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# Correcting Course on *Matter of Lozada* Through the Federal Courts and Executive Action

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**Abstract:** Under U.S. law, legal claims are labeled as being civil or criminal in nature. Depending on this distinction, individuals wanting to raise the defense that their prior counsel was deficient are required to satisfy certain elements. Immigration laws, which can include a mix-master of concepts, sometimes merge criminal concepts into civil administrative proceedings. One clear example of this notion is in the context of claims for ineffective assistance of counsel. The Board of Immigration Appeals, in *Matter of Lozada*, has set out a three-prong procedural requirement that includes the mandatory filing of a bar complaint against attorneys representing noncitizens. This requirement applies in both the removal and benefits contexts as a prerequisite to a claim of ineffective assistance of counsel. After more than three decades, the imposition of this oppressive requirement has proven to undermine due process and chill access to counsel. Due process now mandates that the compulsory bar complaint filing requirement, which creates greater harm for the practice, should be eliminated. While traditional grounds for filing a bar complaint in the face of actual unethical conduct remains solidly grounded in normal process, the requirement that it must always be filed to raise a claim of ineffective assistance of counsel must be abolished. This paper reviews the implementation of *Lozada* throughout the decades, discusses potential avenues available for course correction, including executive action by the attorney general, directive memos by the Executive Office for Immigration Review, and suggests new arguments that can then pave the way for the federal courts to reexamine the application of the *Strickland* standard in immigration matters.

## Introduction

In May 1984, the Supreme Court in the case of *Strickland v. Washington*[1] announced the standard for determining when the right to counsel extends to the overturning of a criminal conviction due to ineffective assistance of counsel.[2] On the heels of this decision, in June of the same year, the Board of Immigration Appeals (Board or BIA) adopted the *Strickland* standard for civil immigration cases.[3] A mere four years later, however, rather than continuing with the *Strickland* standard, the Board issued *Matter of Lozada*, creating its own deviant standard that requires (1) filing an affidavit (2) informing prior

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counsel of the allegations; and (3) explaining "whether a complaint has been filed with appropriate disciplinary authorities . . . and if not, why not."[4]

Immigration law and process has long been recognized as a civil, not criminal, matter.[5] Despite this classification, the concept of ineffective assistance of counsel, a claim reserved for criminal proceedings,[6] has been shoehorned into the immigration laws. Typically, in civil cases, deficient attorney representation claims are referred to as legal malpractice.[7] No matter the nomenclature, the overall essence of both claims ultimately seeks to determine if an attorney's conduct was inadequate to a degree that resulted in causing harm to the client. Put another way, the criminal courts utilize the *Strickland* standard, while civil courts use a negligence standard to determine if the attorney representation was inadequate and, if so, if there was prejudice. Neither standard requires the filing of a bar complaint in order to advance the issue.

Perhaps because immigration laws speak in terms of ineffective assistance of counsel,[8] rather than legal malpractice, the Board, pre-*Lozada*, also utilized the *Strickland* standard. The approach was reasonable for many reasons. Much like criminal proceedings, the government commences, and prosecutes, removal proceedings.[9] Similarly, the terminology in removal proceedings includes concepts like arrest, detention, and bond.[10] With *Lozada*, the Board devalued these similarities, rejected the civil standard, and charted its own punitive course. While both criminal and civil cases assess the nature and quality of the attorney-client relationship, and the resulting harm or prejudice, neither requires, for any reason, that a bar complaint be filed against a deficient attorney. For immigration practitioners, this requirement sets them apart from attorneys in every other area of legal practice.

Despite the passage of more than three decades, the framework outlined by the Board in *Lozada* has remained etched in stone, and in fact has become even more onerous though subsequent interpretations of the *Lozada* requirements. Through its subsequent decisions, which allow no flexibility in the bar complaint requirement, the Board has all but eliminated the "if not, why not" exception to the third prong of *Lozada*, thereby proving the punitive intent behind its creation.[11]

While it can be said that the *Lozada* framework was originally designed to provide guidance to agencies faced with claims of ineffective assistance of counsel, and to provide some measure of protection to nonimmigrants from deficient representation,[12] it was also designed to "police the immigration bar."[13] Time has now shown that parts of the framework are unworkable, and are harmful not only to attorneys, but to their noncitizen clients as well. And, as the Board has made clear in its subsequent decisions, the real purpose behind the *Lozada* requirements is to prevent alleged "collusion" between noncitizens and their attorneys, rather than ensuring that noncitizens' due process rights are protected.[14]

The regulations dictate that published Board decisions are binding on "the Board, the immigration courts, and DHS [Department of Homeland

Security]."[15] In this way the harmful effects of the Board's mandatory bar complaint requirement under *Lozada* affect not only those who practice within the immigration courts but also spill over to United States Citizenship and Immigration Services (USCIS) processes as well. Thus, ineffective assistance of counsel claims that are brought to address resulting harms before USCIS require the same *Lozada* compliance.[16]

Adding to the confusion, the federal courts are disparate in their treatment of the procedural requirements under *Lozada*. Applying the *Strickland* standard will allow immigration practice to align with other areas of law. Claims of deficient representation exist in every area of law. In most areas, judges and adjudicators are authorized to review the record to determine if such claims are meritorious or meritless; no bar complaint requirement exists. Immigration practice must align with other areas of law if this area of practice is to thrive, because many attorneys turn away cases or abandon the practice altogether, simply choosing not to incur the added stress of defending against a frivolous bar complaint. The current framework, with its mandatory bar complaint filing procedure, creates barriers to access to counsel, increases the burden on immigrants, and provides little incentive for new attorneys to enter this field even though the need for representation remains critical and is chronically unmet.

## The History, Background, and Foundation of the *Matter of Lozada* Decision

The legal system is fraught with peril, both for the individuals who are held subject to accountability under the law, and for the attorneys who are trying to help them navigate the process. As long as there have been legal proceedings, lawyers have been making mistakes. The Constitution is supposed to help protect the public from deprivation of their rights without due process of law,[17] and it is from those constitutional rights that the courts have delineated the remedies for people who experienced ineffective assistance of counsel, including when a do-over of the removal proceedings becomes necessary.

In 1984, the U.S. Supreme Court set the standard for determining when a criminal conviction should be overturned due to ineffective assistance of counsel. In *Strickland v. Washington*, the Court held that a finding of ineffective assistance that violates a criminal defendant's right to counsel under the Sixth Amendment requires both (1) that the defense attorney was objectively deficient and (2) that there was a reasonable probability that a competent attorney would have led to a different outcome.[18] Under this reasonable-probability standard, a criminal defendant does not have to show that it is more likely than not that the outcome would have been different, but instead must demonstrate that the attorney's errors undermine confidence in the outcome.

There is no requirement for a finding of attorney malpractice to demonstrate the reasonable probability; rather, a criminal attorney can freely admit when they have made a mistake that undermined confidence in the proceedings. Because the consequences for admitting error are minimal, and the upside is the preservation of due process, everyone wins when a reviewing court can take a second look at a case where attorney error is present. It is common in criminal proceedings for defendants to seek review of their convictions under this standard, and defense attorneys are able to fall on their own swords to admit mistakes in order to avoid an unjust outcome. Everyone sleeps better at night, and we all win.

Not so in the immigration law context. Because removal proceedings are civil rather than criminal in nature, and despite the fact that mistakes by counsel can ultimately lead to removal from the United States and its attendant consequences (potential family separation, diminished outcomes for relatives who are affected by the removal of a caregiver, and even exposure to deadly danger, etc.), the courts have held that the right to counsel in removal proceedings springs not from the Sixth Amendment right to counsel, but rather from the Fifth Amendment guarantee of due process.[19] This results in a world of difference from criminal proceedings and leads to a unique standard for determining when proceedings should be reopened for ineffective assistance of counsel.

A mere four years after *Strickland*, the BIA issued its own standard for motions to reopen for ineffective assistance of counsel in the landmark ruling *Matter of Lozada*.[20] In *Lozada*, the Board articulated the standard and required satisfaction of the following three prongs in order to reopen a case, holding that the motion must:

1. 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 must be informed of the allegations leveled against them and be given an opportunity to respond; and
3. that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and *if not, why not*.[21]

The Board recognized it was creating a high bar for reopening and justified its decision in stating that the "high standard announced here is necessary if we are to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board."[22] As is common in questions of immigration law and policy, the specter of opening the floodgates looms large.

The Board further explained that the potential for abuse of the reopening process remained high, and the standard was necessary to protect former counsel by permitting them the opportunity "to present a version of events if he so chooses, thereby discouraging baseless allegations."[23] The Board's rationale that attorneys would feel impugned by allegations of error and welcome an opportunity to respond is reasonable—appropriate notice and an opportunity to respond are integral to the process and allow for consideration of facts that may be beyond the new counsel's purview. However, this notice requirement and invitation to respond under the second prong of *Lozada* has morphed into a requirement that attorneys must respond to a different kind of notice. Under the third prong the Board has held repeatedly that it is not enough to state whether a bar complaint has been filed, and if not, why not. Instead, the Board has imposed a categorical requirement that a complaint must be filed.[24] This means that attorneys who are notified of deficient conduct and given the opportunity to respond and protect against unjustified aspersions can look forward to also responding to notification of a disciplinary complaint that could materially affect their ability to maintain their license to practice law.

## The Implementation of *Lozada*'s Bar Complaint Requirement Throughout the Decades

### At the Board of Immigration Appeals

As noted above, the *Lozada* decision itself included an exception to the filing of the bar complaint requirement, the "if not, why not" exception. However, subsequent BIA decisions all but eliminated that exception.

In *Matter of Rivera*, which involved a motion to reopen an in absentia hearing, the respondent stated that she had elected not to file a bar complaint because "if any error was made in this case it was a postal error or an error of inadvertence by [former counsel]."[25] However, the Board denied the motion to reopen, stating that in order to prevail on an ineffective assistance claim, filing a bar complaint was a necessary "inconvenience" to help the BIA determine whether such claims were meritorious and to help prevent collusion between the respondent and their attorneys.[26] Although the purported purpose behind this requirement is to protect respondents from unscrupulous or incompetent attorney representation, the Board belies that purported intent by its own language in *Rivera*: in the decision, the Board refers to "collusion" between attorneys and respondents some *13 times*. Thus, it is clear that the majority was far more concerned about disciplining attorneys by not allowing the reopening of cases (and thus directly harming respondents) than it was about protecting said respondents.

Interestingly, Paul Schmidt, the Board Chairman, joined by three other board members, dissented from the majority opinion. Chairman Schmidt stated

> specifying the lawyer's deficient performance and a copy of the lawyer's response, if any; (iii) a completed and signed complaint addressed to, but not necessarily filed with, the appropriate State bar or disciplinary authority; (iv) a copy of any document or evidence, or an affidavit summarizing any testimony, that the alien alleges the lawyer failed to submit previously; and (v) a statement by new counsel expressing a belief that the performance of former counsel fell below minimal standards of professional competence.[33]

Worse, Mukasey found that there was no Fifth Amendment right to counsel in immigration proceedings, causing considerable and understandable concern by immigration advocates. As the American Civil Liberties Union (ACLU) noted, *Compean I*, which was issued during the last days of the Bush administration, was "rushed through without input from many groups and individuals—such as the American Bar Association and . . . some of the most prestigious law firms in the country. . . . and renders immigration proceedings fundamentally unfair.[34] Mukasey's decision also directly contradicted eight circuit court decisions recognizing a fundamental right to effective assistance of counsel in immigration court.[35]

Thus, a mere six months later, Attorney General Eric Holder vacated *Matter of Compean I*, in a decision that restored the long-settled understanding that respondents do possess a Fifth Amendment right to counsel in immigration court proceedings.[36] However, Holder also restored the third prong of *Lozada* but directed the agency to promulgate regulations regarding the issue. Unfortunately, as discussed in greater detail below, no regulations were ever adopted.

## In the Federal Circuit Courts

As is true with so many issues in immigration law, there is a circuit court split over the issue of how strictly a noncitizen must adhere to the three *Lozada* procedural requirements in order for a case to be reopened based on an ineffective assistance of counsel argument. For example, some circuit courts have excused the need to file the bar complaint against previous counsel, particularly when the motion to reopen addresses the "if not, why not" exception included in prong three of *Lozada*.[37]

However, several other circuit courts have required substantial or strict reliance on *Lozada*'s bar complaint requirement. Specifically, the Third, Fifth, Sixth, and Seventh Circuits generally apply a reasonableness standard: So long as the respondent provides a reasonable explanation for the absence of the bar complaint, the third prong of *Lozada* has been satisfied.[38]

The Tenth and Eleventh Circuits require strict compliance with all three prongs, and failure to file a bar complaint is fatal.[39] The remaining circuits apply a substantial compliance standard, although this is something of a continuum. The Fourth and Eighth Circuits also require *substantial compliance*

with *Lozada* but have little case law directly addressing the bar complaint requirement. Other circuits have more squarely addressed the issue.

For example, the Second and Ninth Circuits require substantial compliance but may excuse noncompliance where the policy goals underlying *Lozada* are clearly demonstrated in the record.[40] The Second Circuit has found that "where facts supporting a 'claim of ineffective assistance are clear on the face of the record,' noncompliance with those requirements may be excused," including the bar complaint requirement.[41] And the Ninth Circuit employs a case-by-case approach in cases involving noncompliance, evaluating the substance of each ineffective assistance claim to determine whether the record clearly demonstrates ineffectiveness.[42] By contrast, the First Circuit also reviews whether an immigration judge or the Board has arbitrarily applied *Lozada*'s procedural requirements on a case-by-case basis, but is generally not particularly flexible.[43]

The Third Circuit has truly adopted a reasonable approach to *Lozada*'s procedural requirements, finding that not filing a bar complaint is not fatal where a noncitizen provides a reasonable explanation for the absence of the complaint, and, in so doing, is the circuit that has given the most teeth to the "if not, why not" exception in *Lozada* itself.[44] In fact, the Third Circuit addressed the potential impact of strict, formulaic interpretations of *Lozada*, noting that "we are concerned that courts could apply *Lozada*'s third prong so strictly that it would effectively require all petitioners claiming ineffective assistance to file a bar complaint."[45]

## Unintended (or Intended?) Consequences of Strict Compliance with *Lozada*'s Bar Complaint Requirement

Strict compliance with the third prong of *Lozada* can create unintended consequences for the very immigrants that *Lozada* was purportedly trying to protect. For example, many immigrants do not feel comfortable filing a bar complaint against their former counsel, or do not believe that any mistakes made by former counsel warrant the filing of a bar complaint. In fact, this was the situation in *Matter of Rivera*. Or, they are intimidated by the bar complaint process, even when they have obtained new counsel. In situations such as this, the noncitizen is thus left with the choice of either not being able to reopen their immigration court proceedings or being forced to file a meritless bar complaint against former counsel. Many clients will simply choose to not file the complaint, thus forfeiting their ability to pursue immigration relief. By extension, this can limit noncitizens' access to the counsel of their choosing, which undercuts the purpose behind the revocation of *Compean I*.

As is noted by a study conducted by the Vanderbilt University Immigration Practice Clinic, only five states treat a *Lozada* bar complaint differently than any other type of bar complaint.[46] In those situations in which noncitizens must file bar complaints against their prior counsel, and choose to do so,

state disciplinary authorities often receive, and must adjudicate, numerous complaints that would never have been filed but for the *Lozada* requirement, adding to their workloads, sometimes significantly so.[47]

Finally, the requirement of strict, or even substantial, compliance with the third prong of *Lozada* has significantly impacted the immigration bar itself. Attorneys are placed in the position where, in order to take over a case from another attorney, they are forced to allege an ineffective assistance of counsel claim against a colleague—even where there is no ineffective assistance of counsel by prior counsel, or the mistake does not rise to the level of necessitating a bar complaint. And, if the new counsel declines to adhere to the third prong and does not force the client to file the complaint, then the new counsel will leave themselves vulnerable to having a bar complaint filed against them. This pitting of immigration attorneys against each other also impacts noncitizens' ability to hire counsel of their choice, because many attorneys simply will not take a case that presents a potential *Lozada* issue, and, with representation rates before the immigration courts plummeting, the impact of fewer lawyers willing to take cases can have dire consequences for noncitizens in removal proceedings.[48]

Recently, numerous organizations have studied and commented on the rise in mental health issues in the legal profession.[49] The increase in depression, anxiety, suicidal ideation, and drug and alcohol abuse has reached record levels throughout the legal professions, and the immigration bar is no exception.[50] While there are many reasons for this disturbing trend, including the treatment of immigration lawyers before EOIR (Executive Office for Immigration Review) and USCIS, the incessant delays, and the extremely volatile political landscape in which immigration attorneys must practice, a discrete and concrete example of one of the triggers is the third prong of *Lozada*.[51] The thought of having to defend oneself against a meritless, and yet all too real, state bar complaint could easily push an already overwhelmed advocate into a mental health crisis, exacerbated by the fact that every colleague within a strict compliance jurisdiction can be a potential enemy.

## Potential Federal Court Arguments

With *Matter of Lozada*, the Board imposed an all-but-mandatory procedural requirement that those in removal proceedings claiming that their prior counsel was deficient file a bar complaint with the state bar or disciplinary authority. This standard has also been incorporated in matters before USCIS and its Administrative Appeals Office (AAO). The AAO conducts appellate review of immigration benefit requests within its jurisdiction and is a sister appellate body to the Board. Specifically, the AAO has appellate jurisdiction over approximately 50 different immigration case types filed with USCIS, as well as limited Immigration and Customs Enforcement (ICE) determinations.[52]

As discussed above, federal circuit courts have lacked uniformity in upholding the bar complaint requirement in their examination of ineffective assistance of counsel claims. The time has come for new and zealous challenges before the federal courts to halt this requirement altogether. While the following arguments will eventually wend their way up to the federal courts, it is essential that the record of these arguments be preserved at each step of the process. Keeping in mind that new arguments are impermissible as a matter of first instance at the federal circuit courts, the record must be built below in order to give the circuit courts an opportunity to review them on appeal.

In addition, given some of the limitations on jurisdiction with the Supreme Court's recent holding in *Patel v. Garland*,[53] new and creative avenues will need to be crafted in order to establish that the mandatory bar complaint filing procedure is reviewable by the federal courts under the Administrative Procedure Act (APA). These arguments are likely to be difficult, but it is worth noting that in cases where the facts are not controverted, it may be possible to frame these arguments as legal or constitutional in nature, and skirt the limitations found at 8 U.S.C. § 1252(a)(2)(D). Still, it cannot be denied that *Patel* remains problematic, at least for now, in affirmative APA claims.

Importantly, the current state of the law, depending on the circuit in which the case is brought, may still require some compliance with *Lozada* while these new arguments are put forward. In essence, these arguments must be made in the alternative in jurisdictions that provide no leniency in the *Lozada* factors. Even so, in those jurisdictions where strict compliance is not required, practitioners must lead the way in making bold arguments that carve a path for an eventual review by the Supreme Court.

## *Lozada*'s Bar Complaint Requirement Is Contrary to Accepted Legal Standards

The Board, in *Matter of Lozada*, recognized that "[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process."[54] Furthermore, the Board provided that "a denial of due process [occurs] only if the proceeding was so fundamentally unfair that the [respondent] was prevented from reasonably presenting his case."[55] In other words, the Board outlined that a respondent would have to establish that counsel's assistance was "so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the Fifth amendment due process clause."[56] To ensure that all issues are properly preserved for ultimate federal court review, it is essential that challenges to the status quo are fully litigated from the start before the immigration courts. In so doing, it should be argued that as part of constitutional due process protections, immigration courts must ensure that a fundamentally fair hearing that encompasses effective counsel at its core is provided. To determine if counsel is ineffective, the threshold question to be resolved is "if competent counsel would have acted

otherwise."[57] Having established this element, the second element is to show that prejudice has resulted. Generally, to establish prejudice, it must usually be shown that the outcome would have been different but for the ineffective assistance of counsel.[58]

Looking at these requirements, it is evident that they parallel the measures in the criminal courts where challenges to defense counsel's representation are raised. There, successful claims of ineffective assistance of counsel must meet the *Strickland* standard, which, as noted above, requires a showing that a "trial lawyer's performance fell below an 'objective standard of reasonableness' and 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[59] Even though these standards arise from different contexts, they still aim to preserve the integrity of the processes that often impose life-altering consequences on those who participate.

Moreover, even if the distinction is made that removal proceedings are civil, not criminal, in nature, that distinction is still insufficient to impose a bar complaint filing requirement. A civil malpractice claim has four elements: (1) an attorney-client relationship, (2) negligence or breach of contract by the attorney, (3) proximate causation of plaintiff's damages, and (4) damages to the plaintiff.[60] Again, litigants claiming deficient counsel actions can only satisfy their burden if it can be shown that there was a straight line between the attorney's actions and damage to the plaintiff. In each instance the factors that the court considers in assessing a claim of harm invoked by a party remain consistent. Put plainly, the actions of the prior attorney result in harm and thus the underlying result is subject to amelioration.

Both standards offer a straightforward inquiry for the immigration courts or USCIS to apply: Does the evidence prove that a reasonable attorney would have handled the matter differently and does this mishandling cause prejudice? If the record, by itself, establishes these two factors, then the bar complaint requirement becomes superfluous. Indeed, in practical application, USCIS and the immigration courts rarely await the findings of the disciplinary administrator. In essence, *Lozada* sought to entangle the immigration and the disciplinary processes so that there would be no need for an evidentiary hearing before the immigration court.[61] Practical reality has shown that the immigration processes rarely, if ever, wait for the disciplinary administrator to complete their inquiry and the two processes proceed in totally separate tracks. This dual burden exists only in the immigration setting and is contrary to legal norms, since neither the civil nor the criminal standard imposes the bar complaint requirement as a matter of law.

## *Lozada*'s Bar Complaint Requirement Interferes with the Statutory Right to Counsel

The statutes are clear on their face. They provide that in removal proceedings and in any appeal thereafter, the "person concerned *shall* have the privilege

of being represented"; a nondiscretionary privilege, it can be argued, is a right onto itself. Furthermore, given the plain language of the law, the scope and limitations of such representation are matters that federal courts may decide as a matter of law.[62]

The Supreme Court is poised to overturn 40 years of administrative jurisprudence[63] that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute.[64] Thus, the time may be ripe to raise anew notions of effective counsel in the context of the plain language of the statutes.[65] Although the Board and the circuit courts have routinely found the *Lozada* factors, including the filing of the bar complaint, as having "largely stood the test of time,"[66] such a position is usually not based on any identifiable evidence, and instead ignores clear evidence to the contrary.[67]

Importantly, when Attorney General Holder vacated *Compean I* just five short months after its enactment, he specifically instructed:

> the Acting Director of the Executive Office for Immigration Review to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration. After soliciting information and public comment, through publication of a proposed rule in the Federal Register, from all interested persons on a revised framework for reviewing claims of ineffective assistance of counsel in immigration proceedings, the Department of Justice may, if appropriate, proceed with the publication of a final rule.[68]

Not only did rulemaking never fully come to fruition, as Holder had directed, the critical observations as to the harmfulness caused by the bar complaint requirement were seemingly lost in time. In any *Lozada* record, it is essential that both historical and contemporary data be included as to the barriers that the bar complaint requirement has now created in terms of access to counsel.

## The Bar Complaint Requirement Is Discriminatory on Its Face

Federal courts must prevent further harm to the immigration bar as a result of the *Lozada* bar complaint requirement. Insofar as no other area of law or any other class of practicing attorneys in the United States are subjected to *Lozada*'s mandatory bar complaint requirement, the requirement is discriminatory. In fact, DHS attorneys, even when they have engaged in misconduct, are not subject to mandatory reporting requirements.[69]

While *Lozada* contains language to indicate that if a bar complaint is not filed, an immigration court can determine whether the failure to file is excusable, the Board has effectively closed the "if not, why not" exception contained

in the *Lozada* decision.[70] In practical applicability, any perceived exception to the bar complaint filing requirement is illusory. With no exceptions and no exemptions for private immigration attorneys, the *Lozada* bar filing requirement protection and is impermissible as applied.

## Avenues for *Lozada* "Course Correction," Including Agency Action and Executive Action

### Executive Office for Immigration Review

The Executive Office for Immigration Review has been both the forum and the source of the controversy regarding access to remedies for ineffective assistance of counsel. It could now usher in a new chapter in the *Lozada* narrative and create the solution.

In promulgating *Lozada*, and thereby instituting its unique "requirement" that an aggrieved immigrant seeking reopening of their proceedings, to, in theory, properly present their case and achieve a just outcome, the Board presupposed that the immigrant would likely first need to file a bar complaint. In so doing, the Board perhaps failed to anticipate the many negative consequences of this scheme. As stated in *Lozada*, a motion to reopen or reconsider premised upon allegations of ineffective representation must 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."[71]

In practice, in the hands of adjudicators at all levels of EOIR, the bar complaint has become a de facto *requirement*, whereas *Lozada* itself contemplated the complaint as one of two alternatives, that is, that the immigrant could equally prove their case with a bar complaint *or* prove their case of prejudice and demonstrate that the bar complaint was not warranted in their particular circumstances—the "if not, why not" alternative.

There are self-evident problems with the bar complaint "requirement," and various reasons that immigrants are deterred from taking this extreme measure. Economics conspire against most immigrants, fresh from paying for trial-level work, to then bring an appeal of their case-in-chief and a well-crafted motion to reopen. Awareness of the mechanics of the system and navigating the complaint interface also serve as a deterrent, preventing many immigrants from effectively proceeding *pro se* in their motion. Building an alternative record and arguing that it demonstrates prejudice is a challenging, almost impossible, task for self-represented litigants. Further, a bar complaint is an effective challenge to a lawyer's livelihood (if not personhood), and the immigrant's decision not to wage a war may be influenced by fear, shame, cultural factors, loyalty, friendship, or forgiveness. The *Lozada* scheme requires notice to the former counsel—perceived as a confrontation, to many—thus heightening these deterrent effects, with or without the aid of counsel.

Further, the bar complaint process itself is a burden to justice. As discussed below, when the attorney general issued *Matter of Compean I* in 2009, and in the course of doing so temporarily upended both *Lozada* and the settled expectation that constitutional protections extended to effective representation by counsel in removal proceedings, even that flawed decision contemplated some of the unintended consequences of the bar complaint requirement.[72]

Thus, the risks of *Lozada*'s bar complaint element run both ways, often serving as an unwarranted barrier to immigrants seeking relief and as an unwarranted punitive risk to attorneys representing those immigrants. Remedies exist.

EOIR has multiple tools to affect change in immigration policy and the immigration adjudications process. Central, of course, are the published precedent decisions of the Board and the attorney general, with *Lozada* sitting within this canon of jurisprudence.

## Attorney General's Certification of *Matter of Lozada*

The attorney general could and should revisit *Lozada* itself under their certification authority.[73] This has happened before in the *Lozada* context, of course, in first deciding and then vacating *Matter of Compean*. Various attorneys general have used the certification authority to narrow or expand immigration laws and/or policies, as has been noted by scholars and even attorneys general themselves.[74] For example, Attorney General Merrick Garland used his certification authority to reinstate the concept of "family" as being a particular social group, in part because previous Attorney General Jeff Sessions had used the certification authority to sharply limit that concept.[75]

Removal proceedings are unique in enumerating a bar complaint as an element of a posthearing motion, even more so in the de facto requirement that the complaint be filed. The more just solution would eliminate the bar complaint requirement and leave that in the hands of the bench and bar to voluntarily file complaints where truly appropriate. A half measure would be for the attorney general to reverse the current de facto system and impose a meaningful "if not, why not" standard that is both generously available and noncynically applied, thus leaving the bar complaint measure for truly egregious cases.

## Issuance of an EOIR Director's Memorandum

Within the text of *Lozada* is a two-tiered approach. An immigrant who believes that they can meet the prejudice requirement, in that they can demonstrate that "but for" the ineffective assistance of counsel there is a reasonable probability that the outcome of the proceeding would have been different, finds themselves at a crossroads. To perfect their *Lozada* motion, they must either point to a bar complaint that they filed—ostensibly based on those same reasons—or state why they have not.

The text of *Lozada* suggests why the Board might assume that complaints would be filed (if ethical or legal duties are violated, a complaint might logically follow; it is perhaps indicia that the immigrant "really means it" if they file a complaint with a bar authority), but the Board neither elucidates a continuum of "degrees" down which a complaint is required in certain instances, nor does the Board demand that the absence of a complaint must be *justified*—it must just be explained.[76]

There are good reasons for this open-ended approach, many of which are enumerated above. Further, the immigrant is not in a good position to know what conduct warrants discipline, and even the absence of a strict requirement of complaints has proven overinclusive, since many litigants believe EOIR expects a complaint in a perfected *Lozada* filing.

The lack of a literal requirement of a complaint makes further sense when EOIR recognizes that EOIR itself holds disciplinary authority. It can mete sanctions as it sees fit or refer matters to state authorities where appropriate. EOIR is in infinitely better position to determine whether conduct is sufficiently egregious to warrant a referral, certainly better so than an aggrieved immigrant or their new counsel engaged solely to bring an effective *Lozada* motion (knowing that failure to prove *Lozada* elements might result in a *Lozada* claim against themself).

Here, however, the flexible standard in the text of *Lozada* standard needs reiteration, so that the "if not, why not" text is given its due weight. A tool for accomplishing this is an EOIR Director's Memorandum (DM),[77] providing guidance to adjudicators on the "if not, why not" subpart of the bar complaint prong of *Lozada*. A DM could reiterate the varying opinions in the circuits on whether the filing of a bar complaint is mandatory, explaining circumstances where the reasons "why not" are not fatal to the *Lozada* motion.

The DM would not be making "new law," but would help give voice to current law and correct its regular misapplication. EOIR can find recent precedent for this action in the forum of motions for administrative closure, where in 2021 the director issued DM 22-03[78] to reorient the immigration bench to its precedent *Matter of Cruz-Valdez*.[79] That context was comparable to the instant scenario, in that "administrative closure" had been the subject of a sequence of disparate decisions by the Board, the attorney general, and the federal circuits.[80] The DM clarified how to resolve cases under existing law, reiterating expectations that former, overruled, and/or abrogated precedent did not dictate outcomes in contemporary removal proceedings.

## Training of Immigration Judges

Separately or in tandem with a DM, EOIR could improve the application of *Lozada* through the training of its judges. Beyond the controls of the posthiring probationary period and the workings of the appellate process, EOIR should be mindful that an educated immigration bench is best

positioned to implement immigration policy, as recognized by the Board in its own precedent.

EOIR can and should be able to monitor the statistics of cases bringing *Lozada* claims and the extent to which immigration judges effectively demand a bar complaint (or effectively reject "if not, why not") as an alternative means for satisfying that element. As the typical fact-finder in immigration cases, immigration judges should be aware of the numerous deterrents to filing bar complaints, as they see immigrant litigants in their courtrooms every day.

Immigration judges have a daunting caseload[81] and might be swayed by the preference for finality voiced in *Matter of Compean I*. Training could reduce cynicism and bias against reopening and/or baseless imposition of a de facto requirement that a bar complaint be filed, especially where the totality of the record establishes both deficient representation and prejudice. Training could also include examples where an overly formalistic application of *Lozada*'s bar complaint clause turned out to be unwarranted, such as *Matter of N–K– & V–S–*.[82] Training should also emphasize the principled mission of removal proceedings, inherent in the Board's own decisions, that "the government wins when justice is done," and the court's role is to "ensure that the applicant presents his case as fully as possible and with all available evidence."[83]

Even in cases where counsel admitted their error, but stopped short of filing a bar complaint against themselves, given the circumstances, the Board has declined to reopen the proceedings, rather than accepting the immigrant's "if not, why not" explanation, and presented a confusing paradox.[84] The immigrant in that case, Mr. Melgar, lost reopening where their own counsel had confessed, but not formally complained, about his own conduct. The record had established that counsel had been ineffective (and counsel admitted such) and that prejudice had occurred. "But for" the strict application of *Lozada*, which does not mandate a complaint, of course, Melgar might have won, but the Board applied an extra-*Lozada* heightened logic, rejecting Melgar's lack of bar complaint as overly self-serving and likely encouraging "collusion" in an effort to buy the immigrant time in the United States, in a case that the immigrant lost, repeatedly, on account of that ineffective counsel. In so doing, the Board in *Matter of Melgar* reiterated its purported concern over the potential for abuse in the context of motions to reopen, despite the fact that history has dissipated the Board's illusion of collusion.

## Office of the Principal Legal Advisor/Exercising Prosecutorial Discretion

Finally, the ICE Office of the Principal Legal Advisor (OPLA) could play a role in eliminating the bar complaint requirement. For decades, the impact of fulfilling the bar complaint requirement from *Matter of Lozada* has created wide and negative consequences, significantly impacting the defense bar,

state bar authorities, respondents, and the immigration court process. Based on the current structure for requesting joint motions to reopen through the prosecutorial discretion process, it is challenging to receive OPLA's position or response to fulfill time bars relevant to motions to reopen when *Lozada* is at issue. As such, a bar complaint, even if not justified, then effectively becomes mandatory prior to filing a direct motion with the immigration judge.

OPLA should consider a mechanism or flag where it would consider those cases marked as *Lozada* requests, and thereby create a process for expedited agreement for time-sensitive motions. This process would only be for those matters where a bar complaint, under the facts of the case and any additional evidence in support of the motion, establishes that a bar complaint would not be necessary.

## Conclusion

Over three decades after the Board veered off course and charted a path unlike any in other found in American jurisprudence, the evidence is clear: the Board must now correct course and return to normal legal principles. Not only has the Board's mandatory bar complaint requirement created a hostile culture among immigration practitioners, but its existence also continues to thwart others from entering the profession altogether.

In a time where immigration issues continue to take center stage in political and geopolitical debates, limiting access to counsel for those seeking to enforce their rights seems counterproductive. Likewise, an immigration system that remains consumed by false concerns of attorney-client collusion and the need to police an entire bar feels punitive at its core. Any legal system that promotes mistrust in this way challenges the integrity of the whole process itself. By removing *Lozada*'s mandatory bar complaint requirement, major steps would be taken toward restoring the immigration bar's credibility and ensuring that this area of practice is not treated disparately.

Undoubtedly, there will be times when the filing of a bar complaint with the appropriate disciplinary administrators will be necessary. In cases where there has been misconduct, unethical behavior, or a true violation of an attorney's code of behavior, alerting the appropriate authorities remains proper. The issue with *Lozada* and its progeny is that it requires the filing of a bar complaint in many, many circumstances where a bar complaint is not warranted. Under these circumstances, the universal standard should not require an ineffective remedy. Instead, such considerations should be left to the courts or the agency, in the first instance, to review the facts for evidence of attorney misconduct and any resulting prejudice. This approach is consistent with accepted remedies for ineffective assistance of counsel claims. The time has come for the immigration system to now rejoin other legal disciplines and conform to these accepted standards.

## Notes

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1. *Strickland v. Washington*, 466 U.S. 668 (1984).
2. *Id.*
3. *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984).
4. *Matter of Lozada*, 19 I&N Dec. 637 (B.I.A. 1988).
5. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).
6. *Strickland v. Washington*, 466 U.S. 668 (1984).
7. *Gunn v. Minton*, 568 U.S. 251, 251 (2013).
8. *See generally Matter of Lozada*, 19 I&N Dec. 637 (B.I.A. 1988); *Matter of Grijalva*, 21 I&N Dec. 472, 473-74 (B.I.A. 1996); 8 C.F.R. § 208.4(a)(5)(iii); USCIS Policy Manual, vol. 7, pt. A, ch. 7, https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-7.
9. *See* 8 C.F.R. §§ 1003.13, 1003.14.
10. *See* INA § 236.
11. *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020) (finding that "Counsel's acceptance of responsibility for error does not discharge the disciplinary authority complaint obligation under *Matter of Lozada*" (internal citations omitted)).
12. *See Matter of Rivera*, 21 I&N Dec. 599, 605 (B.I.A. 1996).
13. *Id.*
14. *Id.*
15. 8 C.F.R. § 1003.1(g).
16. *See, e.g.*, *In Re* 10242916 (A.A.O. May 18, 2020), https://www.uscis.gov/sites/default/files/err/D17%20-%20Nonimmigrant%20E-2%20Treaty%20Investor/Decisions_Issued_in_2020/MAY182020_01D17214.pdf; *see also In Re* 23396779 (A.A.O. Dec. 1, 2022), https://www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2022/DEC012022_01B2203.pdf; *In Re* 26379071 (A.A.O. June 15, 2023), https://www.uscis.gov/sites/default/files/err/A6%20-%20Adjustment%20of%20Alien%20in%20U%20Nonimmigrant%20Status%20I-485%20U%20Sec.%20245%28m%29%281%29%20of%20the%20INA/Decisions_Issued_in_2023/JUN152023_01A6245.pdf.
17. *See, e.g.*, *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.").
18. *Strickland v. Washington*, 466 U.S. 668 (1984).
19. *See, e.g.*, *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984).
20. 19 I&N Dec. 637 (B.I.A. 1988).
21. *Id.* (emphasis added).
22. *Id.* at 639.
23. *Id.*

24. *See Matter of Rivera*, 21 I&N Dec. 599 (B.I.A. 1996) (en banc); *Matter of Assaad*, 23 I&N Dec. 553 (B.I.A. 2003); *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).

25. *Matter of Rivera*, 21 I&N Dec. at 605.

26. *Id.* at 604.

27. *Id.* at 608.

28. *Id.*

29. 28 I&N Dec. 169 (B.I.A. 2020).

30. *Id.* at 170-71.

31. 24 I&N Dec. 710 (A.G. 2009) (reversed on other grounds).

32. *Id.* at 737-38.

33. *Id.* at 711.

34. *See, e.g.*, *ACLU Talking Points on Attorney General Mukasey's Compean Decision* (Feb. 17, 2009), ACLU, https://www.aclu.org/documents/aclu-talking-points-attorney-general-mukaseys-compean-decision.

35. *See Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001); *Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001); *Akinwunmi v. INS*, 194 F.3d 1340, 1341 n.2 (10th Cir. 1999); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999); *Saleh v. U.S. Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992); *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985).

36. *Matter of Compean*, 25 I&N Dec. 1, 2 (A.G. 2009) (*Compean II*).

37. *See, e.g.*, *Figeroa v. INS*, 886 F.2d 76 (4th Cir. 1989) (failure of respondent to file a bar complaint against a former attorney did not indicate that the representation had been effective); *Fadiga v. U.S. Att'y Gen.*, 488 F.3d 142, 156-57 (3d Cir. 2007) (no bar complaint needed "where counsel admitted the ineffectiveness and made efforts to remedy the situation"); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131-32 (9th Cir. 2013) (*Lozada* only requires explanation of *whether* a bar complaint was submitted, not proof that the complaint was filed).

38. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001); *Lara v. Trominski*, 216 F.3d 487 (5th Cir. 2022); *Guzman-Torralva v. Garland*, 22 F.4th 617 (6th Cir. 2022); *Stroe v. I.N.S.*, 256 F.3d 498 (7th Cir. 2001).

39. *Yero v. Gonzalez*, 236 F. App'x 451 (10th Cir. 2007); *Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219 (11th Cir. 2003).

40. *See Yang v. Gonzales*, 478 F.3d 133, 142-43 (2d Cir. 2007); *Lo v. Ashcroft*, 341 F.3d 934, 937 n.4 (9th Cir. 2003) ("We seldom reject ineffective assistance of counsel claims *solely* on the basis of *Lozada* deficiencies.").

41. *Id.*

42. *See Castillo-Perez v. INS*, 212 F.3d 518, 525-27 (9th Cir. 2000) (holding that while the *Lozada* requirements are generally reasonable, they are not sacrosanct, and will not be dispositive when the relevant facts are plain on the face of the administrative record).

43. *See, e.g.*, *Garcia v. Lynch*, 821 F.3d 178, 181 (1st Cir. 2016); *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008).

44. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134 (3d Cir. 2001).

45. *Id.* at 133.

46. Vanderbilt University Immigration Practice Clinic Under the Supervision of Professor Karla McKanders & AILA's National Ethics Committee and The Coalition on

*Lozada* and Access to Counsel, *Matter of Lozada* and the Bar Complaint Requirement: A Comprehensive Report, AILA Doc. No. 24040433.

47. *Id.*

48. *Too Few Immigration Attorneys: Average Representation Rates Fall from 65% to 30%* (Jan. 24, 2024), TRAC Immigration, https://trac.syr.edu/reports/736/.

49. *See* Marion Nickum & Pascale Desrumaux, *Burnout Among Lawyers: Effects of Workload, Latitude and Mediation Via Engagement and Over-Engagement*, Psychiatr. Psychol. Law. 2023; 30(3): 349-61; Amanda Roberts, *Mental Health Initiatives Aren't Curbing Lawyer Stress and Anxiety, New Study Shows*, ABA Journal (May 19, 2023), https://www.abajournal.com/news/article/mental-health-initiatives-arent-curbing-lawyer-stress-and-anxiety-new-study-shows.

50. *See, e.g.*, The Lifeguard Is Drowning: Identifying and Combating Burnout and Secondary Trauma in Asylum Practitioners (Apr. 7, 2022), https://www.americanbar.org/groups/public_interest/immigration/events-and-cle/the-lifeguard-is-drowning-identifying-and-combating-burnout/ (American Bar Ass'n webinar).

51. *See, e.g.*, Marco Poggio, *Immigration Attorneys Share Stories of Trauma and Burnout*, Law360 (Aug. 10, 2022), https://www.law360.com/articles/1499108/immigration-attorneys-share-stories-of-trauma-and-burnout.

52. *See* 8 C.F.R. § 103.3; *see also Matter of [Name and File Number Redacted]* (A.A.O. Sept. 13, 2018), https://www.uscis.gov/sites/default/files/err/B7%20-%20Immigrant%20Petition%20by%20Alien%20Entrepreneur,%20Sec.%20203(b)(5)%20of%20the%20INA/Decisions_Issued_in_2013/SEP182013_02B7203.pdf.

53. 596 U.S. 328 (2022).

54. *Matter of Lozada*, 19 I&N Dec. 637, 638 (B.I.A. 1988) (citing *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986), and *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975)); *see Contreras v. U.S. Att'y Gen.*, 665 F.3d 578, 584 n.3 (3d Cir. 2012) (citing *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003); *Denko v. INS*, 351 F.3d 717, 723-24 (6th Cir. 2003); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); and *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005), but finding that due process was not guaranteed under the Fifth Amendment outside of removal proceedings).

55. *Matter of Lozada*, 19 I&N Dec. at 638 (citing *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986); *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Mohsseni Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986); and *Matter of Santos*, 19 I&N Dec. 105 (B.I.A. 1984)).

56. *Id.*

57. *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004); *see also Fadiga v. U.S. Att'y Gen.*, 488 F.3d 142, 157 (3d Cir. 2007); *Rabiu v. INS*, 41 F.3d 879, 882 (2d Cir. 1994); *Paul v. INS*, 521 F.2d at 199.

58. *Contreras v. U.S. Att'y Gen.*, 665 F.3d at 584; *Dakane v. U.S. Att'y Gen.*, 399 F.3d at 1274; *Morales Apolinar v. Mukasey*, 514 F.3d 893, 898 (9th Cir. 2008); *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994); *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006).

59. *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

60. *See Viehweg v. Mello*, 5 F. Supp. 2d 752 (E.D. Mo. 1998); *Sandhu v. Kanzler*, 932 F.3d 1107 (8th Cir. 2019); *UFT Commercial Finance, LLC v. Fisher*, 991 F.3d 854 (7th Cir. 2021).

61. *Matter of Rivera*, 21 I&N Dec. 599, 604 (B.I.A. 1996).
62. INA §§ 240(b)(4)(A), 292 (emphasis added).
63. *Loper Bright Enterprises, Inc. v. Raimondo*, No. 22-451 (argued Jan. 17, 2024); *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024).
64. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
65. INA §§ 240(b)(4)(A), 292.
66. *Matter of Compean II*, 25 I&N Dec. 1, 2 (A.G. 2009).
67. *See generally* Vanderbilt University Immigration Practice Clinic, *supra* note 47.
68. *Matter of Compean II*, 25 I&N Dec. at 2.
69. 8 C.F.R. § 292.3.
70. *See Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).
71. *Matter of Lozada*, 19 I&N Dec. 637, 639 (B.I.A. 1988).
72. *Matter of Compean I*, 24 I&N Dec. 710, 737 (A.G. 2009).
73. INA §§ 103(a)(1), 101(b)(4); 8 C.F.R. §§ 1003.1(a); 1003.1(d)(7); 1003.1(h).
74. *The AG's Certifying of BIA Decisions* (Mar. 29, 2018), Jeffrey S. Chase, https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions; *see also* Alberto Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority, 101 Iowa L. Rev. 841 (2016).
75. *Matter of L–E–A–*, 28 I&N Dec. 304 (A.G. 2021); *Matter of L–E–A–*, 27 I&N Dec. 494 (A.G. 2018); *Matter of L–E–A–*, 17 I&N Dec. 40 (B.I.A. 2017).
76. *Matter of Lozada*, 19 I&N Dec. at 639-40.
77. 8 C.F.R. § 1003.0(b).
78. Memorandum from David L. Neal, Director, Executive Office for Immigration Review, *Administrative Closure*, DM 22-03 (Nov. 21, 2023).
79. 28 I&N Dec. 326 (A.G. 2021).
80. *See Matter of Avetisyan*, 25 I&N Dec. 688, 692 (B.I.A. 2012); *Matter of W–Y–U–*, 27 I&N Dec. 17, 18 (B.I.A. 2017); *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). *See also Arcos Sanchez v. U.S. Att'y Gen.*, 997 F.3d 113, 121-24 (3d Cir. 2021); *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020); *Romero v. Barr*, 937 F.3d 282, 292-94 (4th Cir. 2019); *Garcia-DeLeon v. Garland*, 999 F.3d 986, 991 (6th Cir. 2021).
81. *Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases,* TRAC Immigration (Dec. 18, 2023), https://trac.syr.edu/reports/734/.
82. 21 I&N Dec. 879 (B.I.A. 1997) (finding that "Respondent had satisfied the high burden announced in *Lozada*," because the respondent had filed a detailed affidavit that she had not received notice, and that the attorney's representation was limited in scope, and further that respondent had suffered prejudice to such a degree that reopening was warranted). While the immigrant had, in fact, filed a bar complaint, it was superfluous, because the record itself demonstrated both ineffective assistance of counsel and prejudice.
83. *Matter of S–M–J–*, 21 I&N Dec. 722 (B.I.A. 1997).
84. *Matter of Melgar*, 28 I&N Dec. 169 (B.I.A. 2020).

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

## AILA Law Journal Symposium

# Shaping Immigration Policy through the Federal Courts

March 21, 2024
Grand Hyatt Washington
Washington, D.C.
9:00 a.m.—1:00 p.m.

As Congress remains deadlocked and unable to enact sweeping immigration reform, the federal judiciary has become a crucial site for the evolution of immigration law. President Biden, like his predecessors, has relied on executive actions to reshape key elements of the immigration system. Many of the initiatives have been challenged in the courts with mixed results. To what extent do plaintiffs have standing to challenge f–ederal immigration policy? What does the future bode for Chevron deference? Each of the panels will discuss the current and future role of federal courts in shaping immigration policy in its various manifestations.


AILA Doc. No. 24060402. (Posted 6/4/24)

The topics being presented at today's symposium will be the subject of papers and transcripts collected in the Spring 2024 edition of the *AILA Law Journal*. In addition to papers by today's speakers, the symposium edition of the *Journal* authors will include articles by Robert Pauw on the role of courts in shaping immigration policy, and by Susan Akram on the fight to preserve access to asylum in the US, the UK, and Europe.

# The AILA Law Journal

The *AILA Law Journal*, published under Fastcase's publishing arm Full Court Press, supports AILA's mission to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. Articles range in topic, are timely, and encompass various dimensions of immigration law perspectives in the United States, from policy to pragmatic.

AILA members can access free, downloadable digital copies of the *Journal*, and also purchase a print subscription through Fastcase for $49/year. Non-AILA members can purchase an issue of the *Journal* through Fastcase for $60, or a combined print/digital subscription for $99/year, which includes up to three print copies of each issue and unlimited access to the *Journal* on Fastcase's online legal research system. Call or email Fastcase at 1-866-773-2782 – sales@fastcase.com.



**AILA Doc. No. 24060402. (Posted 6/4/24)**

# Final Symposium Handout

**PROCEEDINGS**

9:00 a.m.–9:10 a.m.
**Introductory Remarks**
Cyrus D. Mehta
*Editor-in-Chief, AILA Law Journal; Founder and Managing Partner, Cyrus D. Mehta & Partners, PLLC*

9:10 a.m.–10:00 a.m.
**Panel 1: Creating Pathways for STEM Workers Through Non-Legislative Means**
William A. Stock, Moderator
*Editorial Board Member, AILA Law Journal; Managing Partner, Klasko Immigration Law Partners, LLP*

Simon T. Nakajima
*Assistant Director for STEM Immigration*
*White House Office of Science and Technology*

Diane Rish
*Editorial Board Member, AILA Law Journal; Senior Manager, Immigration, Salesforce*

Amy M. Nice
*Distinguished Immigration Fellow and Visiting Scholar, Cornell Law School*

10:05 a.m.–11:00 a.m.
**Panel 2: DACA Litigation and the Opportunity for All Campaign**
Kaitlyn A. Box, Moderator
*Editorial Board Member, AILA Law Journal; Senior Associate, Cyrus D. Mehta & Partners, PLLC*

Ahilan T. Arulanantham
*Professor from Practice and Co-Director of the Center for Immigration Law and Policy (CILP), UCLA School of Law*

Anil Kalhan
*Professor of Law, Drexel University*

11:05 a.m.–12:00 p.m.
**Panel 3: The Role of Federal Courts in Shaping Asylum Law: A Comparative Analysis**
Dree Collopy, Moderator
*Author, AILA's Asylum Primer; Partner, Benach Collopy LLP*

Rebecca Sharpless
*Editorial Board Member, AILA Law Journal; Associate Dean for Experiential Learning, University of Miami School of Law; Professor of Law and Director, Immigration Clinic, University of Miami School of Law*

Sabrineh Ardalan
*Clinical Professor of Law, Harvard Law School; Director, Harvard Immigration and Refugee Clinic*

12:05 pm – 1:00 pm
**Individual Presentations**
Thomas Ragland, Moderator
*Editorial Board Member, AILA Law Journal; Member, Clark Hill PLC*

***Correcting Course on Matter of Lozada through the Federal Courts and Executive Action***
Rekha Sharma-Crawford (*Partner, Sharma-Crawford Attorneys at Law*), Sui Chung (*Attorney, Immigration Law & Litigation Group*), Sarah Owings (*Attorney, Owings MacNorlin, LLC*), Susan Roy (*Immigration Attorney, Law Office of Susan G. Roy, LLC*)

***"Circumvention of Lawful Pathways" or Circumvention of the Law?***
Jenna L. Ebersbacher
*Associate, Brown Immigration Law*

***Legislative History of the APA as a Tool to Minimize Government Use of the Foreign Affairs Exception***
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