



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

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Protecting Your Client When Prior Counsel Was Ineffective Expanding the Bounds of *Lozada*

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Respondents in removal proceedings have the right to seek a remedy when their prior counsel was ineffective or when they were victim of fraudulent representation. The Board of Immigration Appeals (BIA or the Board) has held that respondents may file a motion to reopen their cases in these situations.

The leading BIA case on this issue is *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd* 857 F.2d 10 (1st Cir. 1988). *Matter of Lozada* sets out the requirements for filing a motion to reopen based on ineffective assistance. Whenever possible, counsel should try to satisfy these requirements. However, situations arise where it may be impossible to comply with the *Lozada* requirements, where your client has already filed the motion without your assistance, or where the case is in federal court. Circuit case law may help you protect your client. Over the past few years, the appeals courts have rejected some of the Board's overly-technical requirements. Several courts have equitably tolled the time and number restrictions for motions to reopen, and courts have liberally construed the *Lozada* requirements.

Moreover, reliance on circuit case law may become more important since the Board may be reconsidering its position on the right to a remedy where former counsel was incompetent.²

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² Several cases have been consolidated for the purpose of reviewing the Board's position on ineffective assistance of counsel claims. AILF filed a major amicus brief on this issue last year and has supplemented this brief three times at the Board's request.

For over a year, Board Member Filppu has issued separate opinions in many unpublished cases involving *Lozada* claims. He argues that the underlying assumption in *Matter of Lozada* – that ineffective assistance of counsel can give rise to a due process violation – is flawed. Member Filppu maintains that the

This practice advisory provides an overview of the Board's requirements for making an ineffective assistance claim and then describes the developments in the circuit courts, particularly where the courts diverge from the Board's case law. The last section of this practice advisory contains a chart that lists the significant cases in each circuit. With the exception of the Eighth Circuit and the DC Circuit, all of the other circuits have addressed incompetent counsel claims and have uniformly recognized the right to effective counsel.

Please be reminded that this information is accurate and authoritative, but does not substitute for independent legal research by a lawyer familiar with the facts of an individual case.

I. The *Lozada* Requirements

The Board has set out the following requirements respondents must meet to support a claim of ineffective assistance of counsel.

1. The motion must be supported by an affidavit by the respondent attesting to the relevant facts. The affidavit should include a statement of the agreement between the respondent and the attorney with respect to the representation.
2. Before the respondent files the motion, he or she must inform counsel of the allegations and allow counsel the opportunity to respond. Any response should be included with the motion.
3. The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

In addition to these requirements, a motion to reopen must demonstrate that the respondent was prejudiced by counsel's actions. However, respondents need not show prejudice where counsel's incompetence resulted in an entry of an *in absentia* order of deportation or removal. See *Matter of Rivera-Claros*, 21 I&N Dec. 599 (BIA 1996); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996).

II. Time and Number Restrictions and Equitable Tolling

****Statutory Provisions***

Generally, a respondent must file a motion to reopen within 90 days of the final administrative order of removal or within 180 days of the entry of an *in absentia* order of

right to effective counsel only applies where there is a constitutional (Sixth Amendment) right to appointed counsel. He cites two Supreme Court cases, *Coleman v. Thompson*, 501 U.S. 722 (1991) and *Wainwright v. Torna*, 455 U.S. 586 (1982), in support of this argument. Neither case arises in the immigration context.

removal if the failure to appear was because of exceptional circumstances (including ineffective assistance of counsel). *See* INA § 240(b)(5)(C)(i), (e)(6)(C); INA § 242B(c)(3) (1995); 8 C.F.R. §§ 3.2(c)(3) and 3.23(b)(1), (4). The statute and regulations also state that a respondent may file only one motion to reopen.³ INA § 240(e)(6)(A); 8 C.F.R. §§ 3.2(c)(2) and 3.23(b)(1).

****BIA Has Held That There Is No Exception to Filing Deadlines***

The Board has held that the ineffectiveness of counsel does not create an “exception” to the 180-day time limit for filing a motion to reopen under former section 242B(c)(3)(A) of the Act. *Matter of A-A-*, 22 I&N Dec. 140 (BIA 1998); *Matter of Lei*, 22 I&N Dec. 113 (BIA 1998).

****Circuit Courts Have Equitably Tolloed the Filing Deadlines***

Under the Board’s ruling in *Matter of A-A-* and *Matter of Lei*, many respondents would be denied the right to bring an ineffective assistance claim. For example, a respondent might not discover counsel’s incompetence until after a filing deadline has passed or after an initial motion to reopen is filed.

Recognizing this problem, the Second and Ninth Circuits have held that the filing deadlines for motions to reopen are subject to equitable tolling. *Rodriguez-Lariz*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999). This means that the period for filing the motion will not begin to run on the day that the removal or deportation order was entered. Instead, the 90 or 180 days typically will begin running when the respondent discovers (or should have discovered) that the attorney’s actions were fraudulent or otherwise ineffective.

However, respondents must show that they exercised reasonable diligence during the period that they seek to toll. For example, once respondents discover that counsel was ineffective, they should contact another attorney and take immediate steps to reopen their cases. *See Rodriguez-Lariz*, 282 F.3d at *17. If a respondent fails to take action for over a year after learning that an in absentia order of removal has been entered and being advised to consult with an attorney, he or she does not exercise due diligence. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001).

The Ninth Circuit also has explicitly stated that the numerical limitation on motions to reopen may be tolled or waived. *Rodriguez-Lariz*, 282 F.3d at *12; *Varela*, 204 F.3d at 1240. This means that respondents may file more than one motion to reopen.

In addition, in an unpublished decision, the Fourth Circuit Court of Appeals found that the time and numerical requirements for filing a motion to reopen were equitably tolled.

³But note that the number limitation on motions to reopen does not apply to in absentia cases in deportation and exclusion proceedings. 8 C.F.R. §§ 3.2(c)(3) and 3.23(b)(4)(iii)(D).

Davies v. INS, 2001 U.S. App. LEXIS 11674, *2 (4th Cir. June 5, 2001); *but see Njie-Mokionya*, 2001 U.S. App. LEXIS 22912 (4th Cir. Oct. 24, 2001) (unpublished) (finding that IJ followed Board precedent in *Matter of Lei*, but not ruling explicitly on whether it would permit equitable tolling). The First Circuit also has indicated that it would follow the Ninth and Second Circuits on this issue. *See Jobe v. INS*, 212 F.3d 674 *rev'd en banc* 238 F.3d 96 (1st Cir. 2001). In *Jobe*, the court initially held that the filing deadline is subject to equitable tolling. Subsequently, on rehearing, the decision was withdrawn. The court concluded that the respondent had not exercised due diligence; accordingly, the court declined to decide the issue of whether the filing deadlines are subject to equitable tolling.

Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for *Lozada* motions to reopen. *See Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999). The court, however, provided no explanation for its conclusion. Unlike the Second and Ninth Circuits, the Eleventh Circuit did not engage in a thorough analysis of the motion to reopen provisions and their legislative histories. *Compare id. with Socop-Gonzalez*, 272 F.3d at 1188-93 and *Iavorski*, 232 F.3d at 129-33.

III. Circuit Courts Have Urged a Flexible Application of the *Lozada* Requirements

Several circuit courts have applied or approved a flexible application of the *Lozada* requirements. The Ninth Circuit has taken the most liberal position with regard to the *Lozada* requirements. In fact, the court has held that there is no need to comply with *Lozada* when the record itself demonstrates the legitimacy of the ineffectiveness claim. *See Rodriguez-Lariz*, 282 F.3d 1218, *22 (9th Cir. 2002); *Castillo-Perez*, 212 F.3d 518, 525 (9th Cir. 2000); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000). Moreover, even where the record alone does not establish the claim, the *Lozada* factors are not “rigidly applied.” *See Rodriguez-Lariz*, 282 F.3d at *22; *see also Ontiveros-Lopez*, 213 F.3d 1121 (9th Cir. 1999) (criticizing the BIA for arbitrary application of *Lozada* requirements).

In *Esposito v. INS*, 987 F.2d 108 (2d Cir. 1993), the Second Circuit Court of Appeals found that the respondent had met the *Lozada* requirements even though he did not file a complaint with a disciplinary authority. Instead, the respondent provided a reasonable explanation for not filing a complaint, namely, that he believed the attorney had already been suspended.

The Third and Fourth Circuits also have expressed skepticism about the bar complaint requirement. Although the language of *Matter of Lozada* suggests that respondents need not file bar complaints in order to petition the Board for reopening, the Third Circuit is “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.” *See Lu v. Ashcroft*, 259 F.3d 127 (3rd Cir. 2001). Thus, the court warned against the “inherent dangers . . . in applying a formulaic interpretation of *Lozada*.” Likewise, the Fourth Circuit has stated that failure to file a disciplinary complaint does not necessarily indicate that the representation was effective. *See Figueroa v. INS*, 886 F.2d 76, 79 (4th

Cir. 1989) (concluding that respondent, an adolescent who did not speak English, should not be expected to file a bar complaint or malpractice claim and that filing a complaint would not provide respondent with assistance in terms of his deportation proceedings).

The First Circuit also has held that the BIA cannot apply the *Lozada* requirements arbitrarily. See *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001). In *Saakian*, the immigration judge denied the respondent's motion to reopen without allowing him to remedy the deficiencies in the motion. The respondent submitted the remaining documents required by *Lozada* along with his appellate brief to the Board. The First Circuit chastised the Board for emphasizing "form over substance" when it failed to consider the merits of his claim on appeal.

IV. Seventh Circuit Cases

Attorneys practicing in the Seventh Circuit should be aware of the developing law in this circuit. The Seventh Circuit has held repeatedly that "counsel at a deportation may be so ineffective as to have impinged upon the fundamental fairness of the [deportation] hearing in violation of the fifth amendment due process clause." See *Mojsilovic v. INS*, 156 F.3d 743, 748 (7th Cir. 1998); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993); *Castaneda-Suarez v. INS*, 993 F.2d 142, 144 (7th Cir. 1993); see also *Chowdhury v. Ashcroft*, 241 F.3d 848, 854 (7th Cir. 2001).

Nonetheless, in a 2001 decision, the Seventh Circuit, in dicta, questioned whether a due process right to effective counsel exists.⁴ See *Stroe v. INS*, 256 F.3d 498 (7th Cir. 2001). The court, however, did not reconsider its prior precedent, instead stating:

[T]he question whether there is ever a constitutional right to counsel in immigration cases is ripe for reconsideration. But not in this case. . . . We may assume, without having to decide because the issue is not raised, that the Board's decision to allow aliens to claim ineffective assistance of counsel as a basis for reopening deportation proceedings is within the scope of the Board's discretionary authority

Stroe, 256 F.3d at 501.

A recent case, *Pop v. INS*, 279 F.3d 457, 460 (7th Cir. 2002), suggests that *Stroe* decided this issue. As the excerpt above demonstrates, *Stroe* did not overrule its prior precedent regarding incompetent counsel in immigration proceedings. Therefore, respondents should continue to cite *Mojsilovic*, *Henry*, and *Castaneda-Suarez*.

AILF is continuing to monitor the development of this issue in the Seventh Circuit and is prepared to litigate when necessary. Please contact Beth Werlin at bwerlin@ailf.org if you have a Seventh Circuit case involving ineffective assistance of counsel.

⁴In doing so, the court raises many of the arguments articulated by Board Member Filppu. See Footnote 1.

INEFFECTIVE ASSISTANCE OF COUNSEL
Circuit Court Status Report
April 25, 2002

First Circuit

Key Cases:

- Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001)
Hernandez v. Reno, 238 F.3d 50 (1st Cir. 2001)
Jobe v. INS, 238 F.3d 96 (1st Cir. 2001)
Bernal-Vallejo v. INS, 195 F.3d 56 (1st Cir. 1999)
Lozada v. INS, 857 F.2d 10 (1st Cir. 1988)

Due Process Standard	Counsel’s ineffectiveness can give rise to a due process violation if the proceeding was so fundamentally unfair that respondent was prevented from reasonably presenting his or her case. <i>See Lozada, Bernal-Vallejo</i> . The court may find a due process violation where counsel’s actions prevent the respondent from applying for <i>discretionary</i> relief. <i>Hernandez, Bernal-Vallejo</i> . ⁵
Prejudice	In <i>Bernal-Vallejo</i> , the court holds that the respondent “generally must show prejudice,” but cites <i>United States v. Loasiga</i> , 104 F.3d 484 (1st Cir. 1997) which stated, “where a denial of counsel was so flagrant and the difficulty of proving prejudice so great,” it may be possible to presume harm.
Deference to <i>Lozada</i> Requirements	Although the court has indicated its approval of the <i>Lozada</i> requirements (<i>Hernandez</i>), the BIA cannot apply the requirements arbitrarily. <i>Saakian</i> . In <i>Saakian</i> , the respondent was afforded a second opportunity to satisfy the requirements of <i>Lozada</i> .
Equitable Tolling	The court has not decided this issue, although it was raised in <i>Jobe</i> . In that case, the court found that the respondent was “insufficiently diligent” in filing a motion to reopen since he waited more than 1½ years after learning of an in absentia order.

Second Circuit

Key Cases:

- Iavorski v. INS*, 232 F.3d 124 (2nd Cir. 2000)
Rabiu v. INS, 41 F.3d 879 (2nd Cir. 1994)
Esposito v. INS, 987 F.2d 108 (2nd Cir. 1993)
Saleh v. Dept. of Justice, 962 F.2d 234 (2nd Cir. 1992)

Due Process Standard	Counsel’s performance can be “so ineffective as to have
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⁵Contrast with 11th Circuit.

	impinged on the fundamental fairness of the hearing in violation of the fifth amendment due process clause.” <i>Saleh</i> .
Prejudice	Prejudice is required. <i>Saleh, Esposito</i> . The prejudice standard in <i>Esposito</i> is “would the result have been different.” In <i>Rabiu</i> , respondent demonstrated prejudice where he demonstrated prima facie eligibility for 212(c) and was a “strong candidate” for relief.
Deference to <i>Lozada</i> Requirements	No published decision explicitly addresses the requirements, but in <i>Esposito</i> , the court found that respondent satisfied the requirements for filing a <i>Lozada</i> motion to reopen, even though the respondent did not file a bar complaint.
Equitable Tolling	Time limitations for motions to reopen are not a jurisdictional bar. <i>Iavorski</i> . However, in <i>Iavorski</i> , the respondent could not avail himself of equitable tolling because he did not exercise due diligence.

Third Circuit

Key Cases:

Lu v. Ashcroft, 259 F.3d 127 (3d Cir. 2001)

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001)

Due Process Standard	Counsel’s ineffectiveness can give rise to a due process violation if the proceeding was so fundamentally unfair that respondent was prevented from reasonably presenting his or her case. <i>Chmakov</i> . In <i>Lu</i> , the court states that even individuals in exclusion proceedings have the right to have proceedings reopened where counsel was ineffective. It is unclear whether this is a Constitutional or statutory right.
Prejudice	<i>Lu</i> indicates that prejudice is required, but does not address it explicitly.
Deference to <i>Lozada</i> Requirements	Although the <i>Lozada</i> requirements are a proper exercise of agency discretion, the court also recognized that some flexibility is required (especially regarding the bar complaint requirement). <i>Lu</i> .
Equitable Tolling	

Fourth Circuit

Key Cases:

Stewart v. INS, 181 F.3d 587 (4th Cir. 1999)

Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989)

Due Process Standard	“To prevail on a claim of ineffective assistance of counsel at a deportation proceeding, an alien must show not only ineffective representation, but also prejudice to him which
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	occurred as a result of that ineffectiveness.” <i>Figeroa</i> .
Prejudice	In <i>Figeroa</i> , the court found no prejudice because respondent, in applying for asylum, did not allege a specific threat directed against him and therefore, was not entitled to asylum.
Deference to <i>Lozada</i> Requirements	Although there are no published opinions explicitly addressing the <i>Lozada</i> requirements, in <i>Stewart</i> , the court cited <i>Lozada</i> and found that respondent had not exhausted administrative remedies.
Equitable Tolling	<p>The Fourth Circuit has not addressed equitable tolling in a published decision. However, in 2001, three unpublished decisions addressed this issue:</p> <ol style="list-style-type: none"> 1. In <i>Malm v. INS</i>, 2001 US App. LEXIS 18178 (4th Cir. 2001) the court, citing the First Circuit case <i>Jobe</i>, noted that the respondent had not exercised due diligence and therefore, “equitable tolling is not an appropriate remedy in this case.” <i>Malm</i> is not an ineffective assistance case, but involved a motion to reopen in order to apply for CAT relief. 2. The court followed <i>Matter of A-A-</i> and <i>Matter of Lei</i> and refused to toll the filing deadlines in <i>Njie-Mokonya v. INS</i>, 2001 US App. LEXIS 22912 (4th Cir. 2001). 3. In <i>Davies v. INS</i>, 2001 US App. LEXIS 11674 (4th Cir. 2001), the time and numerical limitations were tolled because of the “unusual facts and exceptional circumstances.”

Fifth Circuit

Key Cases:

Goonsuwan v. Ashcroft, 252 F.3d 383 (5th Cir. 2001)

Lara v. Trominski, 216 F.3d 487 (5th Cir. 2000)

Miranda-Lores v. INS, 17 F.3d 84 (5th Cir. 1994)

Mantell v. Dept. of Justice, 798 F.2d 124 (5th Cir. 1986)

Paul v. INS, 521 F.2d 194 (5th Cir. 1975)

Barthold v. INS, 517 F.2d 689 (5th Cir. 1975)

Due Process Standard	The Fifth Circuit’s most recent case involving ineffective assistance held explicitly that due process is violated when the representation afforded respondents was so deficient as to impinge upon the fundamental fairness of the hearing and results in substantial prejudice. <i>See Goonsuwan</i> (footnote 2) (citing <i>Paul</i>). This statement, however, was dicta. Also, it is important to note that prior Fifth Circuit cases have indicated that whether there is a due process right to effective counsel is an open question. <i>Paul</i> , which is cited in <i>Goonsuwan</i> , relies
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	on <i>Barthold</i> . <i>Barthold</i> , however, recognized only that a due process right to counsel <i>may</i> exist. In <i>Mantell</i> , the court stated that although the circuit has “suggested” (in <i>Paul</i>) there is a due process right to effective counsel, “we have created no rule of law to this effect.” Likewise, in <i>Miranda-Lores</i> , the court “assum[ed] without deciding” that this right exists.
Prejudice	The Fifth Circuit has adopted a “substantial prejudice” standard. <i>See Goonsuwan</i> . In <i>Anwar v. INS</i> , 116 F.3d 140 (5th Cir. 1997), the respondent claimed that due process was violated because the BIA did not extend the deadline for filing a brief. In order to show substantial prejudice, he had to establish prima facie eligibility for asylum and a strong showing in support of his application.
Deference to <i>Lozada</i> Requirements	“The general application of the <i>Lozada</i> rules is not an abuse of discretion.” <i>Lara</i> .
Equitable Tolling	

Sixth Circuit

Key Cases:

Huicochea-Gomez v. INS, 237 F.3d 696 (6th Cir. 2001)

Mustata v. Dept. of Justice, 179 F.3d 1017 (6th Cir. 1999)

Dokic v. INS, 899 F.2d 530 (6th Cir. 1990)

Due Process Standard	“The alien carries the burden of establishing that ineffective assistance of counsel prejudiced him or denied him fundamental fairness in order to prove that he suffered a denial of due process.” <i>Huicochea-Gomez</i> . However, the court found that there is no liberty interest at stake (and therefore, no due process violation) where counsel’s ineffectiveness prevented respondent from applying for a discretionary form of relief. <i>Huicochea-Gomez</i> (following Eleventh Circuit case <i>Mejia Rodriguez</i>).
Prejudice	The respondents must establish that “but for [ineffective] legal advice, they would have been entitled to continue residing in the United States.” <i>Huicochea-Gomez</i> .
Deference to <i>Lozada</i> Requirements	The court has not explicitly addressed the requirements. In <i>Huicochea-Gomez</i> , the court cited <i>Lozada</i> , but upheld the Board’s decision to dismiss respondent’s ineffectiveness claim.
Equitable Tolling	

Seventh Circuit

Key Cases:

Pop v. INS, 279 F.3d 457 (7th Cir. 2002)

Stroe v. INS, 256 F.3d 498 (7th Cir. 2001)
Chowdhury v. Ashcroft, 241 F.3d 848 (7th Cir. 2001)
Mojsilovic v. INS, 156 F.3d 743 (7th Cir. 1998)
Henry v. INS, 8 F.3d 426 (7th Cir. 1993)
Castaneda-Suarez v. INS, 993 F.2d 142 (7th Cir. 1993)

Due Process Standard	“Counsel at a deportation hearing may be so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause.” <i>Castaneda-Suarez</i> . In <i>Chowdhury</i> , the Court indicated the standards for establishing an ineffectiveness claim under the fifth amendment are more stringent than the standards for establishing a claim under the sixth amendment. Moreover, in <i>Stroe</i> , the Seventh Circuit, in dicta, questioned the existence of a fifth amendment right to effective counsel. (See Section IV, Seventh Circuit Cases, for a discussion of this case and <i>Pop</i> .)
Prejudice	Ineffectiveness is only a due process violation if the respondent was prevented from reasonably presenting his or her case. <i>Henry</i> . Where respondent claimed that counsel’s ineffectiveness prevented him from presenting his asylum case, the court analyzed the merits of the asylum claim, and found no prejudice since respondent had not established that he would be persecuted if returned to his home country. <i>Pop</i> .
Deference to <i>Lozada</i> Requirements	The Seventh Circuit has deferred to the Board’s requirements. See <i>Stroe</i> ; <i>Henry</i> .
Equitable Tolling	

Eighth Circuit

Key Cases: NO INEFFECTIVE ASSISTANCE CASES

Ninth Circuit

Key Cases:

Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002)
Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001)
Dearinger ex. rel. Volkova v. Reno, 232 F.3d 1042 (9th Cir. 2000)
Ontiveros-Lopez v. INS, 213 F.3d 1121 (9th Cir. 2000)
Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000)
Grijalva v. INS, 206 F.3d 1331 (9th Cir. 2000)
Varela v. INS, 204 F.3d 1237 (9th Cir. 2000)
Ortiz v. INS, 179 F.3d 1148 (9th Cir. 1999)
Lopez v. INS, 184 F.3d 1097 (9th Cir. 1999)
Behbahani v. INS, 796 F.2d 249 (9th Cir. 1986)
Magallanes-Damian v. INS, 783 F.2d 931 (1986)
Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986)

Lopez v. INS, 775 F.2d 1015 (9th Cir. 1985)

Due Process Standard	<p>“Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” <i>Lopez</i>; see also <i>Rodriguez-Lariz</i>; <i>Castillo-Perez</i>; <i>Behbahani</i>; <i>Magallanes-Damian</i>.</p> <p>In <i>Dearinger</i>, the court looks to certain case law involving a defendant’s Sixth Amendment right to counsel, and finds that it “applies with equal force to ineffective assistance of counsel claims arising out of the Fifth Amendment right to due process.”</p>
Prejudice	<p>“Prejudice is found when the performance of counsel was so inadequate that it may have affected the outcome of the proceedings.” <i>Ortiz</i>; <i>Castillo-Perez</i>.</p>
Deference to <i>Lozada</i> Requirements	<p>The <i>Lozada</i> requirements are generally reasonable, but they should not be applied rigidly or arbitrarily. <i>Rodriguez-Lariz</i>; <i>Ontiveros-Lopez</i>; <i>Castillo-Perez</i>. When the administrative record is sufficient to establish counsel’s ineffectiveness, it is not necessary to comply with <i>Matter of Lozada</i>. <i>Castillo-Perez</i>.</p>
Equitable Tolling	<p>The court has held repeatedly that motion to reopen filing deadlines are subject to equitable tolling. <i>Rodriguez-Lariz</i>; <i>Socop-Gonzalez</i>; <i>Varela</i>; <i>Lopez</i>. Likewise, the numerical limitations for motions to reopen can be waived. <i>Varela</i>.</p>

Tenth Circuit

Key Cases:

Akinwunmi v. INS, 194 F.3d 1340 (10th Cir. 1999)

Due Process Standard	<p>Although <i>Akinwunmi</i> was dismissed because of the failure to exhaust administrative remedies, the court stated, “a claim of ineffective assistance of counsel in a deportation proceeding may be based on the Fifth Amendment guarantee of due process.”</p>
Prejudice	<p>The respondent “must show that his counsel’s ineffective assistance so prejudiced him that the proceeding was fundamentally unfair.” <i>Akinwunmi</i>.</p>
Deference to <i>Lozada</i> Requirements	<p>There are no published opinions explicitly addressing the <i>Lozada</i> requirements, but in <i>Akinwunmi</i>, the court cited <i>Matter of Lozada</i> when finding that the respondent did not exhaust his administrative remedies.</p>
Equitable Tolling	

Eleventh Circuit

Key Cases:

Anin v. Reno, 188 F.3d 1273 (11th Cir. 1999)

Mejia Rodriguez v. Reno, 178 F.3d 1139 (11th Cir. 1999)

Paul v. INS, 521 F.2d 194 (5th Cir. 1975) (see discussion above)

Due Process Standard	<p>In <i>Mejia Rodriguez</i>, the court states, “the Due Process Clause – not the Sixth Amendment – gives rise to effective assistance of counsel in deportation proceedings. . . . An alien must establish that his or her counsel’s performance was deficient to the point that it impinged on the ‘fundamental fairness’ of the hearing.”</p> <p>However, there is no due process claim to effective counsel when respondent is applying for a discretionary form of relief (suspension of deportation). <i>Mejia Rodriguez</i>. The court reasons that there is no liberty interest in applying for purely discretionary relief. <i>Mejia Rodriguez</i>.</p>
Prejudice	<p>The court has not articulated a clear prejudice standard. In <i>Mejia Rodriguez</i>, the court stated that the respondent had not demonstrated “actual ‘prejudice’ or ‘substantial prejudice’” because he had no liberty interest in applying for suspension of deportation.</p>
Deference to <i>Lozada</i> Requirements	<p>Although the court has not addressed the requirements explicitly, the <i>Anin</i> court noted that the respondents filed affidavits outlining their ineffective assistance claims “as required by law. <i>See Matter of Lozada</i>.”</p>
Equitable Tolling	<p>In <i>Anin</i>, the court held that motion to reopen filing deadlines are jurisdictional and mandatory.</p>

DC Circuit: NO INEFFECTIVE ASSISTANCE CASES