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[Attorney Name]  
[Title]  
[ORGANIZATION NAME]  
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**RESPONDENT IS DETAINED**

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
[CITY] IMMIGRATION COURT**

**In the Matter of:** )  
 )  
**PT** )  
 )  
**Respondent** )  
 )  
\_\_\_\_\_ )

**File No. A#**

**In Removal Proceedings**

**MOTION TO REOPEN REMOVAL PROCEEDINGS**

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
[CITY] IMMIGRATION COURT**

<b>In the Matter of:</b>	)	
	)	
<b>PT</b>	)	<b>File No. A#</b>
	)	
<b>Respondent</b>	)	
_____	)	<b>In Removal Proceedings</b>
	)	

**MOTION TO REOPEN REMOVAL PROCEEDINGS**

Respondent, PT, through undersigned counsel, respectfully moves this Court to reopen the instant removal proceedings. Respondent seeks reopening of this court’s decision dated [DATE], 20XX which denied her applications for withholding of removal and protection under the Convention Against Torture (CAT) and also ordered her removed to Guatemala. Respondent contends that she did not receive effective assistance by her prior counsel, [], in her case before the Immigration Court. Respondent claims that the denial of her withholding of removal and CAT claims and her order of removal would not have been entered but for her prior counsel’s ineffective assistance.

Respondent contends that such ineffective assistance included prior counsel's failure to 1) properly investigate the case; 2) develop the record for review; and 3) communicate effectively with client. Due to prior counsel’s ineffective assistance, Respondent was prejudiced in a manner that warrants reopening.

Respondent seeks reopening so she will have an opportunity to properly develop the record for review on her application for withholding of removal and CAT. Respondent also

requests that this Court stay the execution of her removal order until such time that this Court issues an order on the Motion to Reopen.

### **I. Factual Background**

Respondent is an indigenous Guatemalan citizen and native Quiche speaker who entered the United States for the first time in [DATE] 20XX. She was apprehended at the border and ordered removed to Guatemala on [DATE], 20XX. She was then removed to Guatemala on [DATE], 20XX. Respondent entered the United States for a second time on [DATE], 20XX and was apprehended at the border. She has been detained at [NAME] Civil Detention Center since that time. The Asylum Office conducted a Reasonable Fear Interview with Respondent on [DATE], 20XX and determined that she had established a reasonable fear of persecution in Guatemala. Her case was then referred to an immigration judge on [DATE], 20XX for further proceedings.

Respondent retained prior counsel to provide representation in her removal proceedings on or around [DATE] 20XX. Prior counsel entered an E-28 Notice of Entry of Appearance and filed an I-589 on behalf of Respondent. This court considered the merits of Respondent's claim for withholding of removal and CAT on [DATE], 20XX. This court denied both claims and ordered Ms. T removed on that same day. Her prior counsel failed to file a timely appeal to the Board of Immigration Appeals. Respondent now files this Motion to Reopen based on a claim of ineffective assistance of counsel.

### **II. Respondent's Removal Proceedings Should be Reopened**

Reopening is proper because Respondent's prior counsel rendered ineffective assistance to Respondent and, as a result, Respondent was both denied fundamental fairness in her removal

proceedings and was prejudiced in the outcome of her claim. More specifically, prior counsel was ineffective by failing to 1) properly investigate the case; 2) develop the record for review; and 3) communicate effectively with Respondent. Prior counsel's ineffective assistance deprived Respondent of her due process right to a fundamentally fair hearing. Respondent suffered prejudice because, unless this Court reopens her case, she will be removed to Guatemala where she fears persecution and torture.

**A. Respondent's Motion to Reopen is Timely**

This Court has jurisdiction over Respondent's Motion to Reopen because it is timely filed. Section 240(c)(7) of the INA affords noncitizens in removal proceedings the opportunity to file one motion to reopen. INA § 240(c)(7). The motion must be filed within ninety (90) days of the entry of a final administrative order of removal and must be supported by affidavits or other evidence which establish new facts that can be proven at a hearing to be held if the motion is granted. INA § 240(c)(7)(B) and (C)(i).

This Court entered a final administrative order of removal against Respondent on [DATE], 2015. Through the instant motion, Respondent alleges new facts and supports such facts by affidavits. The motion is therefore timely filed and complies with INA § 240(c)(7). Accordingly, this Court has jurisdiction to hear this case.

**B. Reopening is Warranted Because Respondent Received Ineffective Assistance of Counsel**

As evidenced by this motion, Respondent's due process right to a fundamentally fair hearing was denied due to her incompetent counsel. Justice demands that Respondent be afforded the opportunity to demonstrate that she is eligible for withholding of removal and protection under the Convention Against Torture.

The Fifth Amendment to the Constitution guarantees due process of law for noncitizens in their deportation proceedings. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (reaffirming that aliens present in the United States are entitled to protection under the Due Process Clause); *Landon v. Plasencia*, 459 U.S. 21 (1982) (holding that aliens are entitled to a fair hearing regarding their deportation); *Yamataya v. Fisher*, 189 U.S. 86 (1803) (executive proceedings to expel aliens must comport with fundamental principles of due process); *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975); *Matter of Assaad*, 23 I&N 553 (BIA 2003) (reaffirming that the attorney's performance in removal proceedings may be so deficient as to constitute a due process violation).

While noncitizens do not have a right to appointed counsel in removal proceedings, courts have recognized that a noncitizen's due process right to a removal/deportation hearing may be violated by incompetent representation. *Mai v. Gonzales*, 473 F.3d 162 (5th Cir. 2006) (recognizing that an alien's claim of ineffective assistance of counsel implicates due process concerns under the Fifth Amendment). Specifically, in *Matter of Lozada*, the Board of Immigration Appeals (The Board) held that an attorney's legal services to a noncitizen may be so deficient as to render the proceedings fundamentally unfair, thus necessitating a new hearing. 19 I&N Dec. 637 (BIA 1988).

The Board also held that any claim of ineffective assistance as grounds for reopening should comply with the requirements of *Matter of Lozada, supra*. *Lozada* requires: 1) respondent's affidavit or verification setting forth the agreement and representations of counsel; 2) that respondent has informed counsel of their error and counsel has been given an opportunity to respond; and 3) an explanation of any bar complaint or grievance against counsel that has been

initiated, or a statement as to why a complaint has not been made. *Matter of Lozada*, 19 I&N Dec. at 638. In addition, the respondent must show that she was prejudiced by the ineffective counsel. *Id.*

Attached to his motion, Respondent submits proof of compliance with *Lozada*. First, Respondent submits her own sworn declaration in which she outlines her agreement with prior counsel and highlights the deficiencies in his representation. *See* Exh. A. Second, the undersigned counsel called prior counsel on [DATE], 20XX to provide him with initial notification of the allegations of ineffective assistance counsel but received no response. Undersigned counsel then subsequently emailed a letter to Respondent's prior attorney on [DATE], 20XX, outlining the errors committed in Respondent's case. *See* Exh. B. To date, Respondent's prior attorney has not responded to the undersigned's email. Third, Respondent has filed a complaint with the State Bar of California. *See* Exh. C.

Respondent's evidence also establishes that she suffered substantial prejudice as a result of prior counsel's performance. First, as explained below, Respondent's prior attorney failed to investigate Respondent's claim or to ask Respondent why she was afraid to return to Guatemala while preparing her case. Second, prior counsel failed to develop the record of Respondent's claim for this Court's review. Third, prior counsel failed to communicate effectively with Respondent during the course his representation—most notably by failing to seek interpretation in her native language of Quiche. The cumulative effect of these deficiencies was that Respondent was prejudiced in her ability to effectively evidence her fear of returning to Guatemala.<sup>1</sup>

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<sup>1</sup> Counsel has not yet been able to obtain a complete copy of the transcript in Respondent's proceedings and thus is

## **1. Prior Counsel Failed to Properly Investigate Respondent's Case**

Prior counsel rendered ineffective assistance of counsel to Respondent by failing to properly investigate her claim. As explained in Respondent's affidavit, at no point did prior counsel meet with Respondent nor explore why she was afraid of returning to Guatemala. *See* Exh. A at ¶ 3. Instead, prior counsel relied solely upon the Reasonable Fear Interview record to put forth Respondent's case. *Id.* Reasonable fear interviews serve only as an indication that Respondent has a reasonable fear of persecution or torture in his or her home country. *See* 8 CFR 208.31(c). A higher standard of proof—a greater than 50% chance of persecution—is required to succeed on the merits of a withholding of removal or a CAT claim. *See* INA 241(b)(3). By failing to ask Respondent any additional questions about her fear of persecution—beyond reviewing those that she had already answered at her Reasonable Fear Interview—prior counsel all but ensured that Respondent would be unable to meet the higher standard of proof at her merits hearing.

This failure to put forth a colorable claim for withholding of removal and CAT is corroborated by the I-589 submitted by prior counsel on behalf of Respondent. Counsel's responses to Part B of the I-589—which queries the substantive reasons why the applicant fears persecution or torture—provided no additional information or context for Respondent's fear beyond what she had already articulated in the Reasonable Fear Interview. *See* Exh. D. Of particular concern, is that even though Respondent indicated at her Reasonable Fear Interview that her life had been threatened on numerous occasions, prior counsel only included a one sentence response to Part B. Question 4 on the I-589 about whether Respondent was afraid of

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unable, at this time, to point to any additional deficiencies that may be elucidated from that transcript.

being subjected to torture in her home country. *Id.* Furthermore, as Respondent indicates in her affidavit, at no time did prior counsel review the contents of the I-589 application with her before submitting it on her behalf. *See* Exh. A at ¶ 3.

## **2. Prior Counsel Failed to Develop a Record in Support of Respondent's I-589 application**

Not only did prior counsel fail to effectively investigate Respondent's fear of returning to Guatemala, he also failed to properly develop the record in support of the claim that he did put forth on her behalf. The sum total of documents that prior counsel submitted to support Respondent's claim was the deficient I-589 referenced above and the Department of State's most recent report on Guatemala. It is common practice in asylum/withholding proceedings to provide multiple examples of country conditions evidence that are specifically relevant to the applicant's claim (e.g. whether based on political opinion, religion, race, or membership in a particular social group).<sup>2</sup> The officer who conducted Respondent's Reasonable Fear Interview determined that her claim of persecution was based on her race as an indigenous Guatemalan. As such, additional evidence of the specific conditions for indigenous people in Guatemala and evidence of the government's inability or unwillingness to protect them from persecution, was necessary to support Respondent's claim. Instead of providing such evidence, prior counsel relied solely upon the generic report from the Department of State.<sup>3</sup>

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<sup>2</sup> *See In re Matter of S-M-J*, 1997 WL 80984, at 724 (BIA 1997). (Explaining that "In order to determine if an alien's claim is 'credible in light of general conditions in the applicant's country,' 8 C.F.R. 208.13(a), or 'plausible' *Matter of Dass*, *supra*, at 124, 125, an adjudicator must understand the general country conditions. Therefore, general background information about a country, where available, must be included in the record as a foundation for the applicant's claim." ).

<sup>3</sup> There are a wide range of readily accessible resources for attorneys to research country conditions in support of a client's asylum/withholding of removal/CAT claim. The following link provides a representative list: [http://www1.umn.edu/humanrts/center/asylum/cond\\_research.html](http://www1.umn.edu/humanrts/center/asylum/cond_research.html) (last accessed on July 17, 2015).



Furthermore, under the Real ID act, an adjudicator may require additional corroborating evidence for an asylum/withholding of removal/CAT applicant's claim, or may require an explanation for why the applicant is unable to put forth such evidence. *See* Pub.L. 109-13, 119 Stat. 302 (May 11, 2005) *See also* INA §241(b)(3). As such, it is common practice for a representative to submit any and all possible corroborating evidence with an I-589, including but not limited to: additional affidavits, police reports, medical records, identification documents, etc.<sup>4</sup> In Respondent's case, prior counsel failed to file any such corroborating evidence.

Finally, on the day of Respondent's individual hearing, prior counsel failed to appear in court with Respondent or in person before this Court. Instead, another attorney (presumably Mr. RT who also filed an E-28 Notice of Entry of Appearance in the case) appeared on Respondent's behalf via teleconferencing. *See* Exh. A at ¶ 5. Respondent had never spoken to or met this attorney previously. As a result, Respondent felt "scared and alone" on the day of the hearing. *Id.*

### **3. Prior Counsel Failed to Communicate Effectively with Respondent**

Prior counsel's failure to investigate Respondent's claim and his failure to adequately develop the record in support of Respondent's claim, were compounded by his failure to communicate effectively with Respondent over the course of his representation. As Respondent notes in her affidavit, she speaks Quiche, not Spanish. *See* Exh. A at ¶ 4. On the very few

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<sup>4</sup> The Public Counsel's Asylum Manual for Public Counsel's Volunteer Attorneys provides a representative list of supporting documentation that is often included in an Asylum/Withholding of Removal/CAT claim. The list of supporting documentation includes 1. Declaration 2. Index of Exhibits 3. Exhibits supporting the client's claim (which may include medical records, declarations or letters from witnesses, newspaper articles, country reports from human rights and governmental organizations and other corroborating documents) 4. Expert declarations (from academics or human rights activities regarding country conditions or from physicians and therapists who have evaluated or treated the client). *See* The Public Counsel's Asylum Manual pages 57-58 at: <http://www.publiccounsel.org/tools/publications/files/AsylumManual.pdf>. (Last accessed on July 17, 2015.)

occasions that Respondent remembers speaking with prior counsel over the phone about her case, the conversations occurred in Spanish. *Id.* At no time did prior counsel make an effort to find or use a Quiche interpreter while investigating and preparing Respondent's case.<sup>5</sup>

Prior counsel is licensed to practice law in the state of California. As such, when undertaking representation of a client, he is held to the standards of practice in that state. In *Gold v. State Bar* the Supreme Court of California found that the ethical duty to communicate continues to exist when attorneys represent a non-English speaking client. *Gold v. State Bar*, 49 Cal.3d 908 (1989). Prior counsel violated his ethical duty to communicate with Respondent when he failed to provide her with updated information on her case on the several occasions that she called him, and more importantly, when he failed to use a Quiche interpreter or to find another viable method of communication with Respondent in the preparation of her case. This ethical violation also exacerbated the effects of prior counsel's ineffective assistance of counsel in Respondent's case.

**C. Prior Counsel's Ineffective Assistance Caused Substantial Prejudice to Respondent**

Due to prior counsel's ineffective legal representation, Respondent suffered substantial prejudice. To show substantial prejudice, she must establish that but for counsel's unprofessional errors, the proceedings would have been different. *Mai v. Gonzales*, 473 F.3d 162, 165-166 (5th Cir 2006) (granting petition for review and reversing the BIA where as a result of counsel's

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<sup>5</sup> The Public Counsel's Asylum Manual for Public Counsel's Volunteer Attorneys provides a helpful reference point for the importance of securing an interpreter in an asylum claim for non-English speaking clients. Securing an interpreter is listed as one of the "essential steps" in preparing an asylum case in Immigration Court. Specifically, the guide states, "If your client does not speak English or is more comfortable in another language, you will need to find an interpreter to translate for you during your case preparation." (Page 79-80). <http://www.publiccounsel.org/tools/publications/files/AsylumManual.pdf> (Last accessed on July 17, 2015).

erroneous admissions to the pleadings, the noncitizen was denied the opportunity to pursue relief from removal).

Prior counsel's failure to investigate Respondent's claim, to develop the record for Respondent's individual hearing, and to communicate effectively, caused substantial prejudice in her case. In an effort to develop an understanding of the likelihood that these deficiencies caused prejudice in Respondent's claim, undersigned counsel conducted a one hour initial interview with Respondent about her fear of returning to Guatemala. During that interview, undersigned counsel used a telephonic interpreter to communicate with Respondent in her native language of Quiche. Over the course of that one meeting, undersigned counsel became aware of additional information related to Respondent's fear of returning to Guatemala, including the fact that Respondent suffered from repeated rapes during the months leading up to her departure from Guatemala and that respondent was forced into a marriage at the age of 13. *See* Exh E. The fact that undersigned counsel ascertained this information after just one meeting with Respondent highlights the effect both of prior counsel's failure to investigate Respondent's claim, and the effect of his failure to communicate with her effectively in her native language. Had the record of Respondent's proceedings included information related to these repeated rapes or to the forced marriage, it is likely that, at a minimum, Respondent's claim under CAT would have been granted. Prior counsel's failings in this regard thus caused substantial prejudice in Respondent's case.

Even without this additional factual information, had prior counsel properly developed the record around the facts that Respondent discussed during her Reasonable Fear Interview, (by providing country conditions reports specifically related to the persecution of indigenous

communities in Guatemala and by corroborating her claims with additional objective evidence), it also likely—based on the repeated death threats that Respondent experienced—that, at a minimum, she would have succeeded on her claim under CAT. Thus, prior counsel’s failure to develop the record for Respondent’s removal proceedings caused substantial prejudice in the outcome of her case.

### CONCLUSION

The cumulative effect of prior counsel’s failure to investigate Respondent’s case, to develop the record on her claim, and to communicate effectively, was to deprive Respondent of a fair hearing and her rights under the fundamental principles of due process.

Therefore, Respondent requests that this Court grant this Motion to Reopen, rescind the removal order, and open the record for a new hearing so that Respondent can be afforded a fair hearing on her application for withholding of removal/CAT relief. In the interim, Respondent also requests that this Court stay her removal until such time as a decision is rendered on the present motion.

Respectfully submitted,

[Attorney Name], Esq.  
[Title]  
[ORGANIZATION NAME]  
[Organization Address]

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing MOTION TO REOPEN REMOVAL PROCEEDINGS was served on the Department of Homeland Security, Office of the Chief Counsel by email on [DATE], 20XX to \_\_\_\_\_

Dated this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
[Attorney Name]

Proposed order

[Attorney Name]  
[Title]  
[ORGANIZATION NAME]  
[Organization Address]

**RESPONDENT IS DETAINED**

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
[CITY] IMMIGRATION COURT**

**In the Matter of:** )  
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**PT** )  
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**Respondent** )  
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\_\_\_\_\_ )

**File No. A#**

**In Removal Proceedings**

**ORDER OF THE IMMIGRATION JUDGE**

Upon consideration of the Respondent’s Motion to Reopen, it is **HEREBY ORDERED** that the motion be granted because good cause has been established for the motion. It is also ordered that Respondent’s order of removal, dated [DATE], 20XX, be vacated and that a new hearing be scheduled in Respondent’s case.

\_\_\_\_\_  
Judge

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Date

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