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DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:)
)
GUTIERREZ SOTO, Emilio)
GUTIERREZ SOTO, Oscar)
)
In removal proceedings)
_____)

File No.: 

DEPARTMENT OF HOMELAND SECURITY'S
OPPOSITION TO MOTION TO REOPEN BASED ON *MATTER OF LOZADA*

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

In the Matter of:)

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El Paso, Texas)

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OPPOSITION TO MOTION TO REOPEN BASED ON *MATTER OF LOZADA*

The Department of Homeland Security (DHS) received the respondents' motion to reopen based on *Matter of Lozada* and hereby files its opposition to that motion. In support of its opposition, the Department states the following:

The respondents are natives and citizens of Mexico. On July 19, 2017, after a full hearing on the merits of their asylum, withholding and deferral under the Convention Against Torture claim an Immigration Judge denied the respondents claim by way of written decision. On August 21, 2017, the respondents, through counsel, filed an appeal with the Board of Immigration Appeals (Board) which was subsequently dismissed¹. On November 17, 2017 the Immigration Judge denied the respondents motion to reopen and stay of removal. Subsequently, the respondents filed, with the Board, this motion to reopen based on *Matter of Lozada*.

In *Matter of Lozada*, the Board established a set of procedural criteria that an "allegedly aggrieved respondent" must satisfy before bringing a "motion based upon a claim of ineffective

¹ The Board dismissed the appeal for being filed untimely and returned the record to the Immigration Judge without further action.

assistance of counsel.” See *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). Procedurally, a motion to reopen removal proceedings because of ineffective assistance of counsel must be accompanied by (1) an affidavit by the alien setting forth the relevant facts, including the agreement with counsel regarding the alien's representation; (2) evidence that counsel was informed of the allegations and allowed to respond, including any response; and (3) an indication that ... a complaint has been lodged with the relevant disciplinary authorities, or an adequate explanation for the failure to file such a complaint. *Lara v. Trominski*, 216 F.3d 487, 496 (5th Cir. 2000) (citing *Lozada*, 19 I&N Dec. at 639. These procedural requirements have not been satisfied in the instant case. The Board has previously acknowledged these requirements set a “high standard,” but concluded it was “necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board.” *Lozada* at 639. “Where essential information is lacking,” the Board continued, “it is impossible to evaluate the substance of such claim.” *Id.*

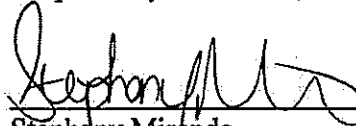
Here, the respondent and counsel have both submitted affidavits. See *Respondent's Motion to Reopen Exh. A*. However, the affidavits differ in their understanding as to the terms of the representation and are not detailed enough as to the agreement between attorney-client. In the respondent's affidavit he states that respondent counsel, Linda Rivas, agreed to take on the appeal of his case. On the other hand, counsel's affidavit, lines 19-20, she states that she began to look for other counsel to take on the respondent's appeal, yet was unsuccessful. *Id.* The affidavits lack in detailing the agreement they had in this attorney-client relationship. Furthermore, although a complaint on the basis of ethical violations is not required, the motion must state the reasons for not filing. *Lozada* at 639. Respondent's motion to reopen states that the respondent sufficiently explained why a complaint was not filed to disciplinary authorities. See *Respondent's Motion to*

Reopen at 4. The respondent's affidavit does not offer an adequate explanation for the failure to file such a complaint, besides "human error". In *Hernandez-Ortiz*, the Fifth Circuit held that an argument, that strict compliance with the *Lozada* requirements is not necessary, is without merit. See *Hernandez-Ortiz v. Holder*, 741 F.3d 644, 646 (5th Cir. 2014) (affirming the Board's decision to dismiss the petitioner's appeal because he failed to perfect his in effective assistance of counsel, claim under *Lozada*. Therefore, not having satisfied the procedural requirements in this case, the Board should deny the motion to reopen based on *Matter of Lozada*.

Respondent's counsel states that she has missed the filing deadline for the appeal. Even if the procedural prerequisites have not been met, a motion to reopen based on ineffective assistance of counsel may then be granted where the respondent demonstrates that the conduct of his prior counsel prejudiced the presentation of his case. *Lozada* at 638 (holding that ineffective assistance may constitute due process violation only where conduct was so fundamentally unfair that the alien was prevented from reasonably presenting his case). In this case, the respondents have not presented any evidence that they are *prima facie* eligible for any relief before the Board. Furthermore, the respondents were beneficiaries of a fair and complete hearing on the merits of their case, in the El Paso Immigration Court.

Inasmuch as the Department has opposed the motion to reopen, for the reasons outlined above, the Department also opposes the respondent's request for a stay of removal².

Respectfully Submitted,

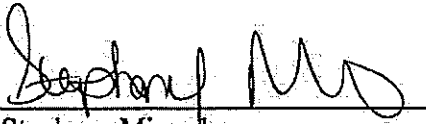


Stephany Miranda
Assistant Chief Counsel

² On December 7, 2017 the Board granted the respondents stay of removal pending the motion to reopen.

CERTIFICATE OF SERVICE

I certify that on December 13, 2017, I served a true and correct copy of the foregoing on the respondent's counsel, Eduardo Beckett at P.O. Box 971061 El Paso, Texas 79997 by depositing it in the United States Mail, postage prepaid.



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DEPARTMENT OF HOMELAND SECURITY'S
MOTION TO ACCEPT LATE FILING

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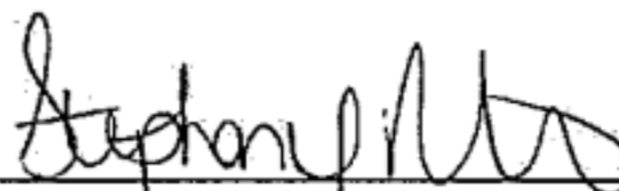
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DEPARTMENT OF HOMELAND SECURITY'S
MOTION TO ACCEPT LATE FILING

The Department of Homeland Security ("Department") hereby requests the Board of Immigration Appeals (Board) accept the Department's late-filed motion opposing the respondent's motion to reopen based on *Matter of Lozada*. The Department received the respondent's motion to reopen on November 21, 2017 and is filing their response on December 13, 2017.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Stephany Miranda".

Stephany Miranda
Assistant Chief Counsel