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Board of Immigration Appeals Motion to Reconsider Dismissal of Late-Filed Appeal

An Immigration Judge (IJ) order of removal becomes a final administrative decision in a few ways including if a respondent does not file an appeal in the time allotted or if the respondent waives his or her right to appeal.[1] The respondent must file a notice of appeal and the fee or fee waiver form with the Board of Immigration Appeals (BIA) no later than 30 calendar days after the IJ's oral decision or the mailing of the IJ's written decision.[2] The BIA must *receive* the appeal before the 30-day deadline.[3]

A practitioner representing a respondent on a BIA appeal must meet the 30-day filing deadline. Missing the 30-day appeal deadline will subject the practitioner to an ineffective assistance of counsel claim. However, if the practitioner did not represent the respondent before the IJ and learns about the case after the 30-day deadline has passed, it is possible to ask the BIA to accept a late-filed appeal. Or, if the respondent already attempted a late-filed appeal that the BIA dismissed, the practitioner may submit a motion to reconsider dismissal of the late-filed appeal. The attached Motion to Reconsider Dismissal of Late-Filed Appeal contains the possible arguments for asking the BIA to accept a late-filed appeal or to reconsider a prior decision dismissing a late-filed appeal.

The more typical remedy for challenging an IJ-issued removal order after the 30-day appeal deadline has passed would be through a motion to reopen with the IJ. But there may be situations where a late-filed appeal to the BIA is a preferable option, at least in the short term, particularly where the motion to reopen would also be untimely.[4] This assessment will depend on the facts of the case. For a detained respondent facing imminent removal, a late-filed appeal may be a better immediate option because, if the BIA agrees to accept the late-filed appeal, the BIA will have jurisdiction to quickly issue a stay of removal. In contrast, an IJ may be less likely to adjudicate the motion for a stay of removal as quickly as the BIA given the lack of a uniform process for IJs to adjudicate such motions and the unprecedented case backlog. The practitioner should also research and address any U.S. Court of Appeals precedent on whether the BIA's 30-day day filing limitation is jurisdictional or a "claim processing" rule.

[Attorney Name] **NON-DETAINED**
[Attorney Title]

---

[1] 8 CFR § 1241.1; *Matter of L–V–K–*, 22 I&N Dec. 976 (BIA 1999).
[2] 8 CFR §§ 1003.3, 1240.15; *see also Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006) (holding that the BIA may certify a case to itself under 8 CFR § 1003.1(c) (2006) where exceptional circumstances are present); *cf. Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011) (holding that the BIA has jurisdiction to accept a case filed one day late).
[3] If an appeal is untimely, the appeal is dismissed. *See* 8 CFR §§1003.38(b); 1240.15.
[4] If the respondent is still within the motion to reopen filing period, the motion to reopen should be timely filed assuming the respondent meets the requirements for filing a motion to reopen. There are also situations where the motion to reopen deadline can be tolled and circumstances where it does not apply. It is important to carefully determine whether it is in the best interest of the client to file a motion to reopen given all the facts of the case and legal standards that apply to motions to reopen.

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Pro Bono Counsel for Respondents

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

In the Matters of:	)	
[Client 1]	)	**File No. A**
[Client 2]	)	**File No. A**
Respondents	)	

<u>RESPONDENTS' MOTION TO RECONSIDER AND REMAND</u>

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I. INTRODUCTION

Respondents [Client 1] ("Ms. [Client 1]") and [Client 2] ("[Client 2]") respectfully move the Board to reconsider its DATE, 20XX decision denying their appeal as untimely. Ms. [Client 1] and her son were victims of serious misconduct by a law firm that denied them their right to a hearing: the firm falsely advised Ms. [Client 1] that she was ineligible for asylum and affirmatively requested a deportation order at a Master Calendar Hearing without her input or permission and without informing her of her right to appeal. This firm, [T.L.] ("[T.L.]"), has been identified by the Board for its pattern and practice of ineffective assistance of counsel in multiple cases involving Central American families. As soon as Ms. [Client 1] and her son became aware that [T.L.] had violated their rights in this case, they acted swiftly and diligently to file a Notice of Appeal with the Board. They have since complied with *Matter of Lozada* and received responses to their bar complaint against [T.L.], and they planned to present supplemental evidence to that effect to the Board at the earliest practical opportunity. As it did in five nearly identical cases involving [T.L.], the Board should accept this late-filed appeal on certification, or in the alternative, equitably toll the Notice of Appeal deadline, and remand the case for further proceedings before the Immigration Judge.

II. FACTS AND PROCEDURAL HISTORY

A. Ms. [Client 1] Fled El Salvador After Repeated M-18 Death Threats and Sexual Assault

Ms. [Client 1] fled to the United States from El Salvador with [Client 2] in 2014 after M-18 gang members in El Salvador threatened kill her and her family. Exh. A, Supplemental Declaration of Ms. [Client 1] ("[Client 1] Suppl. Decl."), at 1-2, ¶¶ 3-8. In the year before she left, an M-18 member known as [Redacted] stalked her, sexually assaulted her, and threatened that she had to be his girlfriend. *Id.* at 1, ¶¶ 3-4. When she refused, he would tell her that "[she] would be

his whether [she] wanted to or not" and lift his shirt to show her a gun. *Id.* at 1, ¶ 3. In addition, M-18 gang members targeted her infant son, [Client 2]. *Id.* at 1, ¶ 5. Shortly after [Client 2] was born in 2013, M-18 gang members proclaimed him an "M-18" baby and declared that he would join the gang when he turned 12. *Id.* After leaving El Salvador for the United States, Ms. [Client 1] and her family continued to receive threats from M-18 gang members. *Id.* at 2, ¶ 8. On multiple occasions, M-18 gang members sent messages to her cousin in the United States threatening to kill her and her family members if they return to El Salvador. *Id.*

B. [T.L.] Misadvised Ms. [Client 1] and Requested a Deportation Order in Court Against Her Wishes

On [date], 2015, Ms. [Client 1] signed a contract with [T.L.] for representation in her immigration case. Exh. A, [Client 1] Suppl. Decl., at 6, ¶ 25; Exh. B, BIA Notice of Appeal Filing of Ms. [Client 1] ("NOA"), Sub-Exh. B, [T.L.] Contract with Translation ("Contract"), at 33-35. The firm questioned her about her immigration case for just ten minutes before informing her that asylum was not an option. Exh. A, [Client 1] Suppl. Decl., at 4-5, ¶ 17. Despite this, the law firm convinced her to accept their services and charged her $3,000. Exh. A, [Client 1] Suppl. Decl., at 5-6, ¶¶ 18-24; Exh. B, NOA, Sub-Exh. B, Contract, at 33-35. Ms. [Client 1] was not familiar with immigration law but believed that [T.L.] would seek permanent relief in her case. Exh. A, [Client 1] Suppl. Decl., at 5, ¶ 19.

On DATE, 2015, Ms. [Client 1] attended a hearing at Atlanta Immigration Court along with an attorney from [T.L.]. *Id.* at 8, ¶ 33. When the attorney informed her that the Immigration Judge had issued her an order of removal, she was distraught and started to cry. *Id.* at 9, ¶ 35. She did not understand that the [T.L.] attorney had given up her opportunity to ask for asylum until after the hearing was over. *Id.* Instead, she thought she would have the opportunity to explain her

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fear of returning to El Salvador before the Immigration Judge made a decision. *Id.* at 8-9, ¶¶ 34-35. Despite her shock, no one at [T.L.] ever informed her of her right to appeal. *Id.* at 9, ¶ 37.

After conceding Ms. [Client 1]'s removal, [T.L.] promised to attend all of her check-ins with Immigration & Customs Enforcement ("ICE"). *Id.* at 10, ¶ 40. The firm also agreed to prepare multiple applications for ICE stays on her behalf and stated that each had a 50% chance of success. *Id.* [T.L.] prepared three stay applications for Ms. [Client 1]'s, all of which were denied. *Id.* at 10-13, ¶¶ 41-63. The firm also frequently failed to attend her ICE check-ins as promised. *Id.*

Throughout their representation of Ms. [Client 1], [T.L.] was difficult to reach, frequently failing to return her calls or provide her with updates. *Id.* at 13-14, ¶ 56, 60. As a result, Ms. [Client 1] rarely knew the status of her case. *Id.* at X, ¶ X. Eventually, Ms. [Client 1] informed a [T.L.] attorney that she would like to file a complaint against the firm. *Id.* at 11-12, ¶ 48. Rather than informing Ms. [Client 1] that she could file a complaint with the Georgia Bar, a [T.L.] attorney recorded her complaint for internal purposes. *Id.* at 11-12, ¶¶ 48-49. Ms. [Client 1] never received a response to her complaint. *Id.* at 12, ¶ 49.

C. [T.L.] Has Been the Subject of Numerous Bar Complaints, and the Board Has Identified the Firm's Pattern of Ineffective Assistance of Counsel

Accepting removal is a strategy frequently employed by [T.L.] in Central American cases. Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases, at 36-39. In response to two complaints filed in other cases with the Georgia Bar, [T.L.] explained that the firm "essentially admit[s] removal" for immigrants from Honduras, El Salvador, and Guatemala in order to later request a "stay." *Id.* at 38. Further, rather than rely on individualized case assessments, the firm openly characterized thousands of recently arriving Central American women and children as "immigrants… fleeing poverty and harsh economic conditions" and stated that this "is unfortunately not a basis for immigration to the United States." *Id.*

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Along with the two cases referenced above, undersigned counsel is aware of at least five additional ineffective assistance of counsel cases against [T.L.] by Central American families. Exh. C, Declaration of KS ("S Decl.") at 44, ¶¶ 4-6. In each of these cases, [T.L.] accepted removal orders for clients without filing asylum applications or other applications for relief. *Id.* The Board remanded each of these cases to give former [T.L.] clients an opportunity to apply for relief before an Immigration Judge with new counsel. *Id.* at 45, ¶ 9.

D. Ms. [Client 1] Secured New Counsel in August 2017, Promptly Filed an Appeal with the Board and Reported [T.L.] to the Georgia Bar

Ms. [Client 1] made contact with her current counsel on DATE, 2017. Exh. A, [Client 1] Decl., at X, ¶ X; Exh. D, Declaration of [Attorney Name] ("X Decl.") at 46, ¶ 5. On DATE, 2017, undersigned counsel learned that Ms. [Client 1] had been represented by [T.L.] and came to understand that she had been the victim of ineffective assistance of counsel. Exh. D, X Decl. at 46, ¶¶ 6-7. Undersigned counsel also learned on DATE, 2017 that Ms. [Client 1] had an ICE check-in to receive a final date to report for deportation four days later, on DATE, 2017. Exh. D, X Decl. at 46, ¶ 7; Exh. E, ICE Form I-220A at 48.

On DATE, 2017, Ms. [Client 1] filed an EOIR-26 Notice of Appeal, one day in advance of Ms. [Client 1]'s ICE check-in. Exh. B, NOA.

Approximately two weeks later, Ms. [Client 1] filed a complaint with the State Bar of Georgia ("GA Bar") through undersigned counsel, alleging ineffective assistance of counsel against [T.L.]. Exh. F, GA Bar Complaint; Exh. G, Email from [Attorney M.M.] to GA Bar, Dated DATE, 2017. Both undersigned counsel and the GA Bar sent a copy of the complaint to [T.L.]. Exh. H, Letter from [Attorney M.M.] to [T.L.], Dated [DATE], 2017; Exh. I, Letter from GA Bar to [T.L.], Dated DATE, 2017.

On DATE, 2017, [T.L.] replied to Ms. [Client 1]'s grievance before the GA Bar. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017. [T.L.] responded to undersigned counsel with a second substantive reply on DATE, 2017. Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. On DATE, 2017, the GA Bar provided Ms. [Client 1] with an opportunity to reply to [T.L.] before DATE, 2017. Exh. L, Letter from GA Bar to [Attorney M.M.], Dated DATE, 2017. Three days later, undersigned counsel submitted a reply to the GA Bar by email and mail. Exh. M, Response from [Attorney M.M.] to GA Bar, Dated DATE, 2017; Exh. N, Email from [Attorney M.M.] to GA Bar, Dated DATE, 2017; Exh. O, Proof of Postage of Response from [Attorney M.M.] to GA Bar, Dated DATE, 2017. Undersigned counsel also sent copies of her reply to [T.L.] by email and mail. Exh. P, Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017; Exh. Q, Email from [Attorney M.M.] to [T.L.], Dated DATE, 2017; Exh. R, Proof of Postage of Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017.

E. Ms. [Client 1] Now Submits a Motion to Reconsider Due to [T.L.]'s Ineffective Assistance of Counsel

Undersigned counsel intended to submit a supplemental filing to the Board after receiving [T.L.]'s reply to Ms. [Client 1]'s grievance. But undersigned counsel did not receive [T.L.]'s reply until two days after the Board dismissed Ms. [Client 1]'s appeal. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. S, BIA Decision. On DATE, 20XX, the Board dismissed Ms. [Client 1]'s appeal as untimely, explaining:

> While the respondents raise a claim of inadequacy of counsel on their Notice of Appeal and have included an employment contract and documentation from other unrelated cases which they allege support the ineffective assistance claim, they have not substantially complied with the procedural requirements for pursing such a claim. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Further, inasmuch as the appeal is now over 2 years late, the respondents have not shown due diligence in pursuing this matter. We find that the respondents appeal properly should be dismissed as untimely…. The Immigration Judge's summary order indicates that the respondents may have waived appeal. However, in view

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> of our disposition of this case, we need not determine whether the respondents made a knowing and intelligent waiver in this case.

Exh. S, BIA Decision. The Board further instructed, "If you wish to file a motion to reconsider challenging the finding that the appeal was untimely, you must file your motion with the Board." *Id.* Ms. [Client 1] now files a motion to reconsider, specifying errors of fact and law in the Board's decision and addressing each of the Board's points in turn: (1) the relevance of "documentation from other unrelated cases," (2) compliance with *Matter of Lozada*; (3) due diligence; and (4) waiver. Ms. [Client 1] also moves the Board, upon accepting her appeal, to remand the case to immigration court for further proceedings. Exhibits enclosed with this motion are submitted to the Board as offers of proof. Ms. [Client 1] also submits her asylum application, which she intends to pursue in immigration court should her case be reopened. Exh. T. Form I-589 of Ms. [Client 1].

III. LEGAL STANDARD

"[T]he Board retains jurisdiction over a motion to reconsider its dismissal of an untimely appeal to the extent that the motion challenges the finding of untimeliness or requests consideration of the reasons for untimeliness." *Matter of Lopez*, 22 I.&N. Dec. 16, 17 (BIA 1998). A motion to reconsider must specify the errors of law or fact in the previous order and be supported by pertinent authority. INA § 240(c)(6)(C); 8 C.F.R. § 1003.2(b)(1). The motion to reconsider in this case is timely, as it was filed within 30 days of the date of the Board's DATE, 20XX decision. INA § 240(c)(6)(B); 8 C.F.R. § 1003.2(b)(2).

A motion to remand is proper when a case merits reopening for further proceedings before the immigration judge while an appeal is pending at the Board. 8 C.F.R. § 1003.2(c)(4). "A motion to remand seeks to return jurisdiction of a case pending before the Board to the Immigration Judge." BIA Practice Manual § 5.8(a). A motion to remand could be granted by a single Board member should the Board accept jurisdiction over this appeal. 8 C.F.R. §1003.1(e)(6).

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IV. ARGUMENT

A. Documentation from Other Ineffective Assistance Cases Is Relevant

The Board erred in characterizing Exhibits C and D to the Notice of Appeal as "unrelated" documentation from other cases. Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases; Exh. B, NOA, Sub-Exh. D, In re G-M-D-R (BIA Jun. 13, 2016); Exh. S, BIA Decision. In fact, these filings are related and highly relevant. Notice of Appeal Exhibit C involves two nearly identical allegations of ineffective assistance of counsel against the same unscrupulous law firm that deceived Ms. [Client 1], corroborating her account. Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases. And Notice of Appeal Exhibit D is an example of the Board accepting a late-filed appeal on certification even though the initial Notice of Appeal did not comply with *Matter of Lozada*'s procedural requirements, demonstrating the Board's commitment to protecting victims of serious attorney misconduct. Exh. B, NOA, Sub-Exh. D, In re G-M-D-R (BIA Jun. 13, 2016).

i. The Documentation Reveals a Pattern and Practice of Misconduct by [T.L.]

First, the ineffective assistance claims brought by other Central American families against [T.L.] are relevant because they reveal a disturbing pattern and practice of serious misconduct by the law firm and corroborate Ms. [Client 1]'s account. *See Matter of R-K-K-*, 26 I.&N. Dec. 658, 659 (BIA 2015) (Adjudicators can "consider significant similarities between statements submitted… in different proceedings."). In fact, in addition to the two cases described in Exhibit C to the Notice of Appeal, undersigned counsel is also aware of five other ineffective assistance of counsel cases against [T.L.] by Central American families. Exh. C, S Decl. at 44, ¶¶ 5-6. [T.L.]'s response to two Georgia Bar grievances in separate cases is thus highly relevant to Ms. [Client 1]'s claim. The grievances were filed for two Central American mothers who entered the United

States in 2014 and hired [T.L.] in November 2014 and March 9, 2015, respectively. Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases. Notably, Ms. [Client 1] also hired the firm in March 2015. Exh. A, [Client 1] Suppl. Decl. at 4-6, ¶¶ 16, 25. Taken together with Ms. [Client 1]'s declaration, [T.L.]'s response establishes that Ms. [Client 1] is a member of a class of Central American immigrants who fell victim to egregious ineffective assistance from [T.L.].

In the response, Mr. JL explained the firm's practice in broad terms, shedding light on their misunderstanding of asylum law, deceit in the stay of removal process, and blatant disregard for the best interests of their Central American clients:

> Succinctly, about two years ago, there was a large influx of immigrants, particularly women and children, primarily from Honduras, El Salvador and Guatemala… Essentially, these immigrants are fleeing poverty and harsh economic conditions in their native countries, and while this is a pitiable state of affairs, it is unfortunately not a basis for immigration to the Unites States.
>
> However, under certain political circumstances, we have been able to spare a large number of these immigrants from deportation through the "stay" process whereby the immigrant essentially admits removal, but through the immigration priorities determined by the President of the United States, the government defers the immigrant's deportation for an indefinite period.

Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases, at 2. [T.L.] has therefore confessed that it was their practice to tell Central American clients that they were ineligible for asylum, accept removal orders on their behalf, and apply for stays of removal from ICE. *Id.* That admission by itself demonstrates a fundamentally deficient approach to cases like Ms. [Client 1]'s in the exact time period that she became a client. The firm admits that it failed to conduct individualized screening of Central American cases, operating under the blanket assumption that immigrants from Honduras, El Salvador, and Guatemala fled only "poverty and harsh economic conditions." *Id.* This approach disregards precedential cases involving Central American respondents, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), as well as the rapidly

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evolving case law on particular social groups at both the BIA and circuit courts, *see, e.g., Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

Furthermore, Mr. L entirely misstates the removal priorities in place under the Obama administration and the potential effect of an ICE stay. Because immigrants who were apprehended at the border were an enforcement *priority*, ICE stays were unlikely to be granted and, if they were, would have most likely only been temporary. Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Department of Homeland Security (Nov. 20, 2014) (identifying "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States" as Priority 1 for immigration enforcement). [T.L.] therefore charged their Central American clients for ICE stays based on either a gross misunderstanding of the enforcement priorities at the time or in an intentional effort to defraud Central American asylum seekers. [T.L.]'s response in the separate Central American cases therefore provides necessary context for the firm's ineffective practice overall, which by their own admission affected a "large number" immigrants from the same region as Ms. [Client 1] and in the same procedural posture. Exh. B, NOA, Sub-Exh. C, [T.L.] Bar Response in Two Other Cases, at 2.

ii. The Documentation Shows That the Board Has Consistently Protected Victims

Second, the cases are relevant because they demonstrate that the Board has taken a strong and uniform stance to preserve the due process rights of victims of unscrupulous attorneys. In the case attached to the Notice of Appeal as Exhibit D, *In Re G-M-D-R*, [redacted] (BIA June 13, 2016), as well as in twelve other cases filed around the same time, families were picked up in ICE enforcement actions and brought to the South Texas Family Residential Facility. Exh. B, NOA, Sub-Exh. D, *In Re: G-M-D-R* (BIA Jun. 13, 2016); Exh. C, S Decl. at 44, ¶¶ 3-5. There, advocates

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realized that the thirteen families had ineffective assistance of counsel claims, five of them involving [T.L.]. *Id.*at 44, ¶¶ 4, 6. Advocates rapidly filed notices of appeal with the Board, without having time to comply with the procedural requirements of *Matter of Lozada*. *Id.* at 44-45, ¶¶ 5, 8. Almost all of the appeals were late-filed, some over two years old and with a paper record reflecting that appeal had been waived. *Id.* at 44, ¶ 7. The families were given briefing schedules, and then filed motions to remand including evidence of compliance with *Matter of Lozada*. *Id.* at 45, ¶¶ 9-10. In each case, the Board accepted the appeal and remanded the case to the immigration court for further proceedings. *Id*. As the Board explained in *In Re G-M-D-R*:

> To resolve any issues as to timeliness, we will accept the respondents' appeal on certification. See 8 C.F.R. § 1003.1(c). In their brief on appeal and related motion to remand, the respondents raise allegations of serious misconduct against former counsel…. In view of the foregoing, and notwithstanding any opposition by the DHS, we deem it appropriate to remand this matter to the Immigration Judge pursuant to our discretionary sua sponte authority under 8 C.F.R. § 1003.2(a).

Exh. B, NOA, Sub-Exh. D, In re G-M-D-R (BIA Jun. 13, 2016).

Ms. [Client 1] and her son are in precisely the same position as these other thirteen families were: at risk of deportation and raising “allegations of serious misconduct against former counsel.” *Id.* The Board should act consistently to protect Ms. [Client 1]’s family as it did for the other families, by certifying this appeal, providing an opportunity to include supplemental evidence of *Lozada* compliance, and remanding to the immigration court for further proceedings.

B. Ms. [Client 1] Should Have an Opportunity to Present Her Strong *Lozada* Claim

Ms. [Client 1] and her son have a strong ineffective assistance of counsel claim under *Matter of Lozada*, and should be given an opportunity to present that claim in full. In its DATE, 20XX decision, the Board concluded that Ms. [Client 1] had “not substantially complied with the procedural requirements” for pursuing a claim under *Matter of Lozada*, 19 I&N Dec. 637 (BIA

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1988). Exh. S, BIA Decision. However, Ms. [Client 1] should not have been required to comply with *Lozada* in a short Notice of Appeal, prior to filing briefing or a motion to remand. On the advice of undersigned counsel, she filed the Notice of Appeal as early as possible, on DATE, 2017, in order to show due diligence (*see* Section IV.C, *infra*) and prevent her family's imminent deportation. Exh. B, NOA. She then quickly filed a bar complaint against [T.L.], notified former counsel, and received responses from former counsel dated DATE, 2017 and DATE, 2017, just after the Board's DATE, 20XX decision. Exh. F, GA Bar Complaint; Exh. H, Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017; Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. If she had been permitted to provide supplemental documentation along with briefing, a motion to remand, or otherwise, Ms. [Client 1] would have been able to show both full compliance with *Lozada*'s procedural requirements and substantive evidence of representation that was so egregious, "so fundamentally unfair" that Ms. [Client 1] and her son were "prevented from reasonably presenting [their] case." *Matter of Lozada*, 19 I&N Dec. at 638.

i. Ms. [Client 1] Has Satisfied **Lozada***'s Procedural Requirements*

Under *Matter of Lozada*, a motion to reopen based on ineffective assistance of counsel must satisfy three procedural requirements:

> (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

Matter of Lozada, 19 I&N Dec. at 637. The Eleventh Circuit requires "substantial, if not exact, compliance with the procedural requirements of *Lozada*." *Dakane v. U.S. Atty. Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005).

Ms. [Client 1] and her son have complied with *Lozada*'s procedural requirements and would have demonstrated that compliance had the Board given them the opportunity. Documentation is enclosed as an offer of proof. First, Ms. [Client 1] provided a detailed affidavit and a copy of the agreement. Exh. B. NOA, Sub-Exh. A, [Client 1] Decl.; Exh. B. NOA, Sub-Exh. B, Contract; *see also* [Client 1] Suppl. Decl. Ms. [Client 1] notified [T.L.] of her allegations (Exh. H, Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017), the State Bar of Georgia notified [T.L.] of the allegations (Exh. I, Letter from GA Bar to [T.L.], Dated DATE, 2017), and attorneys JL and CT responded to the allegations, by letters dated DATE, 2017 and DATE, 2017 (Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017). Third, Ms. [Client 2] filed her initial complaint with the State Bar of Georgia, Office of the General Counsel. (Exh. F, GA Bar Complaint; Exh. G. Email from [Attorney M.M.] to GA Bar, Dated DATE, 2017). On DATE, 2017, State Bar of Georgia Grievance Counsel invited Ms. [Client 1] to rebut [T.L.]'s response. Exh. L, Letter from GA Bar to [Attorney M.M.], Dated DATE, 2017. Accordingly, Ms. [Client 1] submitted a rebuttal including an updated declaration and documentation of her ICE check-ins to both the State Bar of Georgia Grievance Counsel and to [T.L.], by email on DATE, 2017, and by mail on DATE, 2017. Exh. M, Response from [Attorney M.M.] to GA Bar, Dated DATE, 2017; Exh. N, Email from [Attorney M.M.] to GA Bar, Dated DATE, 2017; Exh. O, Proof of Postage of Response from [Attorney M.M.] to GA Bar, Dated DATE, 2017; Exh. P, Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017; Exh. Q,

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Email from [Attorney M.M.] to [T.L.], Dated DATE, 2017; Exh. R, Proof of Postage of Letter from [Attorney M.M.] to [T.L.], Dated DATE, 2017.

ii. The Board Should Allow Ms. [Client 1] to Supplement Her Filing

The Board should reconsider its decision and allow Ms. [Client 1] and her son to provide supplemental evidence of *Lozada* compliance, as it has done in other, similar cases. An initial denial does "not foreclose the respondent's filing of a supplemental motion that satisfies all the requirements of Matter of Lozada." *Matter of Rivera-Claros*, 21 I&N Dec 599, 607 n.5 (BIA 1996). In thirteen cases from 2016, including five that involved former clients of [T.L.], the Board accepted late-filed notices of appeal raising ineffective assistance of counsel, even though the notices of appeal did not include *Lozada* documentation. Exh. C, S Decl. at 44-45, ¶¶ 8-9. The Board then granted Respondents' motions to remand based on *Lozada* evidence submitted with the motions, rather than with the notices of appeal. *Id.* at 44-45, ¶¶ 5-10. In one of the cases involving allegations of misconduct against [T.L.] (*see id.* ¶ 8), Board Member [REDACTED] explained:

> To resolve any issues as to timeliness, we will accept the respondents' appeal on certification. *See* 8 C.F.R. § 1003.1(c). In the motion to remand, the lead respondent raises allegations of serious misconduct against former counsel. She alleges, among other things, that the respondents were unable to meaningfully contest their removability, or to present any applications for relief from removal, due to the alleged misconduct of former counsel. The *evidence proffered with the motion* shows that former counsel has been notified of those allegations.

Exh. U, *In Re: D-A-R-A*, [REDACTED] (BIA May 27, 2016) (emphasis added). *See also* Exh. V, *In Re: M-B-G-R,* [REDACTED] (BIA June 15, 2016) ([REDACTED], Board Member) (same); Exh. B, NOA, Sub-Exh. D, *In Re: G-M-D-R*, [REDACTED] (BIA June 13, 2016) ([REDACTED 2], Board Member) (same).

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This approach would be consistent with Board decisions allowing supplemental *Lozada* evidence on motions to reopen. For example, in one ineffective assistance of counsel case, after the Board had initially denied the respondent's appeal of a motion to reopen for failure to comply with *Lozada*, it then granted a motion to reconsider because the new motion "supplement[ed] evidence in the file" with material showing notice. Exh. W, *In Re: F.L* [redacted], 2004 WL 2374322, at *1 (BIA Sept. 14, 2004). The Board remanded the case to the immigration court, explaining that the respondent now appeared "to have substantially complied with the threshold requirements pursuant to *Matter of Lozada*." *Id.* The same approach would be appropriate here. *See also* Exh. X, *In Re: L.E.Z.*, [redacted], 2005 WL 1104258, at *1 (BIA Mar. 28, 2005) (Granting motion to reconsider because "the Board failed to consider the evidence submitted by the respondents as a supplement to their motion to reopen" regarding *Matter of Lozada* compliance); *Matter of B-B-*, 22 I&N Dec. 309, 310 (BIA 1998) (considering "additional documentation [submitted] in an effort to comply with the Lozada requirements," even though that documentation was not provided in the initial motion to reopen); *Matter of Grijalva-Barrera*, 21 I&N Dec. 472, 473 (BIA 1996) (allowing respondent to submit supplemental evidence to satisfy *Matter of Lozada*'s procedural requirements "in support of his appeal" of his motion to reopen).

Likewise, Courts of Appeals, including the Eleventh Circuit, have considered supplemental evidence in reviewing *Lozada* compliance in the motion to reopen context. In fact, the First Circuit held that it was a due process violation *not* to "invit[e] [a respondent] to remedy [his motion to reopen's] deficiencies or noting [his] entitlement to file a second, properly supported motion" that complied with *Matter of Lozada. Saakian v. I.N.S.*, 252 F.3d 21, 26 (1st Cir. 2001). And the Seventh Circuit explained that "BIA precedent… supports the conclusion that the BIA will accept the *Lozada* materials as a supplement to an already filed motion to reopen after the deadline has

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expired." *Peralta v. INS*, 20 Fed. Appx. 534, 536 n.2 (7th Cir. 2001). *See also Hyacinthe v. U.S. Atty. Gen.,* 215 Fed. Appx. 856, 861 (11th Cir. 2007) (considering evidence of compliance with *Matter of Lozada* both from the initial appeal and the motion for reconsideration of the appeal denial); *Qing Yuan Lian v. Holder*, 485 Fed. Appx. 298, 299 (10th Cir. 2012) (reviewing evidence submitted in "a motion to supplement, offering additional documentation," though ultimately concluding that such the additional documentation did not satisfy *Lozada*); *Kirlew v. Attorney Gen. of U.S.,* 267 Fed. Appx. 125, 129, n.3 (3d Cir. 2008) (faulting respondent for failure to "supplement his pleadings before the BIA" to meet "the strictures of *Lozada*").

In the less common direct appeal context, the need to allow an opportunity to supplement ineffective assistance of counsel claims is even more critical. A short Notice of Appeal (Form EOIR-26) is meant to simply "identify the findings of fact, the conclusions of law, or both, that are being challenged." 8 C.F.R. § 1003.3(b). Practically speaking, it would be prohibitively difficult for most respondents to file a formal complaint and also give prior counsel sufficient opportunity to respond before the 30-day Notice of Appeal deadline. At the time of a Notice of Appeal, there is typically a "lack of a sufficient evidentiary record as to what counsel did, why it was done, and what, if any, prejudice resulted." *Iturribarria v. INS,* 321 F.3d 889, 896 (9th Cir. 2003) (citation and quotation marks omitted).[5] *See also* Exh. Y, *In Re: Eber Salgado-Gutierrez A.K.A. R.G.L.,* [REDACTED], 2015 WL 1605446, at *1 (BIA Feb. 27, 2015) (Remanding case to immigration court where the direct appeal raised ineffective assistance of counsel but without yet

[5] The Ninth Circuit has held that the proper mechanism for an ineffective assistance of counsel claim is a motion to reopen. *Iturribarria,* 321 F.3d at 896. In the Second Circuit, on the other hand, ineffective assistance claims may be presented to the BIA "either through a motion to reopen or on direct appeal." *Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007) As far as counsel is aware, the Eleventh Circuit has not spoken on this issue.

complying with *Lozada*, noting that "[t]he Board has limited ability to engage in fact-finding in the course of deciding appeals.")

Here, though Ms. [Client 1]'s initial appeal deadline had long expired, she filed her Notice of Appeal within *less than seven days* of her coming into contact with undersigned counsel, and just one day before she was scheduled to report to ICE for a final deportation date. Exh. A, [Client 1] Suppl. Decl. at 14-15, ¶¶ 63-68; Exh. D, M Decl. at 46, ¶¶ 6-8; Exh. E, ICE Form I-220A. Due to the exigencies of this imminent deportation and the need to show due diligence on a late-filed appeal, Ms. [Client 1] did not have time to fully develop the record and comply with *Matter of Lozada* before filing. However, her Notice of Appeal properly identified the serious ineffective assistance of counsel issues at the core of her arguments for accepting a late-filed appeal and granting a motion to remand. Exh. B, NOA. Ms. [Client 1] then promptly took steps to satisfy *Lozada*'s procedural requirements and would have supplemented her initial filing with this evidence at the earliest practical opportunity, after prior counsels' responses were received on DATE, 2017 and DATE, 2017. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017, Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. (She received those responses just days after the Board's decision on DATE, 20XX. Exh. S, BIA Decision.)

Finally, even if the Board determines that Notices of Appeal in general must satisfy *Lozada,* undersigned counsel entreats the Board to exercise its discretion and allow Ms. [Client 1] and her son to supplement their filing in this case. Undersigned counsel submits that she acted in good faith in advising Ms. [Client 1] to file the Notice of Appeal as quickly as possible, both to demonstrate due diligence and to protect her family from imminent deportation. Counsel followed a course of action that had been successful for advocates in nearly identical late-filed appeals involving egregious misconduct by the [T.L.] law firm and the need to act quickly due to threats

of deportation. Exh. C, S Decl. at 44-45, ¶¶ 7-10. Counsel believed in good faith that it would be possible to submit documentation regarding *Matter of Lozada* compliance at a later stage, and asks that the Board not fault Ms. [Client 1] and her son for this belief.

iii. [T.L.]'s Performance in Ms. [Client 1]'s Case Was Exceptionally Deficient

As for the substantive component of *Matter of Lozada*, had Ms. [Client 1] and her son been allowed to present briefing and evidence, they would have easily proven that [T.L.]'s representation was both deficient and prejudicial. [T.L.] prevented them from "reasonably presenting [their] case" and caused their removal proceedings to be fundamentally unfair. *Matter of Lozada*, 19 I&N Dec. at 638. On the deficiency prong, evidence submitted with the Notice of Appeal demonstrated not only that Ms. [Client 1] and her son fell victim to ineffective assistance of their prior counsel, but also that [T.L.] adopted this exact model of ineffective assistance for a "large number" of recently-arrived Central American immigrants. Exh. B, NOA, Sub-Exh. A, [Client 1] Decl.; Exh. B, NOA, Sub-Exh. C, Contract, at 34.

Throughout their representation, the attorneys at [T.L.] deliberately stripped Ms. [Client 1] of her right to determine the course of her own representation, in violation of the State Bar of Georgia's Rules of Professional Conduct. Georgia Rules of Professional Conduct, Rule 1.2, *Scope of Representation and Allocation of Authority Between Client and Lawyer* (stating that "a lawyer shall abide by a client's decisions concerning the scope and objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."). The firm ignored Ms. [Client 1]'s fear of her return and her desire to seek relief, instead pursuing a strategy that could only lead to her removal. [T.L.] attorneys also gave Ms. [Client 1] incorrect and misleading information in analyzing her case and developing a legal strategy. As a result, Ms. [Client 2] was unable to make informed decisions about the actions the firm took in her

case. Georgia Rules of Professional Conduct, Rule 1.4 - *Communication* (requiring attorneys to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

In fact, EOIR has grounds to discipline CT and JL for their deficient immigration practice. In this case alone, [T.L.] attorneys: (1) "Knowingly or with reckless disregard made a false statement" and willfully misled, misinformed and deceived Ms. [Client 1]; (2) "Fail[ed] to provide competent representation" to Ms. [Client 1]; (3) "Fail[ed] to consult with a client concerning the objectives of the representation or abide by decisions of the client concerning how to achieve those objectives"; and (4) "Fail[ed] to maintain communication" with Ms. [Client 1]. Executive Office for Immigration Review, *EOIR's Disciplinary Program and Professional Conduct Rules for Immigration Attorneys and Representatives*, 1-2 (Feb. 27, 2013).

[T.L.] provided ineffective assistance both before and after Ms. [Client 1] and her son received removal orders at their Master Calendar Hearing on DATE, 2015. All of the attorneys with whom Ms. [Client 1] interacted made misrepresentations to her about her case. *See* Exh. Z, *L-Y-O-B* (BIA Nov. 2, 2015) (finding ineffective assistance of counsel where the attorney did not submit an appeal brief and then misrepresented the basis for the BIA denial). Before the hearing, the [T.L.] attorney XXJ did not inform her of her right to apply for asylum, nor did he explain the consequences of not seeking asylum or another form of relief in immigration court. Exh. A, [Client 1] Suppl. Decl. at 5, ¶¶ 18-19. He was conclusory and definitive in stating that she was not eligible for asylum, and as a result she did not seek the advice of other counsel. *Id.* at 5-6, ¶¶ 19-20, 23. XXJ told Ms. [Client 1] that her only option was to seek another type of status or pardon from the immigration court or an "amparo," or protection, from ICE. *Id.* at 5-6,

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¶¶ 19, 21. As a result, Ms. [Client 1], trusting the legal advice of this attorney, believed those to be her only options. *Id.* at 5, ¶ 20.

The attorney who attended her DATE, 2017 and DATE, 2015 hearings – a woman with whom Ms. [Client 1] had never interacted prior to the first hearing – further failed to consult with Ms. [Client 1]. She did not ask Ms. [Client 1] whether she wanted to express fear of returning, nor did she inform her that she could do so during the hearing. *Id.* at 7, ¶¶ 26-27. When Ms. [Client 1] asked why she had not been able to explain her case to the Immigration Judge, the attorney responded that the judge did not have time to ask Ms. [Client 1] questions about her case. *Id.* at 7, ¶ 29. She also did not inform Ms. [Client 1] that she had a right to appeal or ask her whether she could waive the appeal on her behalf. *Id.* at 9, ¶ 37. Furthermore, she did not inform Ms. [Client 1] that she would accept a removal order during the DATE, 2015 hearing without presenting any applications for relief. *Id.* at 8-9, ¶¶ 33-35.

After Ms. [Client 1] received the removal order, neither the attorney who was at her hearings nor the next [T.L.] attorney she spoke with, XXO, advised Ms. [Client 1] that she had a right to appeal her and her son's removal orders. *Id.* at 9, ¶ 37. When Ms. [Client 1] asked XXO why the Immigration Judge had not given her a third hearing so that she could present her case, he did not explain that the other [T.L.] attorney had requested her deportation at her second Master Calendar Hearing. *Id.* at 9, ¶ 38. Ms. [Client 1] also asked what else could be done in her case, and XXO told her that she could only apply for an "amparo." *Id.* at 9, ¶ 37. XXO did not explain that, as recent arrivals to the United States, she and her son would have been Priority 1(b) for immigration enforcement at the time she signed the contract – making it unlikely that she would be granted an ICE stay. *Id.* Rather, XXO misled Ms. [Client 1], telling her that she had a 50 percent chance of winning an ICE stay. *Id.*

Ms. [Client 1] was relying entirely on the law firm's legal advice – she had no other source of reliable information about the asylum process. She was ordered released on her own recognizance after her entry into the United States in DATE 2014. *See* Exh. E, ICE Form I-220A, at 47. As a result, she and her son had no orientation to the U.S. immigration system or asylum law, either through the credible fear process or from attorneys providing legal orientation in detention centers. Exh. A, [Client 1] Suppl. Decl. at 2-3, ¶ 10. She was unfamiliar with U.S. immigration system and, because [T.L.] had indicated they could help her with her case from their first meeting, she did not seek the advice of other counsel. *Id.* at 9, ¶ 37.

[T.L.] also repeatedly gave misleading or inadequate information so that she was unaware of how serious their misconduct was. If she had gone to her hearing *pro se*, she would have been better positioned to move forward with her case. The Immigration Judge would have candidly explained her rights and eligibility for relief and provided her with a list of pro bono immigration service providers. *See* Immigration Court Practice Manual, Chapter 4.15(g) ("If the respondent is unrepresented ("pro se") at a master calendar hearing, the Immigration Judge advises the respondent of his or her hearing rights and obligations…"); *see also* David L. Neal, *Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services* (Mar. 10, 2008). Instead, she reasonably relied on the representations of the [T.L.] attorneys, resulting in an uncontested removal order and a series of predictably unsuccessful ICE stay applications.

Contrary to [T.L.]'s claims in the attached responses to Ms. [Client 1]'s bar complaint, Ms. [Client 1] was never informed that she could seek asylum – she was told that she was ineligible for that form of relief. Exh. A, [Client 1] Suppl. Decl. at 5, ¶ 18; Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. In

their responses, Mr. JL and Mr. CT attempt to defend their firm's actions by stating that it was Ms. [Client 1]'s choice to pursue only a removal order and an ICE stay. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. However, it is unclear why anyone acting with adequate information would pay $3,000 for an attorney to ask for an order of removal at a Master Calendar Hearing - without even attempting to submit applications for relief - and then apply for an ICE stay that was very unlikely to be granted. And even if were true that Ms. [Client 1] accepted this strategy, [T.L.]'s practice of charging thousands of dollars to take actions that would most likely result in their clients' imminent removal – even when those clients expressed fear of returning to their home countries – reveals a serious lack of competency in the firm's immigration practice. *See* Georgia Rule of Professional Conduct 1.1 – Competence, Comment 5 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.").

CT admits in his letter to undersigned counsel that their firm "would have discussed the benefits and risks of requesting an order of removal and thereafter seeking a stay of removal from Immigration and Customs Enforcement ("ICE"), including her ability to obtain employment authorization while under ICE supervision and the *possibility* that she would be required to return to El Salvador." Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017, at 113. [T.L.]'s immigration practice was therefore intentionally deceptive. If they were honest in their representations to recently arrived clients, they would have explained that accepting a removal order would place them at high risk of imminent deportation and that an ICE stay alone would be highly unlikely to prevent their detention or removal. Instead, they used the word "amparo," or

protection in Spanish, implying that an ICE stay itself would amount to some sort of relief, and failed to adequately explain the risks of accepting a removal order.

Furthermore, despite Mr. T and Mr. L's assertions in their responses, Ms. [Client 1] did not intend to retain the firm only to accept an order of removal and apply for an ICE stay. Ms. [Client 1] understood that [T.L.] would be applying for a form of relief for her in immigration court, and [T.L.] states in both of their responses that their attorneys planned to make a request for prosecutorial discretion. Exh. A, [Client 1] Suppl. Decl. at 6-9, ¶¶ 25-39; Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. Unfortunately, contrary to [T.L.]'s responses, Ms. [Client 1] was never informed that she should bring documents to [T.L.]'s office in order for them to request prosecutorial discretion on her behalf. Exh. A, [Client 1] Suppl. Decl. at 7-8, ¶¶ 30-31. As a result, she did not bring such documents to [T.L.]'s office prior to her hearing on DATE, 2015. *Id*. [T.L.]'s own records do not indicate that the attorneys at [T.L.] called her prior to that hearing or attempted to follow up about the requested documents. *See* Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017, at 90 (citing to case log attached to JL's letter). However, even if she had been unable to procure the documents, competent counsel would have discussed the failure to bring the documents with the client, ensured that she was ready to move forward without seeking prosecutorial discretion, and if she was not, asked the Immigration Judge for a continuance. Instead, [T.L.] admits in both its responses that Ms. [Client 1]'s representative in court simply requested a removal order without discussing this decision with her client. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. The attorney never informed Ms. [Client 1] of her intent to request the order of removal at the DATE Master Calendar Hearing.

It is also worth noting that [T.L.] either blatantly lied or were relying on incomplete records in crafting their responses to Ms. [Client 1]'s bar complaint. Both responses stated that Ms. [Client 1] missed two check-ins, but she did not. Those check-ins are listed on her check-in sheets: DATE 2017 and DATE 2017. Exh. E, ICE Form I-220A. T and L responses also suggest that Ms. [Client 1] was incommunicative prior to and after her DATE, 2017 ICE check-in. Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017. However, as the records from ICE itself demonstrate, she continued to attend her ICE check-ins on, before, and after DATE, 2017. Exh. E, ICE Form I-220A. She was also available at the same phone number until around DATE 2017, at which point she advised [T.L.] of her new phone number. Exh. A. [Client 1] Suppl. Decl. at 13-14, ¶ 58.

For all the above reasons, [T.L.] was deficient in representing Ms. [Client 1] and her son.

iv. [T.L.]'s Ineffective Assistance of Counsel Prejudiced Ms. [Client 1] and Her Son

[T.L.]'s deficient representation prejudiced Ms. [Client 1] and her son, preventing them from "reasonably presenting [their] case" and causing their removal proceedings to be fundamentally unfair. *Matter of Lozada*, 19 I&N Dec. at 638*; Dakane,* 399 F.3d at 1274 ("Prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different."); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999) ("[T]o establish the ineffective assistance of counsel in the context of a deportation hearing, an alien must establish that his or her counsel's performance was deficient to the point that it impinged the 'fundamental fairness' of the hearing.") (internal citations omitted). At Ms. [Client 1] and her son's second Master Calendar Hearing, a [T.L.] attorney asked the Immigration Judge to enter removal orders against Ms. [Client 1] and her son without presenting any applications for relief, despite Ms.

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[Client 1]'s fear of returning to El Salvador. Exh. A, [Client 1] Suppl. Decl. at 8-9, ¶¶ 34-35; Exh. K, Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017, at 114 ("the attorney asked the court to enter an order of removal in Ms. [Client 1]'s case"). Had she been properly and fully informed of her options, Ms. [Client 1] would have sought other counsel and applied for relief. Exh. A, [Client 1] Suppl. Decl. at 6, ¶ 23. She and her son were therefore prejudiced because [T.L.] robbed them of the opportunity to develop their case with competent counsel and pursue their viable claims for asylum, withholding of removal, and relief under the Convention Against Torture.

[T.L.]'s deficient performance resulted in such a significant lack of due process that the hearing was rendered fundamentally unfair. Ms. [Client 1] was not informed of her rights with regard to any applications for relief, she was not given the opportunity to explain any aspect of her case to the Immigration Judge, and her attorney did not consult her before potentially waiving her right to appeal. *Id.* at 4-9 ¶¶ 18-39. Ms. [Client 1] never even had the opportunity to express her fear of return to the Immigration Judge. *Id.* at 8-9, ¶¶ 34-35. As a result, the Immigration Judge in this case was unable to consider her claim or evaluate her eligibility for relief, unlike the Immigration Judge in *Matter of Lozada*. *See* 19 I&N Dec. at 640. [T.L.]'s representation was so prejudicial that Ms. [Client 1] and her son were denied not simply a reasonable opportunity to present their case, but *any* opportunity to do so. *Id.* at 638. The prejudice in this case is thus straightforward: Ms. [Client 1] wanted to seek refuge for herself and her son in the United States and was prevented from doing so because of the misconduct and poor legal advice of her counsel.

[T.L.]'s failure to apply for any form of relief was manifestly prejudicial because Ms. [Client 1] and her son have viable claims for asylum. *See* Exh. Z, *In Re: L-Y-O-B-*, [REDACTED](BIA Nov. 2, 2015), at 281-83 (finding that that the attorney's failure to argue that

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the Respondent qualified for asylum and his failure to file a brief on appeal amounted to ineffective assistance of counsel). [T.L.] attorneys failed to properly screen Ms. [Client 1] for eligibility for relief, telling her that she was ineligible for asylum after only a cursory interview of approximately ten minutes. Exh. A, [Client 1] Suppl. Decl. at 4-5, ¶¶17-18. However, Ms. [Client 1] feared at the time of her hearing – and continues to fear – that she and her son would be persecuted or tortured if they are removed to El Salvador.[6] *Id.* at 2, 6, 15, ¶¶ 6, 9, 23, 69.

Ms. [Client 1] was sexually assaulted and threatened by M-18 members, and her son [Client 2] received threats from M-18 starting shortly after he was born. *Id.* at 1, ¶¶ 3-5. M-18 has also threatened Ms. [Client 1]'s entire family and targeted her female cousin (*Id.* at 2, ¶¶ 7-9), demonstrating an animus against the Ortez family itself that could pass muster under the guidelines for family-based particular social groups outlined in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017). The threats and harm she and her family have suffered would likely amount to past persecution. *See, e.g.*, *Niftaliev v. U.S. Att'y Gen.*, 504 F.3d 1211, 1217 (11th Cir. 2007) (finding that the cumulative effect of various incidents compelled a finding of past persecution). The Eleventh Circuit, along with other circuit courts, have found threats to amount to past persecution when they are connected to threats or harm against the applicant's family members. *See Sanchez Jimenez v. Att'y Gen.*, 492 F.3d 1223, 1233 (11th Cir. 2007) (finding past persecution where applicant received personal death threats, other family members were threatened with death, and daughter was kidnapped); *see, e.g., Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009) ("Violence or

[6] Ms. [Client 1] now respectfully asks for the opportunity to apply for asylum and is not precluded from doing so if her case is reopened. *See* 8 CFR § 1208.4(a)(5)(iii) (listing ineffective assistance of counsel as an extraordinary circumstances exception to the one year filing deadline). She includes her asylum application with this Motion. Exh. T, Form I-589 of Ms. [Client 1], at 257-68.

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threats to one's close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution.").

Despite knowing that Ms. [Client 1] and her son were targeted by M-18, [T.L.] did not investigate her or her son's asylum claims, nor did their attorneys attempt to speak to Ms. [Client 1]'s family members about M-18's threats. Exh. A, [Client 1] Suppl. Decl. at 4-5, 7-8, ¶¶ 17-19, 29-33. [T.L.]'s actions were therefore highly prejudicial because Ms. [Client 1] was never afforded an opportunity to develop the facts of her case or present her case to the Immigration Judge.

Had Ms. [Client 1] known the extent of [T.L.]'s misconduct, she would have sought another attorney to develop and present her case. However, [T.L.] repeatedly misled Ms. [Client 1]. They told her she was ineligible for asylum, but never informed her that she would not have the opportunity to present her case to the judge before she was ordered removed. *Id.* at 5, 8, ¶¶ 18, 33-34. When she asked what else could be done in her case, the [T.L.] attorneys told her she could only apply for an "amparo," without explaining that it would not be a form of "protection" for her and her son. *Id.* at 5-6, ¶¶ 21-22. [T.L.] also never informed Ms. [Client 1] that she had a right to appeal; Ms. [Client 1] did not learn that she could appeal the removal order until she came into contact with undersigned counsel. *Id.* at 15, ¶ 67. Because of [T.L.]'s multiple misrepresentations to Ms. [Client 1], she was unaware of her need to seek another attorney and therefore did not have the opportunity to prepare her case with the assistance of competent counsel.

[T.L.] also failed to seek prosecutorial discretion on Ms. [Client 1]'s behalf, despite her understanding that [T.L.] would do more than merely accept a removal order. *Id.* ¶ 19; Exh. K., Letter from [T.L.] to [Attorney M.M.], Dated DATE, 2017, at 113-15. Their attorneys did not make any attempt to prepare Ms. [Client 1] for the hearings, nor did they inform her about any documents they needed to request prosecutorial discretion. Exh. A, [Client 1] Suppl. Decl. at 7-8,

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¶¶ 26-33. Instead, Ms. [Client 1]'s attorney requested a removal order without first explaining that she had failed to request prosecutorial discretion or any other relief. *Id.* at 8-9, ¶¶ 34-48. Ms. [Client 1] and her son were therefore ordered removed without any effort on the part of their counsel to prevent their ultimate deportation.

Furthermore, because Ms. [Client 1] was represented by [T.L.] at both Master Calendar Hearings, the Immigration Judge likely did not give her a detailed explanation of her rights in immigration court and the process for applying for relief. She was therefore prejudiced because she was never provided with adequate information with regard to her hearings in immigration court, causing her and her son to receive removal orders without an opportunity "to meaningfully contest their removability." *See* Exh. U, *In Re: D-A-R-A*, A [REDACTED] (BIA May 27, 2016) ([REDACTED], Board Member), at 270.

For all of these reasons, [T.L.]'s misconduct seriously prejudiced Ms. [Client 1] and [Client 2]. Ms. [Client 1] was unable to meaningfully participate in her removal proceedings or seek any form of relief. As a result, she lives in constant fear of removal to El Salvador, where she is afraid she and her son will be murdered or tortured by M-18. Accordingly, the Board should remand this case to afford Ms. [Client 1] the opportunity to present her claims for asylum, withholding of removal, and relief under the Convention Against Torture to the Immigration Judge for the first time.

C. Ms. [Client 1] Has Demonstrated Due Diligence

The Board also erred in concluding that Ms. [Client 1] and her son had "not shown due diligence in pursing this matter" because the appeal was filed two years late. Exh. S, BIA Decision, at 255. To the contrary, Ms. [Client 1] and her son, as victims of gross misconduct by their attorneys, were deceived for years into believing that they did not have a right to appeal and only

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had a right to apply for ICE stays. Exh. A, [Client 1] Suppl. Decl. at 8-9, 14, ¶¶ 34-39, 60. Less than one week after discovering that she could appeal, Ms. [Client 1] filed a Notice of Appeal with the Board. *Id.* at 15, ¶¶ 67-68. Her diligence, both before and after learning of [T.L.]'s misconduct, was described in the declaration submitted with the Notice of Appeal, and is elaborated on in the updated declaration enclosed as an offer of proof. *See id.* at 1-16; Exh. B, NOA, Sub-Exh. A, [Client 1] Decl., at 27-30.

In the related context of equitable tolling of motions to reopen, a litigant is required to show "that he has been pursuing his rights diligently." *Avila-Santoyo v. U.S. Atty. Gen.*, 713 F.3d 1357, 1363, n.5 (11th Cir. 2013) (citation and quotation marks omitted). Due diligence typically includes "both the period of time before the ineffective assistance of counsel was or should have been discovered and the period from that point until the motion to reopen is filed." *Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008). The Ninth Circuit's three-part analysis of due diligence in the ineffective assistance context provides instructive guidance:

> First, we determine if (and when) a reasonable person in petitioner's position would suspect the specific fraud or error underlying her motion to reopen. Second, we ascertain whether petitioner took reasonable steps to investigate the suspected fraud or error, or, if petitioner is ignorant of counsel's shortcomings, whether petitioner made reasonable efforts to pursue relief. Typically, an alien is diligent if he continues to pursue relief and relies on the advice of counsel as to the means of obtaining that relief. Third, we assess when the tolling period should end; that is, when petitioner definitively learns of the harm resulting from counsel's deficiency, or obtains vital information bearing on the existence of his claim. In many cases, this occurs when the alien obtains a complete record of his immigration proceedings and is able to review that information with competent counsel.

Avagyan v. Holder, 646 F.3d 672, 679 (9th Cir. 2011) (citations and quotation marks omitted).

In this case, Ms. [Client 1] was actively misled by [T.L.] into believing that she was ineligible for relief and that she had no right to appeal her immigration case. Exh. A, [Client 1] Suppl. Decl. at 5-6, 8-10, ¶¶ 18-23, 34-40. A young mother newly arrived in the United States, she had little or no understanding of immigration law and did not receive any information while she

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was in detention about her rights or how to apply for asylum. *Id.* at 1-2, ¶¶ 1-3, 10. Reasonably, she trusted her attorneys. *Id.* at 5, ¶ 20.

In the two years after she received a deportation order, Ms. [Client 1] did not suspect that she had been the victim of ineffective assistance of counsel—nor would "a reasonable person in [her] position." *Avagyan*, 646 F.3d at 679. Instead, she continued to trust and rely on her lawyers at [T.L.], as they continued to provide misleading information and inadequate representation. She depended on [T.L.] to file her stay applications and attend her frequent ICE check-ins. Exh. A, [Client 1] Suppl. Decl. at 9-10, 12, ¶¶ 37-43, 50; Exh. E, ICE Form I-220A, at 47-49. Even when Ms. [Client 1] became frustrated with [T.L.] because of their lack of communication, failure to attend her ICE check-ins, and eventually their refusal to submit a third stay for her, she still had no idea that she could have filed an appeal of the immigration court decision. Exh. A, [Client 1] Suppl. Decl. at 11-13, ¶¶ 48-50; 53-54. When she made a complaint to [T.L.] in 2016, she only complained that "no one at [TL] knew about [her] case when [she] called and that they often did not send anyone to go to [her] ICE check-ins." *Id.* at 12, ¶ 49. She did not raise any complaint about her original deportation order or the lack of an appeal. *Id.* at 11-12, ¶¶ 48-50. As late as DATE, 2017, Ms. [Client 1] explained what had happened in her case as, "The lawyer asked that my entry be pardoned but the judge said that I had too little time since entering here and that was why he gave me deportation." Exh. D, M Decl. at 46, ¶ 5. In fact, Ms. [Client 1] was unaware that she had a right to appeal her case until she was on the verge of being deported back to the country that she fears. Exh. A, [Client 1] Suppl. Decl. at 14-15, ¶¶ 63, 67.

Though Ms. [Client 1] did not believe she had any right to an appeal, she "made reasonable efforts to pursue relief," *Avagyan*, 646 F.3d at 679, in the only form she thought possible: stays. She reached out to family members and gathered documentation for her application for a stay of

removal—which [T.L.] advised her was her only available form of protection. Exh. A, [Client 1] Suppl. Decl. at 9-10, 14, ¶¶ 37-41, 60; Exh. J, Letter from [T.L.] to GA Bar, Dated DATE, 2017, Sub-Exh. C, ICE Stay, at 105-112. She diligently went to her ICE check-ins about once per month and ISAP check-ins about once every two weeks—only missing one check-in for the birth of her baby Angel. Exh. A, [Client 1] Suppl. Decl., at 4, 10, ¶¶ 14-15, 41. She followed up with her attorneys to make sure that they would accompany her to her check-ins. *Id.* at 11, ¶¶ 44-45. And she did this all being a devoted mother to her two young children, [Client 2] (now four) and Angel (now two). *Id.* at 1, ¶¶ 1-2.

When Ms. [Client 1] finally "learn[ed] of the harm resulting from counsel's deficiency," *Avagyan*, 646 F.3d at 679, it took her less than a week to file an appeal with the Board. In August of 2017, ICE officers informed Ms. [Client 1] to come to their office on DATE, 2017 to receive a final date for deportation. Exh. A, [Client 1] Suppl. Decl. at 14, ¶ 63. Around that same time, a friend added her to a private Facebook group for mothers seeking asylum. *Id.* at 14, ¶ 64. On DATE, 2017, Ms. [Client 1] posted a question in the group about what the document she had received from ICE meant and asked, "what can I do to request that my baby is not deported with me, I need help." *Id.* at 15, *¶* 65; Exh. D, M Decl. at 46, ¶ 4. Undersigned counsel responded on DATE, 2017 and, after a conversation about her case, informed Ms. [Client 1] that, in undersigned counsel's professional opinion, Ms. [Client 1] had been a victim of ineffective assistance. Exh. D, M Decl. at 46, ¶¶ 6-7. This was the first time Ms. [Client 1] understood that she could appeal her case and submit a bar complaint against [T.L.]. Exh. A, [Client 1] Suppl. Decl. at 15, ¶ 67. Ms. [Client 1] immediately took action, and filed this appeal just 3 days later, on DATE, 2017. *Id.* at 15, ¶ 68; Exh. B, NOA at 17-43; Exh. D, M Decl. at 46, ¶ 8. She now respectfully asks the Board to reconsider its determination regarding diligence.

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D. Ms. [Client 1] Did Not Validly Waive Her Right To Appeal

Further, Ms. [Client 1] and her son did not validly waive their right to appeal. In the Eleventh Circuit, waivers of immigration appeal rights must be knowing, intelligent, and voluntary. "By waiving appeal, an alien relinquishes the opportunity to obtain review of the Immigration Judge's ruling. Thus, it is important that any waiver be knowingly and intelligently made." *Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320, 1322 (BIA 2000). "[S]uch waivers also must be voluntary…. The voluntariness of the alien's decision is a distinct inquiry from whether the alien's decision is knowing and intelligent." *Rodas-Alfaro v. U.S. Atty. Gen.*, 372 Fed. Appx. 974, 975 (11th Cir. 2010) (per curiam) (citing *Cobourne v. I.N.S.,* 779 F.2d 1564, 1566 (11th Cir.1986)).

Here, there is no indication that any supposed waiver of appeal was made knowingly, intelligently, or voluntarily, let alone all three. First, Ms. [Client 1] has no recollection of being informed of any appeal rights or asked about an appeal during the approximately 15 to 20-minute Master Calendar Hearing on DATE, 2015 where she was ordered removed. Exh. A, [Client 1] Suppl. Decl. at 8, ¶ 34. And second, [T.L.]'s failure to advise Ms. [Client 1] of her eligibility for relief or her right to appeal would independently have invalidated any potential waiver. *See* Exh. AA, *In Re: [REDACTED]*, [REDACTED], 2016 WL 3226650, at *1 (BIA May 9, 2016), at 284-85 ("[B]ased on the respondent's allegations that his former attorney did not talk to him about his right to apply for asylum or the terms of the Immigration Judge's grant of voluntary departure, the waiver was also not knowing or intelligent."); Exh. BB, *In Re: S.R.*, ██████████, 2006 WL 1455325, at *1 (BIA Apr. 3, 2006), at 286-87 (where "counsel failed to advise [respondent] of the ramifications of waiving appeal," "respondent's waiver of appeal was not a valid and knowledgeable waiver, [and] we find that the respondent did not waive appeal."); *Rodas-Alfaro*,

372 Fed. Appx. at 976 ("[T]he waiver must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.") (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (alterations omitted).

In the alternative, the Board should find that there is insufficient evidence at this stage to draw a conclusion about waiver. The finding of valid waiver is inherently a fact-specific inquiry. *Matter of Rodriguez-Diaz,* 22 I&N Dec. at 1323 ("[T]he precise articulation of appeal rights required in any given case will necessarily depend on the circumstances of that case...."). In its DATE, 20XX decision, the Board noted that "[t]he Immigration Judge's summary order indicates that the respondents *may* have waived appeal." Exh. S, BIA Decision, at 255 (emphasis added). But undersigned counsel is unable to review the transcript or recording of the Master Calendar Hearing to determine what, if anything, was said regarding an appeal. (Because the appeal was dismissed prior to setting a briefing schedule, undersigned counsel did not receive a copy of the transcript, and has not yet received the recording requested from Atlanta Immigration Court. Exh. D, M Decl. at 46, ¶ 9.)

E. The Board Should Accept the Appeal on Certification

Where a case presents exceptional circumstances, the Board may certify a case to itself under 8 C.F.R. § 1003.1(c)." *Matter of Liadov*, 23 I&N Dec. 990, 993 (BIA 2006). For all the reasons discussed above, this is case where exceptional circumstances warrant certification. Ms. [Client 1] was the victim of serious misconduct by her former counsel: provided false advice about her eligibility for relief, denied a right to a fair hearing, and misled about her right to appeal. Within just days of becoming aware of this, she filed a Notice of Appeal. Her potential deportation is

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looming, though she never had a chance to present any claim for relief in immigration court. She is very afraid to return to El Salvador, where she was sexually assaulted and where she, her son, and her other family members have been threatened by the M-18 gang. Exh. A, [Client 1] Suppl. Decl., at 1-2, 15, ¶¶ 3-9, 69. She and her son deserve a chance for a full and fair hearing to present their gender-based and family-based asylum claims, along with any other forms of relief for which they may qualify.

Finally, it is worth noting once more that this case is nearly identical to Exh. U, *In Re: D-A-R-A*, ██████ (BIA May 27, 2016) ([REDACTED], Board Member), at 269-71 and Exh. V, *In Re: M-B-G-R,* ██████(BIA June 15, 2016) ([REDACTED], Board Member), at 272-74. In these cases, the Board did accept late-filed appeals on certification without requiring full *Lozada* compliance at the Notice of Appeal stage. In the case of *In Re: D-A-R-A*, the appeal was filed over two years late, just like the appeal in this case. *Id.* And in both cases, the Board appeared to base its certification on "allegations of serious misconduct" "against" or "on the part of" "former counsel"—the very same [T.L.] law firm that represented Ms. [Client 1]. Exh. U, *In Re: D-A-R-A*, ██████ (BIA May 27, 2016) ([REDACTED], Board Member), at 269-271; Exh. V, *In Re: M-B-G-R,* ██████(BIA June 15, 2016) ([REDACTED], Board Member), at 272-74; Exh. C, S Decl. at 44, ¶ 8. *See also* Exh. B, NOA, Sub-Exh. D, *In Re: G-M-D-R*, ██████(BIA June 13, 2016) ([REDACTED 2], Board Member), at 41-43 (accepting a late-filed appeal on certification in an ineffective assistance of counsel case in a similar procedural position but involving a different law firm).

F. Alternatively, the Board Should Equitably Toll the Appeal Deadline

There is a growing consensus among Courts of Appeal that the Board's 30-day Notice of Appeal deadline at 8 C.F.R. § 1003.38(b) is not jurisdictional, and is therefore subject to equitable

tolling. *See Irigoyen-Briones v. Holder*, 644 F.3d 943, 947-49 (9th Cir. 2011); *Liadov v. Mukasey*, 518 F.3d 1003, 1008 n.4 (8th Cir. 2008); *Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 259 (2d Cir. 2007); *Huerta v. Gonzales*, 443 F.3d 753, 756 (10th Cir. 2006). The Supreme Court has similarly held that administrative appeal time periods are not jurisdictional. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Though the Eleventh Circuit has yet to rule on the issue, respondents urge the Board to reconsider its determination in *Matter of Liadov* that it lacks "authority to extend the time for filing appeals." 23 I&N Dec. at 993. An amicus brief from the American Immigration Council (AIC) in support of this argument is forthcoming and will be submitted to the Board within the next 14 days.

Assuming that the Notice of Appeal deadline is non-jurisdictional, this is a clear case where equitable tolling should apply. "Generally, equitable tolling requires a litigant to show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. [The court] see[s] no material distinction between the 'exceptional circumstances' in the INA regulations and the 'extraordinary circumstance' requirement for equitable tolling." *Avila-Santoyo*, 713 F.3d at 1363, n.5 (citations and quotation marks omitted). As discussed above, Ms. [Client 1] has diligently pursued her rights, and the outrageous misconduct of [T.L.] is an exceptional circumstance that prevented her from filing a timely appeal.

V. CONCLUSION

Ms. [Client 1] and her son urge the Board to reconsider its decision dismissing the appeal as untimely and either accept their appeal on certification or equitably toll the Notice of Appeal deadline. This family's case merits a remand to the immigration court so that they have an opportunity to present their claims for asylum, withholding, protection under the Convention Against Torture, and any other relief for which they may qualify.

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Dated: DATE, 20XX

Respectfully submitted:
[Signature]

[Attorney M.M.]
Pro Bono Counsel for Respondents

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