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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1208

[EOIR Docket No. 170P; AG Order No. 3706-2016]

RIN 1125-AA68

Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is proposing to amend the regulations of the Executive Office for Immigration Review (EOIR) by establishing procedures for the filing and adjudication of motions to reopen removal, deportation, and exclusion proceedings based upon a claim of ineffective assistance of counsel. This proposed rule is in response to *Matter of Compean, Bangaly & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009), in which the Attorney General directed EOIR to develop such regulations. The Department also proposes to amend the EOIR regulations that provide that ineffective assistance of counsel may constitute extraordinary circumstances that may excuse the failure to file an asylum application within 1 year after the date of arrival in the United States.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by EOIR Docket No. 170P, by one of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.
- Mail: Jean King, General Counsel, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 170P on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Jean King, General Counsel, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. Contact Telephone Number (703) 305-0470.

FOR FURTHER INFORMATION CONTACT: Jean King, General Counsel, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation.

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will

reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

All submissions received should include the agency name and EOIR Docket No. 170P for this rulemaking. Please note that all comments received are considered part of the public record and made available for public inspection at http://www.regulations.gov. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on http://www.regulations.gov.

Personal identifying information and confidential business information identified as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the "For Further Information Contact" section above for agency counsel's contact information.

The reason that EOIR is requesting electronic comments before midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov / Federal Docket Management System (FDMS), which receives electronic comments, terminates the public's ability to submit comments at midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov / FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before midnight on the day the comment period closes.

II. Executive Summary

This proposed rule would establish standards for adjudicating motions to reopen based on ineffective assistance of counsel in immigration proceedings before the immigration judges and the Board of Immigration Appeals (Board or BIA). The Board has addressed reopening proceedings based on ineffective assistance of counsel in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). In *Matter of Compean, Bangaly, & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009) (*Compean I*), Attorney General Mukasey overturned, in part, the Board's decisions in *Matter of Lozada* and *Matter of Assaad*, and provided a new administrative framework for adjudicating motions to reopen based on ineffective assistance of counsel. However, in *Matter of Compean, Bangaly, & J-E-C-*, 25 I&N Dec. 1 (A.G. 2009) *(Compean II)*, Attorney General Holder vacated *Compean I*, and directed EOIR to develop a proposed rule pertaining to such motions. Accordingly, the Department of Justice (Department) has drafted this proposed rule.

Under this proposed rule, an individual seeking to reopen his or her immigration proceedings would have to establish that the individual was subject to ineffective assistance of

counsel and that, with limited exceptions, he or she suffered prejudice as a result. The proposed rule would provide guidelines for determining when counsel's conduct was ineffective, and when an individual suffered prejudice. Under the proposed rule, a motion to reopen based on ineffective assistance of counsel would be required to include: (1) an affidavit, or a written statement executed under the penalty of perjury, providing certain information; (2) a copy of any applicable representation agreement; (3) evidence that prior counsel was notified of the allegations and of the filing of the motion; and (4) evidence that a complaint was filed with the appropriate disciplinary authorities. The proposed rule would permit adjudicators, in exercises of discretion committed exclusively to EOIR, to excuse noncompliance with these requirements in limited circumstances. The proposed rule would also provide that deadlines for motions to reopen can be equitably tolled in certain instances where the motion is based on ineffective assistance of counsel.

The Department believes that this proposed rule would promote consistency in the reopening of EOIR proceedings based on ineffective assistance of counsel, thereby helping to ensure the integrity and fairness of those proceedings. Given the importance of the issues involved, the Department believes it is important for the public to be able to participate in formulating the framework for reopening proceedings based on ineffective assistance of counsel.

III. Analysis of the Motion to Reopen Provisions in Proposed § 1003.48

The Immigration and Nationality Act ("Act" or "INA") provides the Attorney General with extensive authority relating to proceedings before the immigration courts and the Board. The Act provides the Attorney General with the authority to promulgate regulations governing such proceedings. *See* INA 103(g)(2). The Act further provides the Attorney General with the broad authority to reopen proceedings and recognizes her existing authority in this area. *See*

INA 240(c)(7) (permitting a motion to reopen within 90 days of the date on which a final administrative order of removal is entered); INA 240(b)(5)(C) (granting an alien 180 days to seek reopening in order to rescind a removal order entered *in absentia*, and providing no time limit where the alien did not receive notice of the immigration hearing or was in custody and the failure to appear was through no fault of the alien).[1] The Supreme Court also has long recognized the broad discretion accorded the Attorney General to grant or deny motions to reopen proceedings. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) ("The granting of a motion to reopen is thus discretionary, and the Attorney General has 'broad discretion' to grant or deny such motions.") (internal citation omitted); *accord INS v. Abudu*, 485 U.S. 94, 105-06 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Matter of Coelho*, 20 I&N Dec. 464, 471-72 (BIA 1992).[2] Under the delegated authority of the Attorney General, the Board has consistently permitted the reopening of immigration proceedings based upon a claim of ineffective assistance of counsel. *See Matter of Assaad*, 23 I&N Dec. at 558; *Matter of Lozada*, 19 I&N Dec. at 639-40. The Department believes that, in appropriate cases, reopening immigration proceedings

[1] The Act's provisions relating to motions to reopen took effect in 1997. Motions to reopen immigration proceedings had previously been permitted by regulation. *See generally Dada v. Mukasey*, 554 U.S. 1, 12-15 (2008).

[2] The Act imposes requirements that must be met for a motion to reopen to be granted. *See, e.g.*, INA 240(c)(7)(B) ("The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."). The Act's implementing regulations elaborate on these requirements. *See* 8 CFR 1003.23(b)(3) ("A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."); 8 CFR 1003.2(c)(1) ("A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing[.]"); *cf.* 8 CFR 1003.23(b)(1) ("An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals."); 8 CFR 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) ("Notwithstanding the statutorily mandated restrictions, the Board retains limited discretionary powers under the regulations to reopen or reconsider cases on our own motion. . . . The power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.") (internal citation omitted).

based upon a claim of ineffective assistance of counsel continues to be a permissible exercise of the Attorney General's broad discretion.

Immigration proceedings are civil proceedings with high stakes, including the potential removal from the United States of an individual with long-standing family or other ties, or the grant or denial of relief or protection to an individual who claims to fear harm in his or her native country. *See, e.g., Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 806 (9th Cir. 2007). Considering the serious consequences that may result from immigration proceedings, the Attorney General believes that it is paramount to ensure the integrity and fairness of such proceedings. The Attorney General therefore proposes to exercise her authority and discretion to regulate the administrative process of immigration proceedings before the immigration courts and the Board by codifying an administrative remedy for individuals who were in removal, deportation, or exclusion proceedings before EOIR and were subject to ineffective assistance of counsel.[3]

[3] The Department notes that there is currently a split among the circuits regarding whether there is a constitutionally-based right to effective counsel in immigration proceedings. *Compare, e.g., Lin Xing Jiang v. Holder*, 639 F.3d 751, 755 (7th Cir. 2011) ("No statute or constitutional provision entitles an alien who has been denied effective assistance of counsel to reopen the proceedings on the basis of that denial. This Circuit has recognized, nevertheless, that the denial of effective assistance of counsel may under certain circumstances violate the due process guarantee of the Fifth Amendment.") (brackets, ellipsis, and internal quotation marks and citation omitted); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007) ("A claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment – i.e., as a violation of that amendment's guarantee of due process."), *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) ("While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings."), *and Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003) ("While an alien does not have a right to appointed counsel, he does have a Fifth Amendment right to a fundamentally fair proceeding."), *with Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) ("[W]e hold that there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding."). It is beyond the scope of this proposed rule to address whether there is a constitutionally-based right to effective assistance of counsel in immigration proceedings. Rather, this rule is limited to providing an administrative remedy under appropriate circumstances based on the Attorney General's statutory authority and discretion. We note, however, that Attorney General Holder's order in *Compean II*, 25 I&N Dec. at 3, provided that nothing in that order would affect the litigating positions of the Department, and the Department has consistently argued before the Supreme Court that there is no constitutional right to effective assistance of counsel in immigration proceedings. *E.g.*, Brief for Respondent on Petition for a Writ of Certiorari at 14 n.3, *Mata v. Holder*, 135 S. Ct. 1039 (2015) (No. 14-185). Nothing in the proposed regulations affects this position.

The proposed rule would establish procedures and substantive requirements for the filing and adjudication of motions to reopen removal, deportation, and exclusion proceedings before the immigration judges and the Board based upon a claim of ineffective assistance of counsel. The rule would build on procedures, established in *Matter of Lozada* and *Matter of Assaad*, governing motions to reopen based upon a claim of ineffective assistance of counsel.

Matter of Lozada, decided by the Board in 1988, established a three-step procedure for individuals moving to reopen their deportation proceedings— which are now known as removal proceedings— based upon a claim of ineffective assistance of counsel. These three steps are commonly referred to as the *Lozada* requirements or *Lozada* factors, and they provide a "basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board." *Matter of Lozada*, 19 I&N Dec. at 639. First, "[a] motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit attesting to the relevant facts," including "a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken [in the relevant proceeding] and what counsel did or did not represent to the [individual] in this regard." *Id.* Second, "former counsel must be informed of the allegations and allowed the opportunity to respond," and that response (or lack thereof) should accompany the motion. *Id.* Third, "the motion should reflect whether a complaint has been filed with the appropriate disciplinary authorities regarding such representation, and if not, why not." *Id.*

In *Matter of Lozada*, the Board also noted specifically that "[l]itigants are generally bound by the conduct of their attorneys, absent egregious circumstances." *Id.* (citing *LeBlanc* v. *INS*, 715 F.2d 685 (1st Cir. 1983)); *see also Matter of B-B-*, 22 I&N Dec. 309, 310-11 (BIA 1998). In denying the ineffective assistance claim in *Matter of Lozada*, the Board noted that

"[n]o such egregious circumstances have been established in this case." *Matter of Lozada*, 19 I&N Dec. at 639.

The Board also required, in *Matter of Lozada*, that the individual filing the motion establish prejudice. *See id.* at 638, 640. The Board did not set forth a specific standard for prejudice, but simply noted that "no prejudice was shown to have resulted from prior counsel's" conduct in that case. *Id.* at 640.

For over 20 years since the Board's decision, *Matter of Lozada* has provided a workable administrative framework for adjudicating ineffective assistance claims in what are now known as removal proceedings. Thus, *Matter of Lozada* serves as a solid starting point for setting up a framework for this proposed rule. This framework affords relief to an individual in removal, deportation, or exclusion proceedings harmed by his or her attorney's ineffectiveness and at the same time takes into consideration countervailing concerns regarding abuse of the legal process and delay of immigration proceedings.

The Federal courts of appeals have generally endorsed the *Lozada* requirements. In doing so, courts have recognized the important policy considerations those requirements embody. *See, e.g.*, *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008) ("[The *Matter of Lozada*] framework . . . is designed to screen out frivolous, stale, and collusive claims."); *Patel v. Gonzales*, 496 F.3d 829, 831-32 (7th Cir. 2007) ("The *Lozada* requirements reduce the potential for abuse by providing information from which the BIA can assess whether an ineffective assistance claim has enough substance to warrant the time and resources necessary to resolve the claim on its merits."); *Reyes v. Ashcroft*, 358 F.3d 592, 597 (9th Cir. 2004) ("We presume, as a general rule, that the Board does not abuse its discretion when it obligates [individuals] to satisfy *Lozada*'s literal requirements."); *Betouche v. Ashcroft*, 357 F.3d 147, 150 (1st Cir. 2004)

(suggesting that *Matter of Lozada* provides "fair and efficacious techniques for screening out, *ab initio*, the numerous groundless and dilatory claims routinely submitted in these cases."); *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003) (". . . *Lozada*'s policy goals . . . are to provide a framework within which to assess the *bona fides* of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance.").

While the Federal courts of appeals have generally endorsed the *Lozada* requirements, several courts have adopted varying interpretations for determining compliance with the *Lozada* requirements, establishing prejudice, and applying equitable tolling to the filing deadlines for motions to reopen based upon a claim of ineffective assistance of counsel. As discussed below, the courts of appeals have differed on what circumstances, if any, may excuse noncompliance with the *Lozada* requirements. For example, some courts have been flexible in applying the *Lozada* requirements where, in the court's view, strict compliance is not necessary to achieve the requirements' purpose. *See, e.g.*, *Morales Apolinar v. Mukasey*, 514 F.3d 893, 896 (9th Cir. 2008) ("In practice, we have been flexible in our application of the *Lozada* requirements. The *Lozada* factors are not rigidly applied, especially where their purpose is fully served by other means."); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 132-34 (3d Cir. 2001) (concluding that the *Lozada* requirements are "a reasonable exercise of the Board's discretion," *id.* at 132, but stressing "that the failure to file a [bar] complaint is *not* fatal if a petitioner provides a reasonable explanation for his or her decision," *id.* at 134) (emphasis in original); *cf. Patel*, 496 F.3d at 831 (holding that "[t]he BIA is free to deny motions to reopen for failure to comply with *Lozada* as long as it does not act arbitrarily"). One court has found that there are circumstances where compliance with the requirements is unnecessary. *See, e.g.*, *Escobar-Grijalva v. INS*, 206 F.3d

1331, 1335 (9th Cir. 2000) (finding that there is no need to comply with *Matter of Lozada* where the record establishes on its face ineffective assistance of counsel).

The Federal courts of appeals have also proposed varying standards for prejudice. Some courts have required a strict standard for evaluating prejudice. *See, e.g., Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) (requiring the individual filing the motion to "establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States"). Other courts have applied a standard similar to that established by *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which held that prejudice exists when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Fadiga v. Att'y Gen.*, 488 F.3d 142, 158-59 (3d Cir. 2007) (agreeing that *Strickland*'s "reasonable probability" standard is appropriate in the context of removal proceedings); *Obleshchenko v. Ashcroft*, 392 F.3d 970, 972 (8th Cir. 2004) (characterizing the court's prejudice standard as "akin" to the *Strickland* test).

In addition, while the courts of appeals that have reached the issue have permitted the equitable tolling of filing deadlines for untimely motions to reopen based upon claims of ineffective assistance of counsel, some courts have not yet fully addressed whether these deadlines can be equitably tolled.[4] *Compare, e.g., Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) ("Equitable tolling may apply when a petitioner has received ineffective assistance of counsel.") (internal quotation marks omitted), *with Neves v. Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (stating that "[w]e assume arguendo, but do not decide, that the time and number limits on motions to reopen are subject to equitable tolling"). There is also a lack of uniformity among the

[4] Equitable tolling refers to "[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." *Black's Law Dictionary* 579 (8th ed. 2004).

courts regarding the precise requirements and standards that an individual must meet to establish due diligence in order to be eligible for equitable tolling. *Compare, e.g.*, *Singh v. Gonzales*, 491 F.3d 1090, 1096 (9th Cir. 2007) (providing that the filing deadline "is [equitably] tolled until the petitioner 'definitively learns' of counsel's fraud," if the petitioner acted with due diligence), *with Patel v. Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (providing that "[e]quitable tolling requires a court to consider whether a reasonable person in the plaintiff's position would have been aware of the *possibility* that he had suffered an injury") (internal quotation marks omitted).

The purpose of this proposed rule is to establish uniform procedural and substantive requirements for the filing of motions to reopen based upon a claim of ineffective assistance of counsel and to provide a uniform standard for adjudicating such motions. Like *Matter of Lozada* and its progeny, this proposed rule would provide an "objective basis from which to assess the veracity of the substantial number of ineffective assistance claims," would "hold attorneys to appropriate standards of performance," and would "ensure both that an adequate factual basis exists in the record for an ineffectiveness [motion] and that the [motion] is a legitimate and substantial one." *Tamang v. Holder*, 598 F.3d 1083, 1090 (9th Cir. 2010) (discussing the goals behind *Matter of Lozada*) (internal quotation marks omitted). While allowing for some flexibility, the proposed rule would clarify the specific kinds of evidence and documentation to be submitted in support of motions to reopen based upon a claim of ineffective assistance of counsel. The filing requirements described in this rule would serve to guide an individual filing a motion to reopen in providing evidence necessary for a determination as to whether his or her counsel was ineffective. As the Board stated in *Matter of Lozada*, "[t]he high standard announced here is 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. Where essential

information is lacking, it is impossible to evaluate the substance of such claim." *Matter of Lozada*, 19 I&N Dec. at 639.

This proposed rule would add new § 1003.48 to title 8 of the Code of Federal Regulations ("regulations"). New § 1003.48 would provide the filing and evidentiary requirements for motions to reopen based upon a claim of ineffective assistance of counsel. This section would also incorporate standards for evaluating whether an individual has established that he or she (1) acted with due diligence for the purpose of determining the applicability of equitable tolling and (2) was prejudiced by prior counsel's conduct. In addition, this proposed rule would add a cross-reference to new § 1003.48 to the current regulations governing motions to reopen proceedings and to rescind orders of removal, deportation, or exclusion entered *in absentia*.

The Department notes that the Board has consistently permitted the reopening of proceedings based upon a claim of ineffective assistance of counsel. *See Matter of Assaad*, 23 I&N Dec. at 558.[5] The requirements in proposed new § 1003.48 would be in addition to the general requirements for reopening provided in section 240(c)(7) of the Act and §§ 1003.2 and 1003.23 of the regulations. Thus, motions to reopen proceedings based upon a claim of ineffective assistance of counsel would need to meet the general requirements for reopening in proposed §§ 1003.2 and 1003.23, as well as the procedural and substantive requirements for such motions at proposed § 1003.48. The Board and the immigration judges, moreover, have broad authority to grant or deny a motion in the exercise of discretion, and this includes the discretion to deny a motion even if the party moving has presented a *prima facie* case for relief. *See* 8 CFR

[5] Section 240 of the Act is applicable only to removal proceedings (which are initiated on or after April 1, 1997), but, by far, most motions to reopen are filed in removal proceedings. For clarity, we note that in deportation and exclusion proceedings, and all other types of proceedings before the immigration judges and the Board, motions to reopen are governed exclusively by the Attorney General's regulations in 8 CFR 1003.2 and 1003.23, not by section 240 of the Act.

1003.2(a), 1003.23(b)(3); *see also Abudu*, 485 U.S. at 105 (explaining that, even where an individual filing a motion to reopen has presented a *prima facie* case for relief, the Board may deny the motion if the movant would not be entitled to the discretionary relief ultimately at issue).

A. Applicability

The proposed provisions of the rule addressing motions to reopen based upon a claim of ineffective assistance of counsel would cover conduct that occurred only after removal, deportation, or exclusion proceedings have commenced with the immigration courts.[6] With the exception discussed below, the proposed provisions of § 1003.48 would not apply to motions to reopen proceedings before the immigration judge or the Board based on counsel's conduct before another administrative or judicial body, including before, during the course of, or after the conclusion of immigration proceedings. This includes conduct that was immigration-related or that occurred before the U.S. Department of Homeland Security (DHS) or another government agency. *See, e.g.*, *Contreras v. Att'y Gen.*, 665 F.3d 578, 585-86 (3d Cir. 2012) (declining to find ineffective assistance of counsel in the preparation and filing of a visa petition where counsel's conduct "did not compromise the fundamental fairness of" subsequent removal proceedings); *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1051 (9th Cir. 2008) (same where counsel's conduct "[did] not relate to the fundamental fairness of an ongoing proceeding"). The reason for this limitation is that the Board and the immigration judges are generally not in a

[6] For purposes of this rule, included as "removal, deportation, or exclusion proceedings" would be asylum-only and withholding-only proceedings, given that those proceedings are "conducted in accordance with the same rules of procedure as [removal proceedings]." 8 CFR 1208.2(c)(3)(i). This rule would not apply in bond proceedings. However, in bond proceedings, after an immigration judge makes an initial bond redetermination, an individual can request, in writing, that the immigration judge make "a subsequent bond redetermination . . . [based] upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 CFR 1003.19(e). In addition, this rule would not apply in practitioner discipline proceedings conducted under 8 CFR part 1003 subpart G.

position to provide a remedy in a situation where an attorney's performance before another administrative or judicial body is alleged to be ineffective. Rather, a request for a remedy in such a situation would be more appropriately directed to that administrative or judicial body before which the alleged ineffective assistance occurred. *Cf. Rivera v. United States*, 477 F.2d 927, 928 (3d Cir. 1973) (holding that, where the petitioner's appeal had been dismissed because his attorney failed to file a brief, the petitioner's remedy was through a motion in the court of appeals requesting that the mandate be recalled to determine whether the appeal should be reinstated, not through a motion in the district court); *United States v. Winterhalder*, 724 F.2d 109, 111 (10th Cir. 1983) (same).

The proposed motion provisions in § 1003.48 would provide for one explicit exception to the limitation on the Board's authority to provide a remedy for ineffective assistance of counsel before another administrative or judicial body. The exception would be with respect to a claim that counsel was ineffective for failing to file a timely petition for review of a Board decision with the appropriate court of appeals. Under the proposed rule at § 1003.48(c), an individual could file a motion to reopen with the Board in such a situation, and the Board would have discretion to reopen proceedings to address such a claim. The reason for allowing such a motion is that the failure to file a timely petition for review leaves the court of appeals without any jurisdiction to address the claim of ineffectiveness given that the 30-day deadline for filing a petition for review is mandatory and jurisdictional. *See* INA 242(a)(1), (b)(1); *see, e.g., Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012); *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 117-18 (2d Cir. 2008); *Dakane v. U.S. Att'y. Gen*., 399 F.3d 1269, 1272 n. 3 (11th Cir. 2004); *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007). This exception is consistent with the general principles expressed in both *Compean I* and *Compean II*; in both decisions, the

Attorney General contemplated that the Board could provide a remedy for ineffective assistance that occurred after the issuance of a final order of removal. *See Compean I*, 24 I&N Dec. at 740 (stating that "the [view] I adopt today . . . is that the Board has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered"); *Compean II*, 25 I&N Dec. at 3 (noting that, "prior to *Compean*[*I*], the Board itself had not resolved whether its discretion to reopen removal proceedings includes the power to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after a final order of removal had been entered," and stating that "I resolve the question in the interim by concluding that the Board does have this discretion, and I leave it to the Board to determine the scope of such discretion").

For his or her case to be reopened, an individual filing the motion based on failure to file a timely petition for review would have to comply with the requirements of § 1003.48(b)(1)-(3) (affidavit, notice to counsel, and complaint filed with the appropriate disciplinary authorities), described in more detail below. Under § 1003.48(c)(2), in order to establish that counsel acted ineffectively, the individual would have to establish that counsel had agreed to file a petition for review but failed to do so. To meet this burden, the individual would have to submit a representation agreement making clear that the scope of representation included the filing of a petition for review, or would have to otherwise establish that the scope of representation included the filing of a petition for review.

The proposed motion provisions would only apply to the conduct of certain individuals. With the exception discussed below, these provisions would cover only the conduct of attorneys and accredited representatives as defined in part 1292 of title 8 of the Code of Federal Regulations. The reason for such a limitation is that attorneys and accredited representatives are

governed by rules of professional conduct and have skills, including knowledge of immigration laws and procedures, which are directly related to furthering the interests that individuals and the government have in fair and accurate immigration proceedings. *See, e.g., Hernandez v. Mukasey*, 524 F.3d 1014, 1018-20 (9th Cir. 2008) (noting that, in contrast to the law's treatment of attorneys possessing particular skills and governed by specific professional standards, "the law has never presumed that [the participation of non-attorney 'immigration consultants'] is necessary or desirable to ensure fairness in removal proceedings," *id.* at 1019, and that, if "an individual . . . knowingly relies on assistance from individuals not authorized to practice law, such a voluntary choice will not support a due process claim based on ineffective assistance of counsel," *id.* at 1020). With limited exceptions, a person who is not an attorney or accredited representative is not permitted to represent individuals in proceedings before the immigration courts or the Board. *See* 8 CFR 1292.1(a)(1)-(5). Moreover, the regulations require the immigration judge to advise individuals in removal proceedings of their right to representation, at no expense to the government, by counsel of their choice authorized to practice in the proceedings, and specifically require that individuals in proceedings be advised of the availability of pro bono legal services and receive a list of such services. *See* 8 CFR 1003.16, 1003.61, 1240.10(a)(1).

However, this proposed rule would recognize that, sometimes, a person who is not an attorney or accredited representative may lead an individual in removal, deportation, or exclusion proceedings to believe that the person is an attorney or representative, and that the individual in proceedings, as a result of that mistaken belief, may retain that person to represent him or her in such proceedings. When this occurs, in assessing whether to reopen proceedings, the immigration judge or the Board would evaluate on a case-by-case basis whether it was

reasonable for the individual in such proceedings to believe that the person in question was indeed an attorney or an accredited representative, and whether he or she then retained that person. *See* §§ 1003.23(b)(4)(v), 1003.48(a)(1). In evaluating these questions, the immigration judge or the Board could consider, among others, the following inquiries: whether, and the extent to which, the person held himself or herself out as an attorney or accredited representative; whether the individual in proceedings knowingly relied on the assistance of the person not authorized to practice law; and the extent of the representation, including whether the person appeared in the immigration proceedings or completed, signed, or submitted documents or evidence in such proceedings on behalf of the individual.

B. Effective Date

In addition to the above limitations, the proposed provisions of § 1003.48 would apply only to motions to reopen proceedings based upon a claim of ineffective assistance of counsel filed with the immigration courts or the Board on or after the effective date of the final rule.

C. Proposed Requirements in § 1003.48 for Filing a Motion to Reopen Based upon a Claim of Ineffective Assistance of Counsel

The proposed rule at § 1003.48 would provide filing and evidentiary requirements for motions to reopen based upon a claim of ineffective assistance of counsel. In order to succeed in a motion to reopen, the individual filing the motion would have to submit evidence both that prior counsel's conduct was ineffective and that the individual was prejudiced as a result of counsel's ineffective assistance.

With respect to the specific conduct that would amount to ineffective assistance in immigration proceedings, this rule would not set any bright line standards, or an enumerated list, of what specific conduct would amount to ineffective assistance in immigration proceedings.

Rather, the proposed rule would provide, at § 1003.48(a)(2), that "[a] counsel's conduct constitutes ineffective assistance of counsel if the conduct was unreasonable, based on the facts of the particular case, viewed as of the time of the conduct."

This provision, in calling for an inquiry based on the reasonableness of the counsel's conduct, viewed when the conduct occurred, would be based on the Supreme Court's holding in *Strickland*. There, the Court stated that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by . . . counsel or the range of legitimate decisions regarding how best to represent a [client]." *Strickland*, 466 U.S. at 688-89. Rather, for an attorney's representation to constitute ineffective assistance, the representation "must . . . [fall] below an objective standard of reasonableness," *id.* at 688, judged "on the facts of the particular case, [and] viewed as of the time of counsel's conduct," *id.* at 690; *see also Wong v. Belmontes*, 558 U.S. 15, 16-17 (2009) (per curiam) (citing *Strickland*, 466 U.S. at 687-89).

Under this proposed provision, a tactical decision would not be ineffective assistance if the decision was reasonable when it was made, even if it proved unwise in hindsight. *See Strickland*, 466 U.S. at 689 (stating that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight"); *Mena-Flores v. Holder*, 776 F.3d 1152, 1169 (10th Cir. 2015) (stating that "[a]n attorney's objectively reasonable tactical decisions do not qualify as ineffective assistance"); *Jiang v. Mukasey*, 522 F.3d 266, 270 (2d Cir. 2008) (holding that "recommending [a] strategic decision [that ultimately does not succeed] does not constitute ineffective assistance of counsel"); *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (holding that the attorney's decision not to contest deportability, even if "unwise" in hindsight, was not ineffective assistance of counsel);

Rodriguez-Gonzalez v. INS, 640 F.2d 1139, 1142 (9th Cir. 1981) (holding that a tactical "decision to forego challenging [an] accusation of entry without inspection . . . even if in hindsight unwise, does not constitute ineffective assistance"); *cf. Matter of Velasquez*, 19 I&N Dec. 377, 383 (BIA 1986) (stating that the attorney's "admissions [of factual allegations] and the concession of deportability were reasonable tactical actions," and thus were binding). Further, under this proposed provision, we expect that there would be "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The filing requirements described in proposed § 1003.48(b)(1)-(3) would serve to guide the individual filing the motion in providing the evidence necessary for a determination as to whether his or her counsel's conduct was ineffective. In order to demonstrate that counsel's conduct was ineffective, the motion should set forth clearly the particular circumstances underlying a given case. In order to prevail, the individual may need to submit documentary or other supporting evidence beyond that described in § 1003.48(b)(1)-(3). For example, additional evidence could include evidence of payment to prior counsel or an affidavit explaining what the individual in proceedings specifically disclosed to prior counsel, such as the individual's family ties or criminal history. Additional supporting evidence could also include written statements from current counsel or witnesses regarding prior counsel's conduct.

As discussed in detail in section E, in addition to demonstrating that prior counsel's conduct was ineffective, the individual filing the motion would have the burden of establishing that the individual was prejudiced as a result of that conduct. The requirement of providing evidence that the prior counsel was ineffective would be distinct from establishing prejudice as required in § 1003.48(b)(4). The Department cautions that the immigration judge or the Board

would have the discretion to deny the motion without reaching the issue of prejudice, if the individual does not submit arguments or evidence establishing that the prior counsel's conduct was ineffective.

Proposed § 1003.48 would describe the required evidence to be included with a motion to reopen proceedings before the immigration judge or the Board based upon a claim of ineffective assistance of counsel. Section 1003.48(b)(1)(i) would require an individual to submit an affidavit, or a written statement executed under the penalty of perjury as provided in 28 U.S.C. 1746,[7] setting forth in detail the agreement that was entered into with prior counsel with respect to the actions to be taken by counsel, and what representations counsel did or did not make in this regard.

An affidavit is "[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Black's Law Dictionary* 58 (6th ed. 1990). The "affidavit provides an exact, sworn recitation of facts, collected in one place . . . . [T]he affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim." *Reyes*, 358 F.3d at 598 (ellipsis and brackets in original) (quoting *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 327 (9th Cir. 1995)). The Department recognizes, however, that some individuals, particularly those who are unrepresented, may face burdens in complying with the technical requirements of an affidavit. For example, an unrepresented individual may be in detention and without ready access to an official with authority to administer an oath or affirmation. For that reason,

[7] Under 28 U.S.C. 1746, an unsworn declaration, certification, verification, or statement executed in the United States is deemed to be made under penalty of perjury if it includes the following words "in substantially the following form": "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). . . . (Signature)."

§ 1003.48(b)(1)(i) would permit the submission of a written statement, executed under the penalty of perjury as provided in 28 U.S.C. 1746, that does not meet the technical requirements of an affidavit. In addition, as described in more detail below, the Board or an immigration judge could, in an exercise of discretion committed solely to EOIR, excuse the requirement that the written statement be executed under the penalty of perjury in certain limited instances.

Proposed § 1003.48(b)(1)(ii) would provide that, in addition to the affidavit or written statement executed under the penalty of perjury, the individual filing the motion must submit a copy of any agreement entered into with prior counsel. If no agreement is provided, the individual would have to explain its absence in the affidavit or written statement, for example by describing his or her efforts to obtain the agreement from prior counsel. In addition, the individual would have to provide any reasonably available evidence on the scope of the agreement and the reasons for its absence, for example by providing evidence that the representation agreement was unwritten. The requirement to provide evidence of the agreement with prior counsel would help immigration judges and the Board to understand the "nature, scope, or substance" of the attorney's obligations, if any, to his or her client, and thus whether prior counsel was ineffective. *Beltre-Veloz*, 533 F.3d at 10; *see also Punzalan v. Holder*, 575 F.3d 107, 111-12 (1st Cir. 2009) (quoting *Beltre-Veloz*, 533 F.3d at 10); *Ruiz-Martinez*, 516 F.3d at 121 (rejecting an ineffective assistance of counsel claim because the individual filing the motion "did not set forth his agreement with his prior attorneys concerning what actions would be taken or what they did or did not represent in this regard").

Proposed § 1003.48(b)(2) would require an individual filing a motion to provide evidence that the counsel whose representation is claimed to have been ineffective has been informed of the allegations leveled against that counsel and that a motion to reopen alleging ineffective

assistance of counsel would be filed on that basis. As discussed in *Matter of Lozada*, this requirement would mitigate the possibility of abuse by providing a "mechanism . . . for allowing former counsel . . . to present his version of events if he so chooses." 19 I&N Dec. at 639; *see Debeatham v. Holder*, 602 F.3d 481, 485-86 (2d Cir. 2010). Additionally, this "notice requirement [would] provide[] a mechanism by which the [immigration judge] may more accurately assess the merits of [an] ineffective assistance claim." *Reyes*, 358 F.3d at 599.

The Department notes that merely copying counsel on a complaint filed with the appropriate State bar or governmental authority would not be sufficient to meet the notice requirement; rather, the individual filing the motion would have to provide notice to his or her prior counsel in a separate written correspondence that a motion to reopen would be filed alleging ineffective assistance of counsel. With the motion, the individual would also have to provide evidence of the date he or she provided notice to prior counsel, and the manner in which this notice was provided, and the individual would have to include a copy of the correspondence to the attorney. The individual would also have to submit to the immigration court or the Board any subsequent response from prior counsel. This obligation would continue until such time as a decision is rendered on the motion.

Proposed § 1003.48(b)(3) would further require the individual filing the motion to file a complaint with the appropriate disciplinary authorities with respect to any violation of prior counsel's ethical or legal responsibilities. This requirement would help to monitor the legal profession and to assist the appropriate disciplinary authorities in considering and acting on instances of ineffective assistance of counsel. *See, e.g.*, *Matter of Rivera*, 21 I&N Dec. 599, 603-05 (BIA 1996). Additionally, it would "highlight[] the standard[s] which should be expected of attorneys who represent persons in immigration proceedings, the outcome of which may, and

often does, have enormous significance for the person." *Sswajje v. Ashcroft*, 350 F.3d 528, 533 (6th Cir. 2003) (quoting *Matter of Lozada*, 19 I&N Dec. at 639-40); *see also Reyes*, 358 F.3d at 596 (same). The requirement would "also serve[] to protect against collusion between 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." *Matter of Rivera*, 21 I&N Dec. at 604; *see also Betouche*, 357 F.3d at 150 (recognizing the "significant prospect that entirely meritless and/or collusive ineffective assistance claims may be filed for purely dilatory purposes"); *Xu Yong Lu*, 259 F.3d at 133 (quoting *Matter of Rivera*, 21 I&N Dec. 599, on the purposes of the bar complaint requirement).

The proposed rule provides that the individual filing the motion would have to file the complaint against his or her representative with the appropriate disciplinary authorities. For an attorney, the individual would have to file the complaint with the relevant State licensing authority. For an accredited representative, the individual would have to file the complaint with the EOIR disciplinary counsel.[8] Where the individual filing the motion reasonably but erroneously believed a person to be an attorney or accredited representative and retained that person to represent him or her in the proceedings before the immigration judge or the Board, the

[8] Individuals in immigration proceedings are permitted representation of their choosing before EOIR and may be represented by an accredited representative. 8 CFR 1003.16, 1292.1. The proposed rule would require that complaints against accredited representatives be filed with the EOIR disciplinary counsel because EOIR is responsible for the accreditation process and the EOIR disciplinary counsel is responsible for investigating allegations of misconduct against accredited representatives appearing before the immigration courts and the Board. *See* 8 CFR 1003.104, 1292.2(d). The Department notes that the Board and some circuit courts have analyzed ineffective assistance of counsel claims without expressly addressing whether the *Matter of Lozada* requirements should be strictly applied to an accredited representative. *See, e.g.*, *Matter of Zmijewska*, 24 I&N Dec. 87, 94-95 (BIA 2007); *Romero v. INS*, 399 F.3d 109, 112-13 (2d Cir. 2005). The Department has determined, however, that due to EOIR's ability to accredit and to discipline accredited representatives, an accredited representative should be treated the same as an attorney for purposes of determining ineffective representation. Thus, the Department has determined that the requirements for reopening based upon a claim of ineffective assistance of counsel should be applied to an accredited representative appearing in cases before the immigration judges or the Board in the same manner as the requirements are applied to an attorney.

individual would have to file the complaint with an appropriate State or local law enforcement agency (which in some States may include the State Attorney General's office) with authority over matters relating to the unauthorized practice of law or immigration-related fraud. If the individual filing the motion has any questions regarding determining the appropriate State or local enforcement agency with authority over such matters in proceedings before the immigration judges or the Board, he or she should contact the Fraud and Abuse Prevention Program in the Office of the General Counsel at EOIR at (703) 305-0470.

The individual filing the motion would have to submit a copy of the complaint and any correspondence from the disciplinary authority with his or her motion to the immigration court or the Board. In addition to filing the required complaint, the individual would not be precluded from taking any other actions to notify appropriate governmental or disciplinary authorities regarding the conduct of his or her prior counsel, accredited representative, or any person retained by the individual whom he or she reasonably but erroneously believed to be an attorney or accredited representative, and submitting evidence of such actions with his or her motion. In addition, the Department notes that this rule would not preclude the individual from taking any other actions to notify the appropriate governmental or disciplinary authorities regulating the unauthorized practice of law regarding any person not authorized to practice law.

The Department welcomes input from the public about the requirement to submit, with a motion to reopen, a complaint filed with the appropriate disciplinary authorities. As noted above, there are important policy reasons for this requirement, although the Department acknowledges certain countervailing concerns, as referenced by Attorney General Mukasey in *Compean I*, *see* 24 I&N Dec. at 737-38. The Department welcomes comments, including from

State licensing authorities, regarding the efficacy of this requirement in assisting State licensing authorities in regulating the legal profession.

Finally, proposed § 1003.48(b) would require the individual filing the motion to comply with the existing requirements for motions to reopen in §§ 1003.2 and 1003.23. Sections 1003.2 and 1003.23 require the individual to submit evidence of what will be proven at the hearing if the motion is granted and to submit any appropriate applications for relief, supporting documentation, or other evidentiary material. For a motion based on ineffective assistance of counsel, this could include evidence that the filer's prior counsel failed to provide to the immigration judge or the Board, or other independent evidence, such as affidavits, applications for relief and supporting documentation, proffered testimony of potential witnesses, family history, country conditions, identity documentation, or criminal records or clearances.

After promulgation of this rule, the Department may publish additional information, such as in a fact sheet or other format, to assist the public in filing motions to reopen based upon a claim of ineffective assistance of counsel. Additionally, the Department will seek out opportunities to engage the public in an effort to inform individuals about the process. The Department welcomes input from the public regarding what type of information might best assist counsel and unrepresented individuals in the preparation and filing of such motions with the immigration courts and the Board as well as information and ideas on how best to engage impacted communities.

D. Compliance with the Filing Requirements in Proposed § 1003.48

As discussed above, the evidentiary requirements in proposed § 1003.48 would guide individuals in proceedings in providing the evidence necessary for a determination of whether the counsel's conduct was ineffective, and would assist the immigration judge and the Board in

making this determination. *See generally Matter of Lozada*, 19 I&N Dec. at 639-40 (discussing how these evidentiary requirements assist the adjudicator in evaluating a claim of ineffective assistance of counsel); *Matter of Assaad*, 23 I&N Dec. at 556-57 (same); *Matter of Rivera*, 21 I&N Dec. at 603-07 (same).

Most circuits have required some level of compliance with *Matter of Lozada*. The First Circuit, for example, has generally required that the *Matter of Lozada* requirements be satisfied. *See, e.g.*, *Georcely v. Ashcroft*, 375 F.3d 45, 51 (1st Cir. 2004) (noting that "[a]lthough we have hinted that full compliance with *Lozada's* requirements might be excused in an appropriate case, the *Lozada* requirements generally make sense") (internal citation omitted). The court in *Georcely* reasoned:

> It is all too easy after the fact to denounce counsel and achieve a further delay while that issue is sorted out. And in the absence of a complaint to the bar authorities, counsel may have all too obvious an incentive to help his client disparage the quality of the representation.

Id.; *see also Punzalan*, 575 F.3d at 111 ("The BIA acts within its discretion in denying motions to reopen that fail to meet the *Lozada* requirements as long as it does so in a non-arbitrary manner.") (internal quotation marks omitted); *Betouche*, 357 F.3d at 150-51 (setting forth reasons for the *Matter of Lozada* requirements).

The Seventh, Eighth, and Tenth Circuits have also generally required compliance, but have not yet determined whether they might overlook a lack of compliance with the *Matter of Lozada* requirements in an appropriate case. *See Patel*, 496 F.3d at 831 (noting that "[w]e have not expressly decided whether the BIA abuses its discretion by requiring strict compliance with *Lozada*"); *Habchy v. Gonzales*, 471 F.3d 858, 863 (8th Cir. 2006) (noting that the Eighth Circuit "has not ruled on whether a strict application of those requirements could constitute an abuse of discretion in certain circumstances," but stating that, "[a]t the very least, an [immigration judge]

does not abuse his discretion in requiring substantial compliance with the *Lozada* requirements when it is necessary to serve the overall purposes of *Lozada*"); *Tang v. Ashcroft*, 354 F.3d 1192, 1196-97 (10th Cir. 2003) (stating that "[w]e not decide whether substantial compliance would be sufficient because Mr. Tang has made no attempt to comply with any of *Lozada*'s requirements"); *see also Stroe v. INS*, 256 F.3d 498, 504 (7th Cir. 2001) (noting that "we have difficulty understanding how an alien who fails to comply with the Board's criteria can succeed in challenging its decision").

The Sixth Circuit has also required that individuals filing motions generally comply with all three *Lozada* requirements, noting that "[s]ound policy reasons support compliance" and the requirements "facilitate a more thorough evaluation by the BIA and discourage baseless allegations." *Hamid v. Ashcroft*, 336 F.3d 465, 469 (6th Cir. 2003) (internal quotation marks omitted); *see also Pepaj v. Mukasey*, 509 F.3d 725, 727 (6th Cir. 2007) ("An alien who fails to comply with *Lozada*'s requirements forfeits her ineffective-assistance-of-counsel claim."). The Fifth Circuit also requires compliance with *Matter of Lozada*. *See Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012) (rejecting the argument that the court "should apply *Lozada* flexibly").

Other courts have adopted or indicated an approach under which full compliance may be excused in certain limited circumstances. In *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006), the court explained:

> [A]lthough *Lozada* provides a useful framework for assessing ineffective assistance claims, an alien's failure to satisfy all three requirements does not preclude appellate court review in every case. We will reach the merits of an ineffective assistance of counsel claim where the alien substantially complies with the *Lozada* requirements, such that the BIA could have ascertained that the claim was not frivolous and otherwise asserted to delay deportation. However, an alien who fails to satisfy any of the three *Lozada* requirements will rarely, if ever, be in substantial compliance.

Id. at 746; *cf. Dakane*, 399 F.3d at 1274 (requiring "substantial, if not exact, compliance with the procedural requirements of *Lozada*"); *Gbaya v. U.S. Att'y Gen.,* 342 F.3d 1219, 1222 & n. 2 (11th Cir. 2003) (stating that, given that the individual who filed the motion "failed to comply with at least two out of three *Lozada* requirements, [he] would not be in substantial compliance with *Lozada*," *id.* at 1222 n.2, but not deciding "whether the BIA may enforce strict compliance with *Lozada* or must also accept substantial compliance," *id.* at 1222).

However, a few courts of appeals have gone further, excusing a lack of compliance in a greater variety of situations. Such courts have warned of the "inherent dangers . . . in applying a strict, formulaic interpretation of *Lozada*." *Rranci v. Att'y Gen.*, 540 F.3d 165, 173 (3d Cir. 2008) (ellipsis in original) (internal quotation marks omitted); *see also Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007) ("As to compliance with *Lozada* in relation to claims of ineffective assistance of counsel, we have not required a slavish adherence to the requirements, holding only that substantial compliance is necessary."). These courts of appeals have differed on what circumstances excuse the *Matter of Lozada* requirements, but have generally held that there must be a rational reason for excusing failure to comply with one or more of the requirements. For example, both the Ninth and Second Circuits have noted that the *Matter of Lozada* requirements should not be rigidly applied where their purpose is fully served by other means. *See, e.g.*, *Morales Apolinar*, 514 F.3d at 896; *Piranej v. Mukasey*, 516 F.3d 137, 144-45 (2d Cir. 2008) (remanding to the Board because, although the individual filing the motion failed to submit an affidavit outlining his agreement with his prior counsel, a general retainer agreement may have satisfied the *Matter of Lozada* requirements).

The Ninth Circuit has found that, in some circumstances, the individual filing the motion does not need to comply with any of the requirements in *Matter of Lozada*. *See, e.g., Castillo-*

Perez v. INS, 212 F.3d 518, 525-27 (9th Cir. 2000) (finding that there is no need to comply with *Matter of Lozada* where the record was undisputed that counsel failed, without any reason, to apply in a timely manner for relief for which the client was *prima facie* eligible while telling the client that he had filed for such relief); *Escobar-Grijalva*, 206 F.3d at 1335 (finding that there is no need to comply with *Matter of Lozada* where the record establishes on its face ineffective assistance of counsel). In *Tamang*, 598 F.3d at 1090, the Ninth Circuit distinguished prior cases in which "strict compliance with *Lozada* was not required because, under the circumstances of those cases, the ineffectiveness of counsel was plain on its face." The court found that, in Tamang's case, "without Tamang's compliance with the *Lozada* elements, . . . it is impossible to determine whether [his] ineffective assistance of counsel claim has merit." *Id.* Accordingly, the law with regard to compliance with the *Matter of Lozada* requirements varies significantly among the circuits.

The proposed rule would provide adjudicators with the discretion, committed exclusively to EOIR, to excuse noncompliance with the filing requirements in § 1003.48(b)(1)-(3) for compelling reasons in various limited circumstances. Collectively, the filing requirements at § 1003.48(b)(1)-(3) are designed to ensure that adjudicators have access to crucial information to help them determine whether an individual was subject to ineffective assistance of counsel and suffered prejudice. However, the Department recognizes that there are limited situations in which an individual is unable to comply with a filing requirement but can still demonstrate that he or she was subject to ineffective assistance of counsel and suffered prejudice as a result, such that it would be appropriate to grant his or her motion.

As noted above, § 1003.48(b)(1)(i) would provide that an individual filing a motion must submit an affidavit, or a written statement executed under the penalty of perjury as provided in

28 U.S.C. 1746, setting forth in detail the agreement that was entered into with respect to the actions to be taken by counsel and what representations counsel did or did not make in this regard. If the individual submits a written statement, § 1003.48(b)(1)(i) would permit the adjudicator, in an exercise of discretion committed exclusively to EOIR, to excuse the requirement that the written statement be executed under the penalty of perjury if there are compelling reasons why the written statement was not so executed and the motion is accompanied by certain other evidence. For example, if the individual is unrepresented and speaks little English, and submits a written statement that does not fully comply with the technical requirements of 28 U.S.C. 1746 for a document to be under the penalty of perjury, it may be appropriate for the adjudicator, in the exercise of discretion, to excuse for compelling reasons the requirement that the written statement be executed under the penalty of perjury. The Department expects that the waiver issue would arise almost exclusively in cases where the individual is unrepresented and is not familiar with the requirement to submit a written statement under the penalty of perjury, inasmuch as attorneys are familiar with requirements for the submission of affidavits and written statements under the penalty of perjury.

A waiver of the requirement that a written statement be executed under the penalty of perjury would be inappropriate in the absence of other evidence independently establishing that the individual was subject to ineffective assistance of counsel and suffered prejudice as a result. This approach is consistent with the general rule that assertions in a written statement that are not under the penalty of perjury would be entitled to little or no evidentiary weight. *Cf. Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (stating that "statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

The Department seeks comments from the public on this provision. First, the Department seeks comment on whether an individual should be required, without exception, to submit an affidavit or a written statement executed under the penalty of perjury, given that assertions in documents not under the penalty of perjury are generally given little or no evidentiary weight. If an exception should exist, the Department seeks comments on whether this exception should be formulated differently. For example, the Department has considered providing that the requirement that the written statement be executed under penalty of perjury could be excused if there is good cause to do so, or if exceptional circumstances are present. The Department seeks comments on whether either of these standards is more appropriate than the current proposed "compelling reasons" standard.

Similarly, the remaining requirements in proposed § 1003.48(b)(1)(ii)-(3), i.e., submitting any representation agreement with counsel, providing notice to prior counsel, and filing a complaint with the appropriate disciplinary authorities, could be excused in limited instances for compelling reasons. An individual filing a motion would have the burden of establishing compelling reasons for excusing one of these requirements. A simple, unsupported, or blanket assertion of a difficulty or situation that inhibited compliance would not, on its own, suffice. Rather, the individual would have to explain the circumstances preventing his or her compliance, providing sufficient details and supporting documentation when appropriate. He or she should also provide other information to support his or her claim, such as explaining why the failure to comply could not or need not be remedied or producing alternative evidence. Ultimately, as each case would involve its own unique circumstances, the immigration judge and the Board would be in the best position to determine whether a filing requirement should be excused in a

given case and whether the case warrants reopening in the exercise of discretion despite lack of compliance with regulatory requirements.

With respect to the requirement in § 1003.48(b)(1)(ii) that an individual filing a motion submit any applicable representation agreement with prior counsel, such an agreement is the best evidence of the nature, scope, or substance of the representation. However, if an individual filing a motion can establish compelling reasons for failing to submit such an agreement, then § 1003.48(b)(1)(ii) would permit the immigration judge or the Board, in the exercise of discretion committed exclusively to EOIR, to excuse this failure if the individual filing the motion submits other reasonably available evidence regarding his or her agreement with prior counsel.

With respect to the requirement in § 1003.48(b)(2) that an individual filing a motion notify prior counsel, the Department notes that State bar associations generally make their members' contact information publicly available. Further, the requirement to notify prior counsel applies even if a long period of time has passed since a person last had contact with the counsel. However, there are limited instances in which an individual filing a motion may be able to establish compelling reasons why he or she was unable to notify prior counsel. Examples may include instances where the prior counsel is incarcerated or has moved to a foreign country, or where the prior counsel is an individual the movant reasonably but erroneously believed to be an attorney or accredited representative and, despite diligent efforts, he or she cannot obtain prior counsel's contact information.

With respect to the requirement in § 1003.48(b)(3) that an individual filing a motion file a complaint with the appropriate disciplinary authorities, this standard is informed by the fact that the filing of a disciplinary complaint is "a relatively small inconvenience for an alien who asks

that he or she be given a new hearing in a system that is already stretched in terms of its adjudicatory resources." *Matter of Rivera*, 21 I&N Dec. at 605. However, there are limited instances where an individual filing a motion may be able to establish compelling reasons for failing to file such a complaint. An example of such reasons may be the death of the counsel who allegedly provided the ineffective assistance. The Department notes that filing the complaint with the incorrect disciplinary authorities would not, on its own, excuse noncompliance with the filing requirement. If the individual files his or her complaint with the incorrect disciplinary authorities, he or she would have to re-file the complaint with the correct disciplinary authorities. The Department further notes that the fact that counsel has been disciplined, suspended from the practice of law, or disbarred would not, on its own, excuse an individual from filing the required disciplinary complaint. Even in the case of a disbarred attorney, complaints filed after disbarment may be relevant. In the majority of States, a disbarred attorney may seek readmission to the bar after a certain period of time. As such, in considering whether a disbarred attorney merits readmission, the licensing authority may consider complaints filed after disbarment.

It is important to consider the context for ineffective assistance of counsel claims under this rulemaking. These claims will typically arise after a final order has been entered in the case, and the proceedings have ended. The Department believes that the standards for excusing noncompliance with the filing requirements under § 1003.48(b)(1)-(3) must be carefully applied. In this regard, the adjudicator applying these standards should keep in mind the strong public and governmental interests in the expeditiousness and finality of proceedings. *See Abudu*, 485 U.S. at 107 (explaining that motions to reopen are disfavored because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in

giving the adversaries a fair opportunity to develop and present their respective cases"). These interests dictate that a § 1003.48 filing requirement be excused sparingly and only in relatively few circumstances. The Department believes that the exceptions to the proposed rule's filing requirements are appropriately narrow, and that the requirements will accordingly be excused only rarely.

E. Standard in Proposed § 1003.48 for Evaluating Prejudice[9]

The proposed rule would provide that an individual who files a motion to reopen based upon a claim of ineffective assistance of counsel must establish that he or she was prejudiced by counsel's conduct. The Board and the courts of appeals have uniformly recognized that prejudice must be established in order to reopen removal, deportation, or exclusion proceedings based on a claim of ineffective assistance of counsel. *See, e.g.*, *Matter of Lozada*, 19 I&N Dec. at 638; *Torres-Chavez v. Holder*, 567 F.3d 1096, 1100 (9th Cir. 2009); *Jiang*, 522 F.3d at 270; *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006). The Board, however, has not established a standard for prejudice, and the courts of appeals, as set forth below, have provided varying standards.

This rule would set forth a single uniform standard for prejudice to be applied nationwide in ineffective assistance of counsel cases. This would ensure that individuals in similar situations would not be subject to disparate results based solely on the fact that their cases arose in different Federal jurisdictions. *See generally Matter of Cerna*, 20 I&N Dec. 399, 408 (BIA 1991*)* (explaining why immigration laws, to the "extent possible . . . should be applied in a uniform manner nationwide"), *superseded by regulation as stated in Martinez-Lopez v. Holder*, 704 F.3d 169, 172 (1st Cir. 2013); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 912 (9th Cir.

[9] The prejudice standard for motions to reopen *in absentia* proceedings based upon a claim of ineffective assistance of counsel is covered in section G discussed below.

2004) (noting the "strong interest in national uniformity in the administration of immigration laws"); *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen.").

As already noted, the lack of uniformity among the circuits is plain. The Sixth Circuit applies a very strict standard for evaluating prejudice in ineffective assistance of counsel immigration cases. *See, e.g., Sako,* 434 F.3d at 864 (holding that an individual "must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States").

Several circuits apply a standard similar to that established by the Supreme Court in *Strickland* for ineffective assistance of counsel claims arising under the Sixth Amendment in criminal cases, which is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. These include the Third and Eleventh Circuits. *See Rranci,* 540 F.3d at 175-76 ("a reasonable likelihood that the result would have been different if the error[s] . . . had not occurred") (brackets and ellipsis in original) (internal quotation marks omitted); *Dakane,* 399 F.3d at 1274 ("a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different").[10]

[10] The Eighth Circuit also used a similar standard before it found that there was no constitutionally-based right to effective counsel in removal proceedings. *See Obleshchenko,* 392 F.3d at 972; *see also Rafiyev,* 536 F.3d at 861 (concluding that there is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding). The Tenth Circuit has also employed this standard. *See, e.g., Delariva v. Holder,* 312 F. App'x 130, 132, 2009 WL 361373 (10th Cir. 2009) (unpublished) (citing *United States v. Aguirre-Tello,* 353 F.3d 1199, 1209 (10th Cir. 2004) (en banc)).

At the other end of the spectrum, the Ninth Circuit deems the prejudice requirement satisfied so long as an individual can show "plausible grounds for relief" on the underlying claim. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1089 (9th Cir. 2011) (stating that "to show 'plausible grounds' for relief, an alien must show that, in light of the factors relevant to the form of relief being sought, and based on the 'unique circumstances of [the alien's] own case,' it was plausible (not merely conceivable) that the [immigration judge] would have exercised his discretion in the alien's favor") (first brackets in original) (quoting *United States v. Corrales-Beltran*, 192 F.3d 1311, 1318 (9th Cir. 1999)); *Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005).

The Department has determined that using a prejudice standard modeled after *Strickland* would strike a proper balance between providing individuals with a reasonable opportunity to reopen proceedings based upon a meritorious ineffective assistance claim and safeguarding the finality of immigration proceedings. The proposed regulations would therefore provide that to succeed on an ineffective assistance of counsel claim, an individual needs to establish that "there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different."[11] As mentioned above, several circuits have adopted this standard, which presents a middle ground among the standards adopted by the various circuits. Furthermore, as the Supreme Court has deemed a "reasonable probability" standard sufficient in the context of Sixth Amendment criminal cases, the Department considers the

[11] This proposed rule would not provide that certain circumstances require a finding of *per se* prejudice. *See generally Matter of Assaad*, 23 I&N Dec. at 562 (rejecting the argument that the Board should apply a *per se* standard of prejudice to a counsel's failure to file an appeal in immigration proceedings); *cf. Siong v. INS*, 376 F.3d 1030, 1037 (9th Cir. 2004) (applying a rebuttable presumption of prejudice where counsel's error deprived an individual of any appeal in immigration proceedings). Rather, each case would rest on its own particulars, with the recognition that some conduct will more typically indicate prejudice, but that the individual filing the motion always carries the burden to establish that prejudice does in fact exist. As discussed in section G, however, an individual would not be required to establish prejudice in order to reopen *in absentia* proceedings.

standard to be more than sufficient to use in the context of civil, administrative immigration proceedings.

Proposed § 1003.48(a)(3) would provide that eligibility for relief arising after proceedings have concluded ordinarily has no bearing on the prejudice determination. *Cf. Strickland*, 466 U.S. at 696 (stating that "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors"). There are exceptions to this general statement, however. For example, where a Form I-130, *Petition for Alien Relative*, has been filed with United States Citizenship and Immigration Services (USCIS) at DHS on behalf of an individual in removal proceedings, it may, in some instances, constitute ineffective assistance if counsel fails to request that the immigration judge continue the proceedings to await the adjudication of the petition. *Cf. Matter of Hashmi*, 24 I&N Dec. 785, 787-94 (BIA 2009) (articulating the factors for an immigration judge to consider in determining whether to continue removal proceedings pending USCIS's adjudication of an immigrant visa petition). If counsel acted ineffectively by failing to request a continuance, and the immigration judge ordered the individual removed but USCIS subsequently granted the petition, it would be appropriate to consider the individual's eligibility for adjustment of status in deciding whether he or she was prejudiced. That is, had the proceedings been continued, the result of the proceedings may have been different as the individual may have been able to apply for adjustment of status while they were ongoing. The Department seeks the public's comments on this issue, including on whether the reference to eligibility for relief arising after proceedings have concluded should be omitted from the final rule given the exception noted above.

The exact type of evidence that would suffice to establish a "reasonable probability" would be dependent upon the particular circumstances of a given case. The individual filing the motion would bear the burden, however, to show a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different. The individual filing the motion should submit any necessary evidence to establish prejudice, including affidavits or sworn statements from witnesses who were not previously called to testify or whose testimony was adversely impacted by the ineffectiveness of counsel, copies of vital documents that were not submitted in a timely manner, persuasive legal arguments that should have been included in missing or deficient briefs, missing applications for relief with supporting evidence, and any other evidence that serves to undermine the decision-maker's confidence in the outcome of the case. *See generally Strickland*, 466 U.S. at 694 (describing the manner in which the effect of alleged ineffective assistance of counsel on the reliability of a previous proceeding should be analyzed).

The Department notes that proposed § 1003.48 would provide two deviations from the "reasonable probability" standard. First, the rule would provide at § 1003.48(c)(3) that an individual is prejudiced by counsel's failure to file a petition for review with a Federal circuit court of appeals if he or she had "plausible grounds for relief" before the court. To establish that he or she was so prejudiced, the individual filing the motion must explain, with reasonable specificity, the ground or grounds for the petition. Neither the adjudicators nor opposing counsel should be expected to speculate as to what issues the individuals would have raised on appeal. The requirement that the ground or grounds for the petition for review must be explained "with reasonable specificity" would allow adjudicators to consider the filing party's sophistication in deciding whether prejudice has been established. In the Department's view, while some

unrepresented individuals may explain the ground or grounds for appeal in general terms, attorneys and accredited representatives should explain, in detail, the factual and legal bases for appeal.

As discussed in section C of this preamble, for a motion based on counsel's failure to file a petition for review to be granted, the individual filing the motion would first have to establish that his or her prior counsel's conduct was ineffective within the scope of the counsel's representation. If the individual does not do so, the Board could deny the motion without addressing the issue of prejudice.

The second deviation from the "reasonable probability" standard is with respect to motions to reopen *in absentia* proceedings. As discussed in section G of this preamble, the rule would provide that an individual filing a motion is not required to establish prejudice in order to reopen *in absentia* proceedings.

F. Equitable Tolling and the Due Diligence Standard in Proposed § 1003.48

As discussed above, motions to reopen based upon a claim of ineffective assistance of counsel must be filed in accordance with the general requirements for motions provided in section 240(c)(7) of the Act and §§ 1003.2 and 1003.23 of the regulations. With a few exceptions noted in the regulations, motions to reopen must be filed within either 90 days or 180 days of the date of entry of a final administrative order of removal or deportation. In general, a motion to reopen must be filed within 90 days of the date of entry of a final order A motion to reopen proceedings to rescind an order of removal or deportation entered *in absentia* must be filed within 180 days of the order, however, if the motion alleges that the failure to appear was because of exceptional circumstances.

Every circuit court of appeals to have addressed the issue has recognized that equitable tolling may apply to untimely motions to reopen in some instances[12] *See, e.g., Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. U.S. Att'y Gen.*, 713 F.3d 1357, 1362-65 (11th Cir. 2013) (en banc) (per curiam); *Barry*, 524 F.3d at 724; *Yuan Gao v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Zhao v. INS*, 452 F.3d 154, 156-57 (2d Cir. 2006); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187-93 (9th Cir. 2001) (en banc). However, as some of these courts have noted, "[e]quitable tolling is an extraordinary remedy which should be extended only sparingly[.]" *Mahmood*, 427 F.3d at 253 (first brackets in original) (internal quotation marks omitted); *see also Kuusk*, 732 F.3d at 306 (adhering "to the general principle that equitable tolling will be granted 'only sparingly,' not in 'a garden variety claim of excusable neglect'") (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *Hernandez-Moran*, 408 F.3d at 499-500 ("'[E]quitable tolling is granted sparingly. Extraordinary circumstances far beyond the litigant's control must have prevented timely filing.'") (brackets in original) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)).

The First Circuit has not yet decided the applicability of equitable tolling to the filing deadlines for motions to reopen based upon ineffective assistance of counsel, but has assumed without deciding that tolling is available. *See Neves*, 613 F.3d at 36 (stating that "[w]e assume arguendo, but do not decide, that the time and number limits on motions to reopen are subject to equitable tolling"). The Fifth Circuit similarly has not decided this question. *See Reyes-Bonilla*

[12] As noted above, equitable tolling refers to "[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." *Black's Law Dictionary* 579 (8th ed. 2004).

v. Lynch, 616 F. App'x 193, 194 (5th Cir. 2015) (unpublished) (noting that "even if the immigration statutes are subject to equitable tolling, Reyes-Bonilla has failed to show that such tolling would apply").

In those circuits that have held that equitable tolling of the filing deadlines applies, the courts have differed on the precise standard for due diligence. The Board has not adopted a uniform approach to due diligence, instead applying the law of the circuit in which the motion was filed. *See, e.g.*, *Yuan Gao*, 519 F.3d at 379. For example, the Ninth Circuit has found that the filing deadlines are equitably tolled "until the petitioner 'definitively learns' of counsel's fraud," although the petitioner must of course demonstrate that he or she exercised due diligence prior to this point as well. *Singh*, 491 F.3d at 1096 (citing *Albillo-DeLeon v. Gonzales*, 410 F.3d 1090, 1100 (9th Cir. 2005)); *see also Ghahremani v. Gonzales*, 498 F.3d 993, 999-1000 (9th Cir. 2007). The Second Circuit's due diligence analysis focuses on when the ineffective assistance "[was], or should have been, discovered by a reasonable person in the situation." *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000). The Seventh Circuit has stated that "'[e]quitable tolling requires a court to consider whether a reasonable person in the plaintiff's position would have been aware of the *possibility* that he had suffered' an injury." *Patel*, 442 F.3d at 1016 (quoting *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 860-61 (7th Cir. 2005) (emphasis in original)). The Seventh Circuit has also held that when an individual learns of the ineffective assistance before the expiration of the statutory filing period and fails to explain why he or she was unable to file the motion within the statutory filing period, equitable tolling is not available and will not "reset the clock." *Yuan Gao*, 519 F.3d at 379 (finding that the individual filing the motion had "failed to point to any circumstances that made this the abnormal case in which a diligent attempt to comply with the 90-day deadline would have failed, in which event an appeal

to equitable tolling would lie"). The Ninth Circuit, by contrast, has held that equitable tolling may in fact have the effect of resetting the statute of limitations period. *See Socop-Gonzalez*, 272 F.3d at 1196 ("[W]e need only ask whether Socop filed within the limitations period after tolling is taken into account.").

With respect to the due diligence standard, some courts have emphasized that the individual filing the motion has a duty to investigate whether his or her counsel is ineffective. *See, e.g.*, *Rashid v. Mukasey*, 533 F.3d 127, 132-133 n.3 (2d Cir. 2008) ("[A]n alien who is unfamiliar with the technicalities of immigration law can, under certain circumstances, be expected to comprehend that he has received ineffective assistance without being explicitly told so by an attorney. . . . Even someone not schooled in the technicalities of the law 'should have' recognized, under the[] circumstances [of this case], that his attorney was ineffective."); *see also Singh*, 491 F.3d at 1096-97 (finding that the individual filing the motion was not eligible for equitable tolling because he failed to investigate whether his attorney was ineffective).

There are also other considerations. Some circuits, such as the Second Circuit, have found that due diligence is required in both discovering the ineffectiveness and taking appropriate action upon discovery. *See, e.g.*, *Rashid*, 533 F.3d at 132 (noting that "an alien is required to exercise due diligence both before *and* after he has or should have discovered ineffective assistance of counsel") (emphasis in original); *see also Wang v. Board of Immigration Appeals*, 508 F.3d 710, 715 (2d Cir. 2007) (noting that an individual filing a motion "bears the burden of proving that he has exercised due diligence in the period between discovering the ineffectiveness of his representation and filing the motion to reopen"). Other courts have similarly required that the motion to reopen must be filed within a reasonable time of discovering the ineffective assistance. *See, e.g.*, *Tapia-Martinez v. Gonzales*, 482 F.3d 417, 423-24 (6th Cir.

2007) (finding that the individual filing the motion did not exercise due diligence because she filed the motion to reopen more than fifteen months after discovering her prior counsel's ineffectiveness); *see also Pafe v. Holder*, 615 F.3d 967, 969 (8th Cir. 2010) (finding that, despite existence of fraud and deception by prior attorneys, the Board did not abuse its discretion in denying a motion to reopen to rescind *in absentia* removal proceedings where the individual waited nearly six years to file the motion); *Jobe v. INS*, 238 F.3d 96, 100-01 (1st Cir. 2001) (en banc) (declining to find due diligence where an individual waited to file a motion to reopen to rescind an *in absentia* order more than half a year after he "learned that an [immigration judge] had taken some action on his asylum application and was advised to consult an attorney immediately").

The Department has determined that it may be appropriate in certain circumstances for an immigration judge or the Board to equitably toll the filing deadlines in section 240(c)(7) of the Act and §§ 1003.2 and 1003.23 of the regulations where the basis of the motion is a claim of ineffective assistance of counsel.[13] Accordingly, the proposed rule would provide, at § 1003.48(d), that these filing deadlines shall be tolled if a motion to reopen is based upon a claim of ineffective assistance of counsel, the ineffective assistance prevented the timely filing of the motion, and the individual filing the motion exercised due diligence in discovering the

[13] The Department notes that there are other regulations governing special motions to reopen for suspension of deportation and cancellation of removal pursuant to section 203(c) of the Nicaraguan Adjustment and Central American Relief Act (NACARA) (Public Law 105-100, tit. II) and section 1505(c) of the LIFE Act Amendments of 2000 (Public Law 106-554, tit. XV). *See* 8 CFR 1003.43. In addition, there are regulations governing special motions to seek relief under former section 212(c) of the Act. *See* 8 CFR 1003.44. The Department notes that there may be circuit law addressing the applicability of equitable tolling to the filing deadlines of these special motions to reopen. *See, e.g.*, *Albillo-De Leon*, 410 F.3d at 1098 (finding that section 203(c) of NACARA is subject to equitable tolling); *Johnson v. Gonzales*, 478 F.3d 795, 799 (7th Cir. 2007) (declining, for lack of due diligence, to equitably toll the deadline for filing a motion to reopen to apply for relief under former section 212(c) of the Act). This proposed rule would not address whether ineffective assistance of counsel may be a basis to toll the filing deadlines of these special motions. The Department welcomes comment from the public regarding whether ineffective assistance of counsel should be a basis for tolling the filing deadlines of these special motions and whether the proposed rule should be expanded to cover those situations.

ineffective assistance. Specifically, the proposed rule would provide that, if an individual exercised due diligence in discovering the ineffective assistance, he or she has 90 days after discovering the ineffective assistance to file the motion to reopen. This 90-day filing period would apply to all motions to reopen based on ineffective assistance of counsel, including motions to reopen to rescind an *in absentia* order based on exceptional circumstances arising from a claim of ineffective assistance of counsel. The proposed rule would provide that an individual exercises due diligence if he or she discovers the ineffective assistance within the time it should have been discovered by a reasonable person in his or her position. The Department notes that equitable tolling would not shorten the filing deadlines set out in §§ 1003.2 and 1003.23.

The Department recognizes that some motions to rescind *in absentia* orders and reopen proceedings are not subject to time limitations. *See, e.g.*, *Matter of Bulnes*, 25 I&N Dec. 57, 59 (BIA 2009) (motions to reopen to rescind *in absentia* orders where the individual demonstrates he or she did not receive notice); *Matter of Cruz-Garcia*, 22 I&N Dec. 1155, 1157-59 (BIA 1999) (deportation proceedings under former section 242(b) of the Act); *Matter of N-B-*, 22 I&N Dec. 590, 591-93 (BIA 1999) (exclusion proceedings). We are soliciting comments on whether the requirements of this new rule should be applied to motions to reopen filed in such cases on the basis of a claim of ineffective assistance of counsel.

As discussed above, there is variation among the courts of appeals regarding the exact standard for determining that an individual exercised due diligence in discovering ineffective assistance of counsel. While eligibility for equitable tolling will depend upon the particulars of the case, the Department seeks to promote uniformity in the due diligence standard. As such, the Department considered various standards of the courts of appeals for evaluating due diligence.

For example, the Department considered standards requiring the immigration judge or the Board to determine when the individual filing the motion, acting with due diligence, definitively learned of the ineffective assistance of counsel,[14] or to evaluate when a reasonable person in that individual's position would have been aware of the possibility that he or she had been prejudiced by counsel's conduct.[15] After review of the case law discussed above, the Department is proposing to include a standard for evaluating due diligence that would require the immigration judge or the Board to determine when the ineffective assistance should have been discovered by a reasonable person in the individual's position. This standard is consistent with the Second Circuit's case law discussed above,[16] as well as the "discovery rule" used in certain non-immigration cases to determine when a claim has accrued such that the statute of limitations begins to run.[17]

The evidence required for demonstrating due diligence would vary from case to case. However, to establish due diligence, an individual would ordinarily have to present evidence that he or she timely inquired about his or her immigration status and the progress of his or her case.

The Department welcomes comments from the public on the appropriateness of including the remedy of equitable tolling and the proposed standard for assessing due diligence in the rule.

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[14] *See Singh*, 491 F.3d at 1096.

[15] *See Patel*, 442 F.3d at 1016.

[16] *See Iavorski*, 232 F.3d at 134.

[17] Depending upon the type of case, jurisdiction, and applicable exceptions, the "discovery rule" permits an individual to file a suit in a civil case within a certain period of time after the injury is discovered, or reasonably should have been discovered. *See, e.g.*, *Black's Law Dictionary* 499 (8th ed. 2004) (defining the discovery rule as "[t]he rule that a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim").

G. Effect of Proposed § 1003.48 on Motions to Reopen and to Rescind an Order of Removal, Deportation, or Exclusion Entered *In Absentia*

The proposed rule would add a cross-reference to new § 1003.48 in the regulations governing motions to reopen proceedings and rescind orders of removal, deportation, or exclusion entered *in absentia*. An order of removal entered *in absentia* in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded upon a motion to reopen filed within 180 days after the date of the order, if the individual filing the motion demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order of exclusion entered *in absentia* may be rescinded upon a motion to reopen filed at any time if the individual demonstrates reasonable cause for his or her failure to appear. The standard for rescinding orders of deportation entered *in absentia* varies. Orders subject to section 240(b)(5) of the Act may be rescinded upon a motion filed within 180 days of the order if the individual demonstrates that the failure to appear was because of exceptional circumstances beyond his or her control.[18] Orders subject to a provision of the INA in effect before June 13, 1992, may be rescinded upon a motion filed at any time if the individual demonstrates reasonable cause for his or her failure to appear. *See Matter of Cruz-Garcia*, 22 I&N Dec. at 1157-59.

As has been established in Board precedent, this rule would provide that an individual may establish exceptional circumstances or reasonable cause, whichever is applicable, by demonstrating that the failure to appear was due to ineffective assistance of counsel. *See Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (BIA 1996); *see also Matter of Rivera*, 21 I&N Dec. at 602. In establishing exceptional circumstances or reasonable cause based upon ineffective

[18] In addition, removal and deportation orders entered *in absentia* may be rescinded upon a motion filed at any time when the individual filing the motion demonstrates that he or she did not receive the requisite notice, or that he or she was in Federal or State custody and the failure to appear was through no fault of the individual. *See* INA 240(b)(5)(C)(ii).

assistance of counsel, an individual would generally have to comply with the requirements for motions provided in new § 1003.48. However, consistent with the Board's longstanding practice, that individual would not be required to establish that he or she was prejudiced. *See Matter of Grijalva*, 21 I&N Dec. at 473 n.2; *see also Matter of Rivera*, 21 I&N Dec. at 603 n.1.

As discussed above, the rule would also permit equitable tolling of the time limitations on filing of motions to reopen and rescind an *in absentia* order. Provided that the individual establishes that he or she exercised due diligence in discovering his or her counsel's ineffectiveness, the individual would have 90 days from when the ineffective assistance was discovered to file a motion to reopen and rescind an *in absentia* order.[19] The Department notes that equitable tolling does not shorten the filing deadlines set out in §§ 1003.2 and 1003.23.

IV. Ineffective Assistance of Counsel and the Asylum One-Year Filing Deadline

The Department and DHS have independent roles and authorities with respect to the adjudication of applications for asylum under section 208 of the Act. As a general matter, DHS asylum officers have authority to adjudicate affirmative asylum applications filed with USCIS, while the immigration judges in EOIR have authority to adjudicate the asylum applications of individuals who are the subject of proceedings before EOIR. Under section 208(a)(2)(D) of the Act, an application for asylum may be considered despite the fact that it was not filed within one year of the applicant's arrival in the United States where he or she establishes "extraordinary circumstances" relating to the delay in filing of the application. The regulations of EOIR and DHS provide a non-exclusive list of situations that could fall within the extraordinary circumstances definition and specifically provide that a claim of ineffective assistance of counsel

[19] *But see supra* note 13.

may constitute extraordinary circumstances excusing an applicant's failure to timely file an application for asylum. *See* 8 CFR 208.4(a)(5)(iii), 1208.4(a)(5)(iii).

This rule proposes to amend the EOIR asylum regulations at 8 CFR 1208.4(a)(5) to incorporate some of the language used in the motion to reopen provisions in proposed § 1003.48 for extraordinary circumstances claims based upon a claim of ineffective assistance of counsel. The provisions of the rule addressing the one-year deadline for filing for asylum will apply upon the effective date of the final rule.

The Department notes that this rule proposes to amend only the EOIR asylum regulations in 8 CFR 1208.4.

V. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate "small entities," as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on

the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Orders 12866 and 13563

The proposed rule is considered by the Department to be a "significant regulatory action" under section 3(f)(4) of Executive Order 12866. Accordingly, the regulation has been submitted to the Office of Management and Budget (OMB) for review. The Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Department believes that this proposed rule would provide significant net benefits relating to EOIR proceedings. *See* Executive Order 12866(b)(6) (stating that "[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"). The proposed rule would help ensure the fairness and integrity of these proceedings by setting out a standard set of requirements for reopening proceedings, allowing for reopening where an individual was genuinely subjected to ineffective assistance of counsel and suffered prejudice as a result. The

Department is unaware of any monetary costs on public entities that the rule would impose. Further, the Department does not believe that, broadly speaking, the proposed rule could be said to burden the parties in EOIR proceedings, as the rule simply changes an adjudicatory standard used in those proceedings, generally striking a middle ground between the circuit courts' approaches.[20]

E. Executive Order 13132: Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new or revisions to existing "collection[s] of information" as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320.

List of Subjects

[20] For example, as noted above, the proposed rule's standard for establishing prejudice would be more lenient than the Sixth Circuit's current standard but stricter than the Ninth Circuit's. The proposed rule would provide at § 1003.48(a)(3) that, for an individual to establish that he or she was prejudiced by counsel's ineffective assistance, the individual must show that "there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different." Currently, the Sixth Circuit requires an individual to "establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States." *Sako*, 434 F.3d at 864. However, the Ninth Circuit simply requires an individual to show that he or she "had plausible grounds for . . . relief." *Barajas-Alvarado*, 655 F.3d at 1089 (quotation omitted).

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons set forth in the preamble, the Attorney General is proposing to amend title 8, chapter V of the Code of Federal Regulations as follows:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301, 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953, Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

2. Section 1003.23 is amended by adding a new paragraph (b)(4)(v), to read as follows:

§ 1003.23 Reopening or reconsideration before the Immigration Court.

* * * * *

(b) * * *

(4) * * *

(v) *Motions to reopen and rescind an in absentia order based upon a claim of ineffective assistance of counsel.* A motion to reopen proceedings and rescind an in absentia order of removal, deportation, or exclusion is subject to the requirements for such motions under

paragraph (b)(4)(ii) or (b)(4)(iii)(A) of this section and § 1003.48. For a motion to reopen proceedings and rescind an in absentia order of removal, deportation, or exclusion, the alien may establish exceptional circumstances or other appropriate legal standards to reopen proceedings based upon a claim of ineffective assistance of counsel. The alien does not need to establish prejudice in order to reopen proceedings and rescind an order of removal, deportation, or exclusion entered in absentia based upon a claim of ineffective assistance of counsel. Deadlines for motions to reopen and rescind an in absentia order based upon a claim of ineffective assistance of counsel may be equitably tolled pursuant to § 1003.48(d). The term "counsel," as used in this subsection, only applies to the conduct of an attorney or an accredited representative as defined in part 1292, or a person whom the alien reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent the alien in proceedings.

* * * * *

3. Add § 1003.48 to subpart A to read as follows:

§ 1003.48 Reopening based upon a claim of ineffective assistance of counsel.

(a) *Standard for adjudication.* Except as provided in this section, a motion to reopen proceedings before the Board or an immigration judge based upon a claim of ineffective assistance of counsel will be adjudicated in accordance with section 240(c)(7) of the Act and the applicable regulations governing motions at §§ 1003.2 and 1003.23. The individual filing the motion must demonstrate that counsel's conduct was ineffective and prejudiced the individual.

(1) *Conduct covered.* Except as provided in paragraph (c) of this section, this section covers conduct that occurred while removal, deportation, or exclusion proceedings were pending before the Board or an immigration judge. The term "counsel," as used in this section, only

applies to the conduct of:

(i) An attorney or an accredited representative as defined in part 1292; or

(ii) A person whom the individual filing the motion reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent him or her in the proceedings before the Board or an immigration judge.

(2) *Standard for evaluating counsel's ineffectiveness.* A counsel's conduct constitutes ineffective assistance of counsel if the conduct was unreasonable, based on the facts of the particular case, viewed as of the time of the conduct.

(3) *Standard for evaluating prejudice.* Except as provided in paragraph (c)(3) of this section, in evaluating whether an individual has established that he or she was prejudiced by counsel's conduct, the Board or the immigration judge shall determine whether there is a reasonable probability that, but for counsel's ineffective assistance, the result of the proceeding would have been different. Eligibility for relief occurring after the conclusion of proceedings will ordinarily have no bearing on the determination of whether the individual was prejudiced during the course of proceedings.

(b) *Form, contents, and procedure for filing a motion to reopen based upon a claim of ineffective assistance of counsel.* A motion to reopen under this section must be filed in accordance with section 240(c)(7) of the Act or other applicable statutory provisions, and the applicable regulations at §§ 1003.2 and 1003.23 governing motions to reopen. The motion must include the following items to support the claim of ineffective assistance of counsel:

(1) *Affidavit or written statement.* (i) The individual filing the motion must, in every case, submit an affidavit, or a written statement executed under the penalty of perjury as provided in 28 U.S.C. 1746, setting forth in detail the agreement that was entered into with

counsel with respect to the actions to be taken by counsel and what representations counsel did or did not make to the individual in this regard. If the individual submits a written statement not executed under the penalty of perjury, the Board or the immigration judge may, in an exercise of discretion committed exclusively to the agency, excuse the requirement that the written statement must be executed under the penalty of perjury, if:

(A) There are compelling reasons why the written statement was not executed under the penalty of perjury; and

(B) The motion is accompanied by other evidence independently establishing that the individual was subject to ineffective assistance of counsel and suffered prejudice as a result.

(ii) In addition, the individual filing the motion must submit a copy of any applicable representation agreement in support of the affidavit or written statement. If no representation agreement is provided, the individual must explain its absence in the affidavit or written statement and provide any reasonably available evidence on the scope of the agreement and the reason for its absence. The Board or an immigration judge may, in an exercise of discretion committed exclusively to the agency, excuse failure to provide any applicable representation agreement in support of the affidavit or written statement if the individual establishes that there are compelling reasons for the failure to provide the representation agreement and he or she presents other reasonably available evidence regarding the agreement made with counsel.

(2) *Notice to counsel.* The individual filing the motion must provide evidence that he or she informed counsel whose representation is claimed to have been ineffective of the allegations leveled against that counsel and that a motion to reopen alleging ineffective assistance of counsel will be filed on that basis. The individual must provide evidence of the date and manner in which he or she provided notice to prior counsel and include a copy of the correspondence sent

to the prior counsel and the response from the prior counsel, if any, or state that no such response was received. The requirement that the individual provide a copy of any response from prior counsel continues until such time as a decision is rendered on the motion to reopen. The Board or an immigration judge may, in an exercise of discretion committed exclusively to the agency, excuse failure to provide the required notice if the individual establishes that there are compelling reasons why he or she was unable to notify the prior counsel.

(3) *Complaint filed with the appropriate disciplinary authorities.* The individual filing the motion must file a complaint with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and provide a copy of that complaint and any correspondence from such authorities. The Board or an immigration judge may, in an exercise of discretion committed exclusively to the agency, excuse the failure to file a complaint if the individual establishes that there are compelling reasons why he or she was unable to notify the appropriate disciplinary authorities. The fact that counsel has already been disciplined, suspended from the practice of law, or disbarred does not, on its own, excuse the individual from filing the required disciplinary complaint. The appropriate disciplinary authorities are as follows:

(i) With respect to attorneys in the United States: the licensing authority of a state, possession, territory, or Commonwealth of the United States, or of the District of Columbia that has licensed the attorney to practice law.

(ii) With respect to accredited representatives: the EOIR disciplinary counsel pursuant to § 1003.104(a).

(iii) With respect to a person whom the individual reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent him or her in

proceedings: the appropriate Federal, State, or local law enforcement agency with authority over matters relating to the unauthorized practice of law or immigration-related fraud.

(4) *Prejudice*. Except as provided in § 1003.23(b)(4)(v), the individual filing the motion shall establish that he or she was prejudiced by counsel's conduct. The standard for prejudice is set forth in paragraph (a)(3) of this section, except as provided in paragraph (c)(3) of this section. The Board or an immigration judge shall not waive the requirement to establish prejudice.

(c) *Claims of ineffective assistance of counsel based upon conduct occurring after entry of a final order of removal, deportation, or exclusion.* (1) *Scope of review*. After entry of a final order of removal, deportation, or exclusion, the Board has discretion pursuant to §§ 1003.2 and 1003.48 to reopen removal, deportation, or exclusion proceedings based upon counsel's failure to file a timely petition for review in the Federal court of appeals. Such discretion, however, shall not extend to other claims based upon counsel's conduct before another administrative or judicial body. Except as described in paragraph (c)(3) of this section, a motion to reopen based upon counsel's failure to file a timely petition for review in the Federal court of appeals must meet the requirements set forth in paragraph (b) of this section.

(2) *Establishing ineffective assistance.* To establish that counsel provided ineffective assistance, an individual seeking to reopen removal, deportation, or exclusion proceedings based upon counsel's failure to file a timely petition for review in the Federal court of appeals must establish that counsel had agreed to file a petition for review but failed to do so. For the individual to meet this burden, he or she must submit a representation agreement making clear that the scope of counsel's representation included the filing of a petition for review, or must otherwise establish that the scope of the representation included the filing of a petition for review.

(3) *Establishing prejudice*. An individual is prejudiced by counsel's failure to file a petition for review with a Federal circuit court of appeals if he or she had plausible ground for relief before the court. To establish that he or she was so prejudiced, the individual filing the motion must explain, with reasonable specificity, the ground or grounds for the petition.

(d) *Due diligence and equitable tolling.* (1) The time limitations set forth in §§ 1003.2 and 1003.23 shall be tolled if:

(i) The motion to reopen is based upon a claim of ineffective assistance of counsel;

(ii) The individual filing the motion has established that he or she exercised due diligence in discovering the ineffective assistance of counsel; and

(iii) The motion is filed within 90 days after the individual discovered the ineffective assistance of counsel.

(2) In evaluating whether an individual has established that he or she has exercised due diligence, the standard is when the ineffective assistance should have been discovered by a reasonable person in the individual's position.

(e) *Applicability date*. This section applies only to motions filed on or after [effective date of final rule].

* * * * *

PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

4. The authority for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1225, 1231, 1282.

5. Section 1208.4 is amended by revising paragraphs (a)(5)(iii)(A), (B), and (C) and adding paragraph (a)(5)(iii)(D) to read as follows:

§ 1208.4 Filing the application.

* * * * *

(a) * * *

(5) * * *

(iii) * * *

(A) The applicant files an affidavit, or a written statement executed under the penalty of perjury as provided in 28 U.S.C. 1746, setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken by counsel and what representations counsel did or did not make to the applicant in this regard. If the applicant submits a written statement not executed under the penalty of perjury, the Board or the immigration judge may, in an exercise of discretion committed exclusively to the agency, excuse the requirement that the written statement must be executed under the penalty of perjury, if there are compelling reasons why the written statement was not executed under the penalty of perjury, and the applicant submits other evidence establishing that he or she was subject to ineffective assistance of counsel and suffered prejudice as a result. In addition, in all cases, the applicant must either submit a copy of any applicable representation agreement in support of the affidavit or written statement or explain its absence in the affidavit or written statement. Failure to provide any applicable representation agreement in support of the affidavit or written statement may be excused, in an exercise of discretion committed exclusively to the agency, if the applicant establishes that there are compelling reasons that he or she was unable to provide any representation agreement.

(B) The applicant provides evidence that he or she informed counsel whose representation is claimed to have been ineffective of the allegations leveled against him or her. The applicant must provide evidence of the date and manner in which he or she provided notice

to his or her prior counsel; and include a copy of the correspondence sent to the prior counsel and the response from the prior counsel, if any, or state that no such response was received. Failure to provide the required notice to counsel may be excused, in an exercise of discretion committed exclusively to the agency, if the applicant establishes that there are compelling reasons why he or she was unable to notify counsel.

(C) The applicant files and provides a copy of the complaint filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and any correspondence from such authorities. Failure to provide the complaint may be excused, in an exercise of discretion committed exclusively to the agency, if the applicant establishes that there were compelling reasons why he or she was unable to notify the appropriate disciplinary authorities. The fact that counsel has already been disciplined, suspended from the practice of law, or disbarred does not, on its own, excuse the applicant from filing the required disciplinary complaint. The appropriate disciplinary authorities are as follows:

(*1*) With respect to attorneys in the United States: the licensing authority of a State, possession, territory, or Commonwealth of the United States, or of the District of Columbia that has licensed the attorney to practice law.

(*2*) With respect to accredited representatives: the EOIR disciplinary counsel pursuant to § 1003.104(a).

(*3*) With respect to a person whom the applicant reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent him or her in proceedings before the immigration courts and the Board: the appropriate Federal, State or local law enforcement agency with authority over matters relating to the unauthorized practice of law or immigration-related fraud.

(D) The term "counsel," as used in this paragraph (a)(5)(iii), only applies to the conduct of an attorney or an accredited representative as defined in part 1292 of this chapter, or a person whom the applicant reasonably but erroneously believed to be an attorney or an accredited representative and who was retained to represent him or her in proceedings before the immigration courts and the Board.

* * * * *

Dated: July 19, 2016.

Loretta Lynch,
Attorney General.
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