of appeal is deemed filed from the time a prisoner delivers it to prison authorities for forwarding to the district court).

³⁴ *See, e.g.*, FRAP 3(c) (requiring that notice of appeal of specify the parties taking the appeal, designate the judgment or order appealed from, and name the court to which the appeal is taken); INA § 242(c) (requiring that a petition for review or for

of Appeal must “specifically identify the findings of fact, the conclusions of law, or both, that are being challenged ... supporting authority must be cited ... [or] the specific facts contested must be identified [or] the appellant must state whether the alleged error relates to statutory grounds of eligibility or to the exercise of discretion and must identify the specific factual and legal finding or findings that are being challenged.” 8 C.F.R. §§ 1003.3(b), 1003.1(d)(2)(i). If the Notice of Appeal does not comply with these requirements, a single BIA member may summarily dismiss the appeal. 8 C.F.R. § 1003.1(d)(2)(i).

This hurdle is especially high if the respondent is pro se or was represented at the hearing by a lawyer who was paid only for the removal hearing. Many respondents retain a lawyer for the removal hearing only through considerable financial sacrifice. Respondents may have been pro se before the IJ but want to retain counsel for the appeal to the BIA. At that point, the respondent must decide to and have sufficient funds to retain counsel for the next stage and / or identify new counsel who will need to try to review the record and complete a properly detailed and accurate Notice of Appeal, and send it in time for its arrival at the BIA within 30 days.

Many ineffective assistance claims begin when lawyers attempt to and fail to comply with the narrow 30-day Notice of Appeal deadline. The unique challenges faced by respondents in removal proceedings – the lack of counsel appointed and paid by the government, the scarcity of pro bono counsel, the requirement that Notices of Appeal be detailed – and the goal of reducing the volume of ineffective assistance claims all call for a 60-day period for filing a notice of appeal.

E. IJs and the BIA Should Send a Copy of Their Decisions to Respondents and Inform Respondents of the Right to Appeal or Seek Review and the Relevant Deadlines

EOIR already has instituted a positive change to make sure all respondents – even those who are represented – have personal knowledge of appeal deadlines. Specifically, EOIR announced on December 19, 2008 by news release that as of March 1, 2009, it would provide a copy of the BIA’s final decisions to all respondents in immigration proceedings, regardless of whether the respondent is represented by counsel. This is an excellent practice and helps assure that respondents and their representatives are timely communicating about and acting to meet relevant deadlines. This practice should be codified into regulation and applied to written immigration court decisions as well.³⁵

We also urge EOIR to formally adopt the current, sound practice of notifying respondents of the date that their appeal is due to the BIA. Current regulations require immigration

habeas corpus of an order of removal contain a copy of the underlying order and state whether a court has upheld the validity of that order).

³⁵ As IJs usually issue oral decisions, the administrative burden of mailing even represented respondents a copy of the IJ decision will be minimal.

judges to give notice to a party affected by a decision of “the opportunity for filing an appeal.” 8 C.F.R. § 1003.3(a)(1). In addition, 8 C.F.R. § 1240.13(d) requires IJs to advise respondents of the provisions of 8 C.F.R. § 1240.15. The latter regulation sets out the 30-day filing deadline, defines the “filing date,” states in summary form the requirements for the Notice of Appeal, and cross references to other regulations. As far as we know, there is no requirement that IJs inform the respondent of the actual due date of the Notice of Appeal. Although IJs generally use a form for notifying respondents of their appeal rights and the form does allow the IJ to indicate the filing deadline, we urge EOIR to formalize the practice by including a due-date notice requirement in the regulations.

Further, the BIA’s written decisions should include notice that the respondent may have the right to petition for review of the decision, and that any such petition for review may have to be filed in federal court within 30 days of the date of the BIA’s decision. Even this short, generally-worded paragraph will put respondents on notice that they may have legal rights and must act on them quickly.

EOIR previously considered our suggestion for the BIA to provide notice of these rights, and said that such advisals could be implemented administratively without the need for a regulation.³⁶ At that time, the Department of Justice said that it would give the matter further consideration.

³⁶ “The Department has also considered the suggestion that the Board notify aliens of their right to file a petition for review within 30 days of the Board’s dismissal of the alien’s appeal. This advisal is beyond the scope of this rule, as it would require the Board to include such an advisal in every decision, not just those involving voluntary departure. However, such an advisal can be implemented administratively without the need for a regulation. The Board historically has not given such a notice, but the Department will give further consideration to the matter administratively.” Department of Justice, Executive Office for Immigration Review, *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 73 Fed. Reg. 76927, 76933 (Dec. 18, 2008).

We hope that our recommendations assist you in your review of the current ineffective assistance of counsel framework and the development of new regulations. As mentioned above, we welcome the opportunity to discuss our recommendations with you further. Please contact Nadine Wettstein at (202) 507-7523 or Beth Werlin at (202) 507-7522 with any questions you might have or if you would like to schedule a meeting to discuss these recommendations. Thank you for your consideration.

Respectfully Submitted,

American Immigration Council (formerly
American Immigration Law Foundation)
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