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

	)	
In the Matter of	)	
	)	
Respondent	)	**A# ###-###-###**
	)	
Respondent	)	

RESPONDENT'S MOTION TO REOPEN

Respondent, Respondent ("[Respondent]" or [Respondent]), respectfully moves the Board of Immigration Appeals ("Board" or "BIA") to reopen the instant proceedings. Respondent seeks reopening of this court's decision dated [DATE], 20XX, due to ineffective assistance of counsel. Respondent was prejudiced by the ineffective assistance of counsel he received from his prior attorney during the proceedings, and he complied with the procedural requirements set out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) for raising claims of ineffective assistance of counsel. As such, the Board should reopen [Respondent] 's immigration proceedings and remand the record to the Immigration Judge to allow respondent to apply for Cancellation of Removal for Lawful Permanent Residents.[1]

[1] In accordance with 8 C.F.R. § 1003.23(b)(1)(i), the Respondent hereby notifies the Court that the validity of his removal order is the subject of a pending Petition for Review before the Second Circuit Court of Appeals filed on [DATE], 2015, *[case number]*. Respondent additionally notifies the court that he is not the subject of any pending criminal proceeding under Act, nor is he the subject of any pending criminal prosecution.

STATEMENT OF FACT AND PROCEDURAL HISTORY

[Respondent] is a twenty-six year-old native of the Dominican Republic. [Respondent] entered the United States as a Lawful Permanent Resident in 1994, when he was four years old. In the years since his arrival, [Respondent] has become the proud parent of a U.S. citizen daughter, has helped raised the two sons of his U.S. citizen girlfriend as his own, and created strong ties to his community in The Bronx.

On [DATE], 2015, [Respondent] was detained by the Department of Homeland Security ("DHS") and served with a Notice to Appear ("NTA"), charging him with removability under two grounds. First, under Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), as a noncitizen convicted of an aggravated felony relating to the illicit trafficking of a controlled substance as defined under INA § 101(a)(43)(B). Second, under INA § 237(a)(2)(B)(i), as a noncitizen convicted of a violation of law relating to a controlled substance. The NTA alleged that [Respondent] 's 2007 conviction under New York Penal Law ("NYPL") § 220.03, Criminal Possession of a Controlled Substance in the 7th Degree, and his 2008 conviction under NYPL § 220.31, Criminal Sale of a Controlled Substance in the Fifth Degree supported the removability charges against him. [Respondent] was subsequently transferred to XXX County Jail, where he continues to be detained.

[Respondent] retained [Prior counsel] ("[Prior counsel] ") from [Law office] on the morning of [DATE], 2015, the day of [Respondent] 's first master calendar hearing. Exhibit A, Affidavit of Respondent; Exhibit B, Retainer Agreement Between [Respondent] and [Prior counsel] . [Prior counsel] told [Respondent] that because he could not afford an attorney, he was eligible to receive her services free of charge. Ex. A; *see also* Ex. B. [Prior counsel] told [Respondent] that, if retained, she would represent him in all proceedings before the Varick

Street Immigration Court and, if necessary, before U.S. Citizenship and Immigration Services and would serve as counsel of record for any application for immigration benefits that he could request as part of his removal defense, as well as in any appeal to the BIA. Ex. A; *see also* Ex. B. In reviewing the scope of what her representation would entail, [Prior counsel] also explained the limits of her representation: that it did not extend to any collateral criminal matter, Petition for Review to the Second Circuit or habeas petition. Ex. A; *see also* Ex. B.

On [DATE], 2015, [Prior counsel] filed a Motion to Terminate [Respondent] 's case arguing that the government had failed to establish removability under INA §§ 237(a)(2)(A)(iii) and 237(a)(2)(B)(i). At [Respondent] 's [DATE], 2015, master calendar hearing, the Immigration Judge adjourned proceedings to give DHS an opportunity to file a reply to respondent's Motion to Terminate. The government's reply was filed on [DATE], 2015. At [Respondent] 's third master calendar hearing, which was held on [DATE], 2015, the Immigration Judge stated the he was going to deny the motion to terminate and sustained the charges in the NTA. Exhibit E, Transcript of Proceedings Before the Immigration Court. Then, the Immigration Judge asked [Prior counsel] if there were any application for relief, to what she responded "No, your Honor. He would apply for cancellation of removal if he didn't have an aggravated felony." *Id.* The Immigration Judge then adjourned the case to issue a written decision because he could not "adequately analyze" the briefs orally. *Id.*

The Immigration Judge did not issue a decision on [Respondent] 's Motion to Terminate on [DATE], 2015, as planned, because [Respondent] , through counsel, filed a supplemental brief several days before the hearing. *Id.* The brief addressed the application to [Respondent] 's proceedings of newly-issued Supreme Court precedent in *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). Instead, the Immigration Judge adjourned the case to give the government an opportunity

to respond and for him to issue a written decision taking into account *Mellouli* and the parties' supplemental briefing. *Id*.

On [DATE], 2015, the Immigration Judge issued a written decision finding that the government failed to prove [Respondent] was convicted of an aggravated felony under INA § 237(a)(2)(A)(iii), but sustaining the charge of removability under INA § 237(a)(2)(B)(i). Exhibit H, Decision of the Immigration Judge, dated [DATE], 2015. Because [Respondent] 's removability was sustained under INA § 237(a)(2)(B)(i) as a noncitizen convicted of a violation of law relating to a controlled substance, the motion to terminate proceedings was denied. *Id*. [Prior counsel] erroneously advised [Respondent] that his only option was to appeal the judge's decision to the Board. Ex. A.

[Respondent] was ordered deported at his [DATE], 2015, master calendar hearing. During the hearing, [Prior counsel] and the Immigration Judge had the following exchange:

> JUDGE TO [Prior counsel]
> Do you have the applications?
> [Prior counsel] TO JUDGE
> Judge, we're not making any applications for relief.
> JUDGE TO [Prior counsel]
> Okay. So is your client interested in a removal order at this point?
> [Prior counsel] TO JUDGE
> Yes, Judge.

Ex. E. After this exchange, the Immigration Judge ordered [Respondent] removed. *Id*. [Respondent] reserved his right to appeal the decision. *Id*.

[Prior counsel] filed a Notice of Appeal on behalf of [Respondent] on [DATE], 2015. The Board issued a briefing scheduled on [DATE], 2015. On [DATE], [Prior counsel] requested a briefing extension due to her "heavy workload." The Board granted [Prior counsel] 's request and issued a new briefing schedule setting [DATE], 2015, as the deadline for filing Respondent's appeal brief.

On [DATE], 2015, [Prior counsel] first noticed that the Immigration Judge did not sustain the aggravated felony charge against [Respondent] and that she should have applied for Cancellation of Removal on his behalf. Exhibit D, Letter from [Prior counsel] to the Departmental Disciplinary Committee for the First Department, dated [DATE], 2015, together with proof of receipt by the Disciplinary Committee. The next day, [Prior counsel] and her supervisor, [Supervisor], visited [Respondent] at XXX County Detention Center and revealed to [Respondent] counsel's failure to diligently review the written decision by the Immigration Judge and her failure to identify his eligibility for relief and to file an application before the court. *Id.*; Ex. A. Subsequently, [Prior counsel] filed a Motion to Remand [Respondent] 's case to the Immigration Judge to allow him to apply for Cancellation of Removal. [Prior counsel] also filed an Appellate Brief arguing that [Respondent] 's convictions were not controlled substance offenses under 237 § INA(a)(2)(B)(i). The Board dismissed both [Respondent] 's appeal and his Motion to Remand. Exhibit I, Decision of the Board of Immigration Appeals, dated [DATE], 2015. Finally, on [DATE], 2015, [Prior counsel] filed a Motion to Reconsider the Board's decision. Exhibit F, Letter from the Board of Immigration Appeals, dated [DATE], 2016. This motion was rejected because [Prior counsel] failed to include the proper fees or a fee waiver request. *Id.*

On [DATE], 2015, [Prior counsel] reported her deficient performance in [Respondent] 's case to the relevant disciplinary committee. Ex. D. In the letter, [Prior counsel] acknowledges her failure to notice that the Immigration Judge did not sustain the aggravated felony charge against [Respondent] and to apply for Cancellation of Removal on [Respondent] 's behalf. *Id.* Additionally, [Prior counsel] was presented with the allegations against her included in the instant Motion to Reopen and she admitted those allegations. Exhibit C, Email to [Prior counsel]

informing her about [Respondent] 's Allegations of Ineffective Assistance of Counsel and [Prior counsel] 's Response Admitting to the Allegations.

ARGUMENT

I. Because [Respondent] was Prejudiced by Prior Counsel's Ineffective Assistance and Has Complied with the Requirements in *Matter of Lozada,* the Board Should Reopen the Instant Proceedings and Remand the Record to the Immigration Court.

The Board should reopen [Respondent] 's proceedings because he was prejudiced by the ineffective assistance provided by his prior attorney. Noncitizens have Fifth Amendment due process right to effective assistance of counsel in removal proceedings. *Matter of Assaad,* 23 I&N Dec. 553, 560 (BIA 2003). To prevail on a claim of ineffective assistance of counsel, a respondent must show that prior counsel's performance was deficient and that he was prejudiced by prior counsel's deficient performance. *Iavorski v. U.S. I.N.S.*, 232 F.3d 124, 128-29 (2d Cir. 2000). Additionally, the respondent must substantially comply with the three procedural requirements set out in *Matter of Lozada*.

[Respondent] 's prior counsel's failure to diligently review the written decision by the Immigration Judge; her failure to identify [Respondent] 's eligibility for Cancellation of Removal, and failure to apply for this form of relief constituted ineffective assistance that gravely prejudiced [Respondent], and because he has complied with the requirements set forth in *Matter of Lozada*, the instant proceedings should be reopened and the record should be remanded to the Immigration Judge.

A. [Respondent] 's prior counsel's failure to diligently review the Immigration Judge's written decision, to identify [Respondent] 's eligibility for Cancellation of Removal and to apply for this form of relief constituted ineffective assistance of counsel.

Prior counsel, [Prior counsel] , provided ineffective assistance to [Respondent] by failing to identify his eligibility for Cancellation of Removal and to apply for this form of relief. It is well established that "a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case." *Matter of Assaad,* 23 I&N Dec. at 558. In determining whether [Respondent]'s due process rights were violated the Board should consider whether 1) competent counsel should have acted otherwise, and 2)

whether respondent was prejudiced by prior counsel's performance. *Iavorski v. U.S. I.N.S.*, 232 F.3d at 128-29. Although the courts have not articulated a clear standard as to what constitute ineffective assistance, and instead each "court uses its own judgment as to whether counsel was effective", the cases where ineffective assistance has been found are illustrative and show that [Prior Counsel]'s performance was clearly deficient. *Esposito v. I.N.S.*, 987 F.2d 108, 111 (2d Cir. 1993)

Both the Board and the Second Circuit have found that individuals under similar circumstances as [Respondent] received ineffective assistance. The Second Circuit has found that an attorney's failure to file an application for discretionary relief constitutes ineffective assistance of counsel. *See e.g.*, *United States v. Perez*, 330 F.3d 97, 102 (2d Cir. 2003) (holding that attorney's failure to file an application for 212(c) relief constituted ineffective assistance); *Rabiu v. I.N.S.*, 41 F.3d 879, 882 (2d Cir. 1994)(same). In *Mercedes-Pichardo v. Holder*, the Second Circuit also found that a respondent is deprived of effective assistance of counsel where counsel erroneously concedes ineligibility for discretionary relief and no plausible strategic reason supports counsel's concession. 374 F. App'x 213, 217 (2d Cir. 2010). Similarly, the BIA has found that an attorney provides ineffective assistance when he fails to argue that respondent qualifies for discretionary relief. *L-Y-O-B-*, AXXX XXX XXX (BIA Nov. 2, 2015), attached as Exhibit G.

The rules of professional conduct also provide valuable guidance as to the minimum level of performance expected for competent representation. The New York Rules of Professional Conduct dictate that a lawyer "shall act with reasonable diligence and promptness in representing a client" and that she "shall not neglect a legal matter entrusted" to her. Rule 1.3(a)-(b); *see also* 8 C.F.R. 1003.102(q)(1)-(2). Moreover, "[c]ompetent representation requires the…thoroughness and preparation reasonably necessary for the representation." N.Y.R.P.C. Rule 1.1(a); *see also* 8 C.F.R. 1003.102 ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.").

Here, [Prior counsel] admits that she did not notice the Immigration Judge had not sustained the aggravated felony charge against [Respondent] in his written decision until [DATE], 2015, nearly three months after the decision was issued and over two months after [Respondent] was ordered deported. Ex's.

A, C and D. Had prior counsel diligently and thoroughly reviewed the written decision by the Immigration Judge, as the rules of professional conduct require, she had noticed that [Respondent] , who has been a lawful permanent resident since age four, was not barred from applying for Cancellation of Removal under INA § 240A(a). This grave oversight by prior counsel led her to further violate her ethical duties by failing to abide by [Respondent] 's clear representation objective of remaining in the United States. Instead, at [Respondent] 's last master calendar hearing, [Prior counsel] failed to file for Cancellation of Removal and accepted an order of deportation on [Respondent] 's behalf. Ex. E. [Prior counsel] acknowledges that the sole reason why she did not file an application for Cancellation of Removal was because of her failure to carefully review the Immigration Judge's decision and to identify [Respondent] 's eligibility for relief. Ex's. C-D. Thus, [Prior counsel] 's failure had no plausible strategic purpose. Moreover, her failure to apply for Cancellation of Removal on behalf of [Respondent] , on its own, constitutes ineffective assistance under Second Circuit law. *See Mercedes-Pichardo v. Holder*, 374 F. App'x at 217; *United States v. Perez,* 330 F.3d at 102; *Rabiu v. I.N.S.*, 41 F.3d at 882.

B. [Respondent] was prejudiced by prior counsel's failure to identify [Respondent] 's eligibility for Cancellation of Removal and to apply for this form of relief.

[Respondent] was prejudiced by [Prior counsel]'s failure to identify his eligibility for Cancellation of Removal and to apply for this form of relief because he was prima facie eligible for Cancellation of Removal and would have presented a strong case for a discretionary grant of relief if afforded the opportunity. Prejudice can be established when counsel's performance is so inadequate that it may have affected the outcome of the proceedings. *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (finding that respondent does not need to show he will win claim); *see also Contreras v. Attorney Gen. of U.S.*, 665 F.3d 578, 584 (3d Cir. 2012) (finding that respondent must show "reasonable likelihood" that outcome of the proceedings would have been different). Prior counsel's performance prevented [Respondent] from applying for Cancellation of Removal and deprived him of the opportunity to present evidence of his extensive family and community ties in the United States, his rehabilitation, and the hardship he and his U.S. citizen family members would suffer if he were deported in order to

demonstrate that he warrants relief in the exercise of discretion. In sum, he was deprived of the opportunity to present a meaningful defense to his deportation, and moreover, is an individual who has many positive equities that would weigh in support of a grant. Because [Respondent] may have been granted Cancellation of Removal if afforded the opportunity to apply for it, the Board should find that he was prejudiced by prior counsel's deficient performance.

i. ***[Respondent] was prima facie eligible for Cancellation of Removal***

[Respondent] was prima facie eligible for Cancellation of Removal for Certain Permanent Residents under INA § 240A(a). Under INA § 240A(a), a noncitizen, like [Respondent], who is deportable or removable may have his removal cancelled if: 1) he has been a lawful permanent resident for no less than five years, 2) he has resided continuously in the United States for seven years after having been admitted in any status, and 3) has not been convicted of any aggravated felony. Pursuant to INA § 240A(d)(1), a noncitizen cannot establish he has accrued seven years of continuous residence in the United States if he is convicted of an offense referred to in INA § 212(a)(2) within seven years of admission under any status. [Respondent] was admitted to the United States as a lawful permanent resident in [DATE], 1994, almost twenty-two years ago. Ex. J. Since his arrival, he has continuously resided in the United States and was not convicted of any offense until 2006, twelve years after his admission. Exhibit K, [Respondent] 's Form EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents, listing his convictions. Finally, [Respondent] has not been convicted of any aggravated felony and, as the Immigration Judge found, the government has not been able to establish the contrary. Ex. H. As such, [Respondent] is prima facie eligible for Cancellation of Removal.

ii. ***[Respondent] warrants the favorable exercise of discretion in the form of Cancellation of Removal.***

[Respondent] can also establish that he is a strong candidate for Cancellation of Removal. A noncitizen statutorily eligible for Cancellation of Removal must demonstrate that relief is warranted in the exercise of discretion. The Board has established that in assessing whether discretion should be exercised, the Immigration Judge should take into account family ties in the United States, residence of long

duration in this country, evidence of hardship to the applicant and his family if removal occurs, a history of employment, existence of property or business ties, proof of genuine rehabilitation, and other evidence attesting to the applicant's good moral character. *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998). These positive equities should be weighed against the negative factors in [Respondent] 's case. *Id* at 8-9. In *Rabiu v. I.N.S.*, the Second Circuit found that a lawful permanent resident had established that he was a strong candidate for 212(c) relief – which requires the same discretionary showing as cancellation of removal – notwithstanding his two aggravated felony convictions because he arrived to the United States when he was nine years old, had resided in the United States for over fifteen years, his father and sisters were U.S. citizens and he had made efforts to rehabilitate himself. 41 F.3d at 883; *Matter of C-V-T-*, 22 I&N Dec.at 11.

[Respondent], who has less serious convictions than the respondent in *Rabiu* and who has stronger equities, including longer residence and from an earlier age, can certainly establish that he has a strong claim for discretionary relief. [Respondent] has substantial family ties to the United States and his family members would suffer greatly is he were deported. Before his detention, [Respondent] used to reside with his long-term U.S. citizen girlfriend, their daughter and his girlfriend's sons, who he raised as his own. Ex's. A and L. [Respondent] 's U.S. citizen girlfriend is disabled and is struggling without [Respondent] 's financial support and co-parenting. Ex. L. His daughter misses him tremendously and is having severe difficulties in school after [Respondent] 's detention, to the point that she is receiving special education for the first time. *Id*; Ex. M. His girlfriend's sons also miss him and are begging for his release from detention. Exhs. N-O. Before his detention, [Respondent] was also very involved in the life of his U.S. citizen father, who is severely ill. Ex. P. It is safe to assume that if [Respondent] were deported, the hardship to his immediate family would only be intensified.

[Respondent]'s long residence in the United States, his employment and tax history, as well as his efforts towards rehabilitation also show that he is a strong candidate for Cancellation of Removal. [Respondent] has been working and filing taxes since his release from custody in 2009. Ex. K, [Respondent] Tax Records for the years 2007, 2010-2012, and 2014. Despite the significant barriers to employment faced by individuals with criminal convictions, [Respondent] has been able to obtain employment as a construction worker and his employer has offered to re-hire him if he were released from detention. Ex's. K-L. [Respondent] history of employment and the active role he plays in his family, demonstrate that he has taken substantial steps towards his rehabilitation. Moreover, he has never been convicted of a violent crime and does not have any felony convictions after 2009, when he was about nineteen years old. The fact that his long-term U.S. citizen girlfriend has consistently attended to [Respondent] 's master calendar hearings further demonstrate that he has the familial support necessary to continue his rehabilitation.

Given [Respondent] 's eligibility for Cancellation of Removal and his ability to show he is a strong candidate for relief, the Board should find that [Respondent] was prejudiced by the admittedly deficient performance of his prior attorney. It is unquestionable that prior counsel's ineffective performance, at the very least, may have affected the outcome of the proceedings.

C. [Respondent] complied with the requirements in *Matter of Lozada*.

A respondent seeking to reopen his case based on ineffective assistance of counsel should also follow the procedural requirements set forth by the Board in *Matter of Lozada*, 19 I&N Dec. Under *Lozada*, a motion to reopen based on infective assistance of counsel requires: 1) that the motion be supported by an affidavit of respondent setting forth the agreement and representations by prior counsel, 2) that prior counsel be informed about the claim and given an opportunity to respond, and 3) that the motion reflects whether a complaint has been filed with

the appropriate disciplinary authorities, and if no complaint has been filed, the motion should include an explanation about why no complaint has been filed. *Id*. However, the Second Circuit does not mandate "slavish adherence to the requirements" under *Lozada* and has held "only that substantial compliance is necessary". *Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *see e.g., Sabaratnam v. Holder*, 428 F. App'x 110, 112 (2d Cir. 2011) (finding compliance with *Lozada* without requiring the filing of a disciplinary complaint where attorney conceded ineffective assistance).

[Respondent] more than substantially complied with the requirements set forth in *Matter of Lozada*. Attached to this Motion to Reopen is an affidavit of [Respondent] setting forth in detail the facts relevant to his claim, including the agreed upon scope of representation and mutual understanding of [Respondent] 's goals, as well as a copy of the retainer agreement between him and prior counsel. Ex's. A-B. Prior counsel, [Prior counsel], was informed of the allegations of ineffective assistance of counsel and has responded to those allegations by admitting them. Ex. C. Moreover, [Prior counsel], who does not dispute her performance was deficient, has self-reported to the Departmental Disciplinary Committee for the First Department. Ex. D. [Respondent] has not independently filed a complaint against prior counsel because the Disciplinary Committee is already on notice of [Prior counsel]'s admittedly deficient performance and, as such, filing an additional complaint will serve no legitimate purpose.

II. The Board Should Exercise its *Sua Sponte* Authority to Reopen [Respondent] 's Case

In light of the exceptional circumstances present in [Respondent] 's case, the Board should exercise its *sua sponte* authority to reopen the instant proceedings and remand the record to the Immigration Court. 8 C.F.R. § 1003.2(a). As explained above, [Respondent] is a long-term lawful permanent resident who has been deprived of his opportunity to seek relief from removal

due to the admittedly deficient performance of prior counsel. Moreover, [Respondent] has shown that he will make a strong case for discretionary relief, if given the opportunity. As such, the Board should reopen [Respondent] *sua sponte* and remand his case to the Immigration Court.

CONCLUSION

In light of the foregoing, [Respondent]'s proceedings should be reopened and remanded to the immigration court to allow him to apply for Cancellation of Removal under INA § 240A(a).

Dated: [DATE], 20XX
[City, State]

Respectfully submitted,

_____
[Attorney Name], Esq.
[Organization/Firm Name]