XXXX
[redacted]

Attorney for Respondents

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

In the Matter of:	)	
	)	A_____
_____, _____	)	A_____
_____, _____	)	A_____
_____, _____	)	A_____
_____, _____	)	
	)	MOTION TO REOPEN
Respondents.	)	
_____	)	

INTRODUCTION

Respondent _____ _____, and her three children, Respondents _____-_____, _____-_____, and _____-_____, through undersigned counsel, hereby move the Board to reopen their final order which was issued on [DATE], 20[redacted] See attached, p. 32. Respondents were granted voluntary departure at that time. The grant of voluntary departure has been stayed by order of the Ninth Circuit Court of Appeals after Respondents filed a timely petition for review on [MONTH] __, 2007, of the final order along with a motion for stay of the order granting voluntary departure. See attached, p. 38.

Thus, this motion is timely, as pursuant to INA § 240(c)(7)(C)(i), it is filed within ninety days of the final order. This is the first and only motion to reopen filed in proceedings. Moreover, given the stay of voluntary departure issued by the Ninth Circuit Court of Appeals, Respondents remain within the voluntary departure period.

Finally, Respondents are seeking to reopen proceedings to allow them an opportunity to renew their applications for adjustment of status for which they are prima facie eligible, but were previously denied the opportunity due to ineffective assistance of counsel. Instead, their previous counsel only informed them of the opportunity to apply for cancellation of removal for certain non-lawful permanent residents, under INA § 240(b)(1).

Statement of the Facts

Respondents are the wife and children of_____ _____, a lawful permanent resident. See attached, p. 1-3. Mr. _____ filed visa petitions on behalf of his wife and children in 1996 and 1997. All of the visa petitions were approved. See attached, p. 4-8. In 2001, Mr. _____ retained attorney _____to file applications for V-visas for all of the Respondents. They were likewise approved. See attached, p. 9-10. Mr. _____ then retained attorney _____to file their applications for adjustment of status. They paid $5,455, in filing fees and another $1,455 in attorney's fees. See attached, p. 1, 11-13. However, the applications of the children were denied because their attorney erred in filing the adjustment applications for the children when the priority dates were not yet current. See attached, p. 14-21. The application of the mother, Respondent _____ _____ was denied as the Service issued a notice revoking the visa petition that was approved nine years earlier, stating

that it had not been properly signed. See attached, p. 22-25. Respondents were subsequently placed in removal proceedings in ____ of 2006. See attached, p. 27-28. Respondents once again retained attorney _____to represent them in removal proceedings. By this time, the priority dates had become current. But inexplicably, their attorney did not advise the immigration court that Respondents sought to renew their applications for adjustment of status. Instead, Attorney. _____filed applications for cancellation of removal under INA § 240A(b)(1) on behalf of all of the respondents. See attached, p. 2, 30.

These applications were denied, as the Immigration Judge found that Respondents were unable to demonstrate that their removal would cause exceptional and unusual hardship to the father. At this point, attorney _____advised Respondents that they should seek new counsel as she could no longer help them. See attached, p. 2. At this point, Respondents retained the services of the law office of _____. See attached, p. 2, 29. They first met with Attorney _____, who recognized that they had been denied the opportunity to renew their applications for adjustment of status and needed to move to remand their cases to the immigration judge for this purpose. The retainer agreement specifically includes a provision for filing a motion to remand for adjustment of status. See attached, p. 29. Mr. _____soon thereafter left the law office of _____. However, prior to leaving the law office he sent a message to _____ explaining that Attorney _____had failed to apply for adjustment of status even though the applicants qualified, and that on appeal, the law office of _____ should file a motion to remand with so that they could have an opportunity to renew their applications for adjustment of status. See attached, p. 30-31.

However, after Mr. _____'s departure from the law office of _____, no action

was ever taken remand their cases to the Immigration Judge for purposes of applying for the relief for which they were eligible. Instead, the appeal went forward challenging only the denial of the application for cancellation. This is despite the fact that both the retainer agreement and the message from _____ to his former employer, makes clear that the law office of _____ was retained for the purposes of seeking remand on the cases to give the family their first opportunity to apply for adjustment of status. See attached, p. 29-31.

After all, all Respondents were beneficiaries of approved visa petitions with current priority dates. They had already paid the filing fees when they applied affirmatively for adjustment of status. Even the oldest child, who had subsequently turned twenty-one, continued to be eligible for adjustment of status under the Child Status Protection Act. Indeed, even if he would not have qualified for adjustment, he could have applied to renew his V-visa, as all four Respondents had applied for and been granted V-visas. The local CIS office had denied the mother's application for adjustment of status (and only the mother's, none of the children's) based on the USCIS decision to revoke the I-130 petition. But this was nine years after the approval of the visa petition. And given that the I-130 petition had already been approved nine years early, and no notice or intent to deny was given, this revocation was unlawful. Moreover, even if the revocation were lawful, her spouse subsequently filed another visa petition on her behalf. Finally, even if the mother was not eligible for adjustment of status, the fact that all her children were granted adjustment of status, along with the fact that her husband was already a lawful permanent resident, would dramatically alter the facts regarding her eligibility for cancellation of removal.

However, Respondents never had an opportunity to present these forms of relief, and

instead, on appeal, the Board of Immigration Appeals was only asked to address the decision denying the application for cancellation of removal. The Board subsequently denied the appeal on [DATE], 2007. See attached, p. 32-34. The law of _____ then sent a letter to Respondents advising that the appeal had been denied and that they had thirty days to file a petition for review to the Court of Appeals. See attached, p. 35. However, they were informed that Mr. _____ was going on vacation, so then they returned to Attorney _____ , who agreed to file the petition for review for $3,000. See attached, p. 2-3. Respondents accordingly filed a timely petition for review along with a motion for stay of voluntary departure that was granted by the Court. See attached, p. 38. However, Respondents were never informed that their attorneys had failed to renew their applications for adjustment of status before the Immigration Court. Indeed, Respondents were never informed that the Court of Appeals did not have jurisdiction to review the discretionary determination of the EOIR in rejecting the application for Cancellation of Removal. But two weeks later, Attorney _____called to inform them that their case was going to be dismissed from the Ninth Circuit, and that they should find another attorney. See attached, p. 3, 38-39. At that point they met with Northwest Immigrant Rights Project and only then learned that their previous attorneys had still failed to renew their applications for adjustment of status. See attached, p. 3. Respondents then filed bar complaints with the State Bar of _____ against both Attorney _____and Attorney _____. See attached, p. 44-47. Counsel for Respondents also sent a letter to the prior attorneys regarding the complaint of ineffective assistance of counsel. See attached, p. 40-43.

ARGUMENT

A motion to reopen removal proceedings must be supported by evidence that Ais material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1). In addition, the motion "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 1003.2(c)(2). In this case, Respondents have timely filed a motion to reopen, demonstrating, pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that due to ineffective assistance of counsel they had been denied the opportunity to seek primary forms of relief from removal. Specifically, their previous attorneys had failed to assert their right to renew their applications for adjustment of status.

A. Respondents' eligibility for adjustment of status and other forms of relief was material, indeed it was essential to their cases in the underlying removal proceedings.

All Respondents were beneficiaries of approved visa petitions with current priority dates. They had already paid the filing fees when they applied affirmatively for adjustment of status. Even the oldest child, who had subsequently turned twenty-one, continued to be eligible for adjustment of status under the Child Status Protection Act. Indeed, even if he would not have qualified for adjustment, he could have applied to renew his V-visa, as all four Respondents had applied for and been granted V-visas. The local CIS office had denied the mother's application for adjustment of status (and only the mother's, none of the children's) based on the USCIS decision to revoke the I-130 petition. But this was ___ years after the approval of the visa

petition. And given that the I-130 petition had already been approved nine years early, and no notice or intent to deny was given, this revocation was unlawful. Moreover, even if the revocation were lawful, her spouse subsequently filed another visa petition on her behalf. Finally, even if the mother was not eligible for adjustment of status, the fact that all her children were granted adjustment of status, along with the fact that her husband was already a lawful permanent resident, would dramatically alter the facts regarding her eligibility for cancellation of removal.

The evidence submitted in a motion to reopen need not definitively prove eligibility for relief. Rather, respondents must make out a *prima facie* case for eligibility. *Matter of Coelho*, Int. Dec. #3172, at 9 (BIA 1992). In this case, Respondents are able to submit not only the approval notices demonstrating that they were all beneficiaries of visa petitions filed in 1996 and 1997, but also an approval notice demonstrating that all Respondents were granted V-visas. Respondents also have submitted decisions from USCIS rejecting their adjustment applications, which demonstrate that they have already filed adjustment applications, including paying the filing fees. Indeed, the denial notices clearly inform Respondents of their right to "renew your application for status as a permanent resident during such proceedings." See attached, p. X, XX, XX, XX.

Respondents _____ and _____ note that even though they have completed 21 years of age they continue to be eligible to apply for adjustment of status under the Child Status Protection Act. Moreover, even if they were not eligible for adjustment of status, they could apply to renew their applications for V-visa. Thus, Respondents ___ and ___have attached applications I-539 to renew their V-visa. See attached, p. 48-53.

Finally, as previously noted, Respondent _____ _____ _____ contends that her adjustment of status application was wrongfully denied. She has never had the opportunity to contest this denial by renewing her application in Immigration Court. Moreover, her husband has subsequently filed another visa petition on her behalf. Finally, even if she did not qualify for adjustment of status, her application for cancellation of removal for certain nonlawful permanent residents under INA § 240A(b)(1), would have been dramatically altered if her children were adjusted to lawful permanent resident status. Thus, she would have been able to demonstrate hardship to not only her husband, but also her four children which applied with her for adjustment of status, in addition to her youngest child who was born in the United States. Thus, all Respondents have submitted documents demonstrating that they are *prima facie* eligible to apply for relief from removal, and that due to ineffective assistance of counsel, they were previously denied this opportunity.

It is plainly evident that the prior attorney's ineffective assistance of counsel deprived Respondents of their opportunity to challenge the errors of prior counsel before the Federal Court of Appeals, as these forms of relief were never addressed by either the IJ or EOIR. INA § 242(b)(4) precludes review before the Federal Court of Appeals of any issues that were not made part of the administrative record. Moreover, traditional statutory rules of exhaustion would also preclude Respondents from now raising these matters for the first time before the Court of Appeals.

B. <u>Ineffective Assistance of Counsel demonstrates that evidence of eligibility for relief was previously unavailable.</u>

As the evidence submitted in this motion demonstrates, including the attached affidavit, notices, receipts, letters to and from attorneys, and bar complaints, it is clear that Respondents' prior attorneys provided ineffective assistance of counsel, which not only prevented Respondents from initially seeking to renew their adjustment applications or apply for other forms of relief like a V-visa before the Immigration Judge, but also prevented Respondents from seeking redress from both the BIA and the Federal Court of Appeals. Respondents' prior attorneys' actions have completely deprived Respondents of due process of the law by taking away their opportunity for a full and fair hearing, and then both administrative and judicial review. "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

The Board has determined that evidence of ineffective assistance of counsel meets the "unavailable and could not have been presented" standard for reopening final orders. *Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996). In *Grijalva*, the respondent, who was represented by an attorney, failed to appear for a deportation hearing and was ordered deported *in absentia*. *Id*. at 472. He then hired a new attorney, who alleged that his previous attorney had mistakenly informed the respondent that he need not appear for his hearing. *Id*. at 473. The Board found that this constituted Asufficient grounds for reopening [the deportation] proceedings." *Id*.

In addition, a respondent alleging ineffective assistance of counsel must comply with the requirements laid out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Under *Lozada*, the respondent must: (1) "include a statement that sets forth in detail the agreement that was entered into with former counsel"; (2) inform former counsel of the allegations and allow him or her an

opportunity to respond; and (3) state "whether a complaint has been filed with appropriate disciplinary authorities regarding [the ineffective] representation, and if not, why not." *Id*. at 639.

In this case, Respondents have complied with all of the *Lozada* requirements. First, the detailed declaration of Respondents' husband/father demonstrates how the attorneys failed to advise Respondents of their opportunity to renew their applications for adjustment of status, and then later, of the need to move to remand matters to the IJ to seek such relief. See attached, p. 1-3. Respondents are also able to submit a retainer agreement contracting to file a motion to remand to the IJ for purposes of adjustment, and an e-mail from one attorney from the law office of _____ clarifying the need to move to remand proceedings back to the IJ, and possibly the need to file a V-visa for the oldest child. See attached, p. 29-31. Yet, instead, on appeal, the only matter addressed was the denied cancellation application. See attached, p. 32-34. Once again, the declaration clarifies that on the petition for review their attorney did not advise Respondents about the failure to submit claims regarding the applications for adjustment of status, or alternatively, the applications for V-visas. See attached, p. 2-3.

Second, attached at page XX-XX, are letters undersigned counsel wrote to the prior attorneys, informing them of the allegations that Respondents are making against them. Respondents are not able to wait more time to receive a response from those attorneys given that the ninety day deadline for filing a motion to reopen is quickly approaching. Third, Respondents have filed complaint against both Attorney _____and Attorney _____ with the ____ State Bar Association. See attached, p. 44-47.

CONCLUSION

For the aforementioned reasons, Respondents' respectfully move the Board to reopen the final orders and remand proceedings to the immigration judge to allow them the opportunity to present their applications for relief.

Dated: [DATE] 20 [redacted]

Respectfully Submitted,

XXXX
[redacted]
Attorney for Respondents