04-3921-ag(L)

To Be Argued By:
DOUGLAS P. MORABITO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3921-ag(L)
04-3920-ag(CON)

MEI YING LI & YU LIU FING,
Petitioners,

-vs-

BUREAU OF CITIZENSHIP AND
IMMIGRATION SERVICES,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR RESPONDENT

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

DOUGLAS P. MORABITO
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(b) (2006), to review Petitioners' challenge to the Board of Immigration Appeals' June 24, 2004, denial of their motion to reopen.

STATEMENT OF ISSUE
PRESENTED FOR REVIEW

1. Whether the BIA abused its discretion in denying Petitioners' motion to reopen?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3921-ag (L), 04-3920-ag (CON)

MEI YING LI & YU LIU FING,

Petitioners,

-vs-

BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

Preliminary Statement

Mei Ying Li and Yu Liu Fing,[1] natives and citizens of the People's Republic of China, petition this Court for review of the June 24, 2004, decision of the Board of

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[1] The male petitioner is at times referred to as Xing Zhou You, but Yu Liu Fing is the name listed on his order to show cause. (JA 324). For the sake of convenience he will be referred to as Yu Liu Fing.

Immigration Appeals ("BIA") denying their motion to reopen. (Joint Appendix ("JA") 1-3).

For the reasons that follow, the BIA properly rejected their claim of ineffective assistance under *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). With respect to the lawyer who represented them before the agency, the BIA reasonably concluded that by filing their motion to reopen on the same day that they sent a letter to former counsel complaining of his performance, they did not comply with *Lozada*'s clear requirement that they give their attorney an opportunity to respond *before* seeking relief from the agency. Moreover, the BIA reasonably concluded in the alternative that petitioners had failed to allege with specificity how their lawyer's alleged failure to prepare their case was deficient, and how they were prejudiced as a result.

With respect to their claim that the services of an interpreter/translator also amount to ineffective assistance of counsel, their claim should likewise be rejected. There was no evidence that the interpreter held himself out as an attorney or accredited legal representative; to the contrary, their own allegations show that the translator arranged for them to be represented by a lawyer before the agency. Petitioners' essential claim – that an alien's constitutional rights are violated when he or she relies on misadvice provided by a third party who is neither a lawyer nor an accredited legal representative – would open the floodgates to a deluge of claims by aliens seeking to reopen adverse immigration decisions. Moreover, it would improperly divorce *Lozada* relief from its animating

principle – that immigration regulations grant an alien the right to representation by an attorney, or someone recognized as the functional equivalent by the agency, and that deprivation of *that recognized right* may give rise to fundamental unfairness in immigration proceedings.

For all these reasons, the petition for review should be denied.

Statement of the Case

On or about April 8, 1993, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause ("OSC") to Petitioner Yu Liu Fing, charging him with being deportable as an alien who entered the United States without inspection. (JA 324-26). On or about October 14, 1997, the INS issued an Notice to Appear ("NTA") to Petitioner Mei Ying Li charging her with being removable on the same grounds. (JA 195-96).

After several hearings, on November 8, 2000, Immigration Judge Sandy Hom, sitting in New York City, issued a written decision finding Petitioners deportable and removable,[2] denying their requests for voluntary

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[2] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. The "deportation" process was commenced by issuance of an "Order to Show Cause," whereas the "removal" process is now commenced by issuance of a (continued...)

departure, and denying their requests for asylum, withholding of removal and for relief under the Convention Against Torture ("CAT"). (JA 39-53).

Petitioners filed timely notices of appeal to the BIA and on January 3, 2003, the BIA issued separate decisions affirming the IJ's decision and dismissing the appeals. (JA 233-37). Petitioners never appealed those BIA decisions to this Court.

On March 7, 2003, Petitioners filed a motion to reopen (JA 216-32), and on June 24, 2004, the BIA denied this motion (JA 1-3). On July 23, 2004, Petitioners filed a timely petition for review of the BIA's denial of their motion to reopen.

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[2] (...continued)
"Notice to Appear." *See generally Aguilar de Polanco v. U.S. Dep't of Justice*, 398 F.3d 199, 201 n.4 (2d Cir. 2005) (discussing changes enacted by Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546); *Rojas-Reyes v. INS*, 235 F.3d 115, 120 (2d Cir. 2000). As relevant to the issues presented in these joined petitions for review, these amendments make no practical difference.

Statement of Facts

A. Petitioners' Entry into the United States

Petitioners Mei Ying Li and Yu Liu Fing are natives and citizens of the Peoples Republic of China. (JA 40, 195, 324). They first entered the United States in April 1993. (JA 40, 195, 324).

Both petitioner submitted separate written applications for asylum and withholding of removal with the Immigration and Naturalization Service ("INS").[3] (JA 171-75; 257-81 with attachments). Petitioners based their asylum request on their claim that they violated the family planning policy of China. (JA 171-75; 257-81 with attachments). Specifically, the female petitioner asserted that she left China because she did not want to abide by the family planning policy and that she wants to have as many children in the future as she desires. (JA 172). The male petitioner stated that he would be persecuted for violating the family planning policy because he presently has two U.S. citizen children, based on his religion and also because he left China without permission. (JA 260, 266-67).

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[3] The INS was abolished effective March 1, 2003, and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002. See Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to the Bureau of Immigration and Customs Enforcement ("ICE"). *Id.* For convenience, this brief will refer throughout to the INS.

B. The Deportation Proceedings

On or about April 8, 1993, the INS issued an OSC to Mr. Fing. (JA 324-26). The INS issued an NTA to Mrs. Li on or about October 14, 1997. (JA 195-96). Both Petitioners were charged as aliens present in the United States without being admitted or paroled, or who have arrived in the United States without inspection. (JA 195-96; 324-26). The male petitioner was deportable at the time of entry pursuant to INA § 241(a)(1)(B) because he entered the United States without being inspected by an immigration officer. (JA 324-26). The female petitioner was removable pursuant to INA § 212(a)(6)(A)(i) because she entered the United States without being paroled or admitted after being inspected by an immigration officer. (JA 195-96).

After several continuances, a combined removal and deportation hearing, and hearing on the asylum petitions, was held before the Immigration Judge ("IJ") on November 8, 2000 (hereinafter "Deportation/Removal/Asylum Hearing").

1. Testimony of Mrs. Li

On direct examination, petitioner testified among other things that she got married when she was 17 years old but that she did not register her marriage because she was underage at the time. (JA 76). She further explained that she had a wedding ceremony in the United States in 1995. (JA 78-79). She also testified that her religion was Catholic. (JA 77-78). She reported that she had two

United States citizen children – a girl and a boy. (JA 78). Petitioner further stated that she entered the United States in 1993. (JA 79).

Petitioner claimed that she was persecuted by the government based on being forced to have an abortion. (JA 80-81). She claimed that she went in to a hospital for a check-up and that she was arrested and thereafter forced to have an abortion. (JA 81-82). She claims that she was fined $5,000 by the Chinese government because she was pregnant underage. (JA 82). Asked why she needed to apply for asylum in the United States, petitioner said that she believed she would be jailed if she were to return to China. (JA 82).

On cross-examination, INS trial counsel questioned petitioner regarding several dates contained in her applications. (JA 84-87). Petitioner testified that she never told the asylum officer that she left China because she wanted to avoid the family planning policy because she was never asked that question. (JA 89). Petitioner admitted that she never detailed the fact that she claimed to have undergone a forced abortion in China in her asylum application or in her amended personal affidavit. (JA 90, 155-56). Petitioner also conceded that she did not have a receipt for the fine she allegedly was issued. (JA 91).

2. Testimony of Mr. Fing

On direct examination, petitioner testified among other things that he got married when he was 20 years old but

that he did not register his marriage because he was underage at the time. (JA 95). He further explained that he had a wedding ceremony at a church in the United States in 1995. (JA 96-97). He also testified that his religion was Catholic. (JA 97-98). He further reported that he had two United States citizen children – a girl and a boy. (JA 96). Petitioner further stated that he entered the United States in 1993. (JA 98).

Petitioner claimed that he was persecuted by the government based on being married underage and also because his wife was forced to have an abortion. (JA 98-100). Asked why he needed to apply for asylum in the United States, petitioner said that he believed she would be jailed if he were to return to China. (JA 100).

On cross-examination, Petitioner admitted that he never detailed the fact that his wife claimed to have undergone a forced abortion in China and that neither he nor his wife had an abortion certificate. (JA 100-02).

C. The IJ's Decision

The IJ issued an oral ruling on November 8, 2000, denying petitioners' asylum petitions, and their requests for withholding of removal and CAT relief. (JA 39-53). The IJ also denied petitioners' request for voluntary departure. (JA 52).

The IJ began her ruling by noting that petitioners admitted the allegations in their respective charging documents. (JA 40).

After summarizing the hearing testimony and the applicable law, the IJ found that petitioners' testimony in support of their asylum claims was not credible based on inconsistencies in the record. (JA 46). Specifically, the IJ found that petitioners' testimony was inconsistent with their asylum applications in that neither application explains that a forced abortion took place at the hands of the Chinese government. (JA 46-48). The IJ concluded that, because petitioners could not meet their burden of proof as to their asylum claims, they also could not make out a claim for withholding of removal.

The IJ also rejected petitioners's claims that they were persecuted based on their religion. The IJ found that they provided no detail, specifics or corroboration for their claims and that their testimony was not credible on this point.[4] (JA 49-50). In sum, the IJ concluded that, because petitioners could not meet their burden of proof as to the asylum claims, they also could not make out a claim for withholding of removal. Finally, the IJ concluded that petitioners also could not establish a claim for relief under the CAT because there was no evidence that it was more likely than not that they would be singled out for torture by the government upon return to the People's Republic of China. (JA 51).

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[4] The IJ concluded that, because of the glaring inconsistencies in the record, the male petitioner had filed a frivolous application and was thus barred from any relief. (JA 50-51).

D. The BIA Decisions

On January 3, 2003, in separate orders, the BIA affirmed the decision of IJ Hom.[5] (JA 233-37). As to the male petitioner, the BIA concluded that his asylum claim was not credible because he did not provide sufficient explanation for his failure to include the fact that his wife allegedly had undergone a forced abortion in China. (JA 233-34). The BIA also concluded that the male petitioner's asylum claim based on his fear of persecution for violating the family planning policy in China was not supported by the record and in any event was not objectively reasonable. (JA 234-35).

As to the female petitioner, the BIA concluded that her asylum claim was not credible because she did not provide sufficient explanation for her failure to include the fact that she had undergone a forced abortion in China. (JA 236). As such, the BIA concluded that petitioner's claim that she suffered past persecution was not credible and thus she could not establish eligibility for asylum or withholding of removal based on the abortion. (JA 236-37). The BIA also concluded that the female petitioner's asylum claim based on her fear of persecution for violating the family planning policy in China was not supported by the record and in any event was not objectively reasonable. (JA 236-37).

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[5] Neither petitioner challenged the IJ's denial of their CAT relief. (JA 233-37).

Petitioners never petitioned this Court to review the BIA's decisions.

E. The BIA's Decision on the Motion to Reopen

On March 7, 2003, Petitioners moved to reopen their case before the BIA, claiming ineffective assistance of counsel under *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). On June 24, 2004, the BIA denied petitioners' motion to reopen and issued a written opinion. (JA 1-3). In its opinion, the BIA explained that petitioners' claim appeared to be against their former attorney, Andrew Wilson, and against Xiong He of AmeProfessional Group. With respect to Mr. He, the BIA concluded that there was no evidence in the record establishing that He or the AmeProfessional Group ever acted as petitioners' legal representative or that they were affiliated with Andrew Wilson. (JA 2).

As to petitioners' claim against their former counsel, the BIA held that petitioners failed to comply with the procedural requirements of *Matter of Lozada* because the record indicated that they filed their motion to reopen on the same day they gave their former counsel notice of their ineffective assistance of counsel claim. (JA 2). This, the BIA held, did not comply with the *Lozada* requirement that counsel be given an opportunity to respond *before* allegations of ineffectiveness are presented to the Board. (JA 2). The BIA further explained that the letter to petitioners' former counsel did not appear to sufficiently inform him of the allegations being made against him. (JA 2). The BIA also held that the female petitioner's affidavit

in support of the motion to reopen asserted only general allegations against her former counsel and failed to submit additional evidence to support her allegations or to demonstrate how her former counsel's conduct affected the outcome of her case. (JA 2-3). In sum, the BIA concluded that petitioners failed to establish that they suffered prejudice as a result of their former counsel's conduct, such that they would have prevailed at their hearing before the IJ or on appeal to the BIA. (JA 2-3). The BIA also concluded that petitioner failed to state any "exceptional circumstances" that would warrant granting her motion *sua sponte*. (JA 3).

SUMMARY OF ARGUMENT

The BIA properly exercised its discretion to deny petitioners' motion to reopen. The BIA carefully reviewed the record and addressed petitioners' arguments.

Petitioner's *Lozada* claim is meritless with respect to the alleged actions of Mr. He, an interpreter whom petitioners do not claim to be either an attorney or their accredited "legal representative" under immigration regulations. Although this Court has recognized that ineffective assistance of counsel may implicate the fundamental fairness of immigration proceedings, and hence due process, it has always linked that right to "counsel." Moreover, 8 CFR § 292.1 identifies a list of people recognized by immigration officials as being permitted to represent aliens. In short, that regulation stands for proposition that "counsel" means a concrete list of people. That list, however, does not include

unaccredited lay representatives, and it certainly does not include people who regularly engage in an immigration practice. Petitioners essentially ask this Court to recognize a new right, to be free of ineffective assistance of non-counsel. Such a novel right would know no limits, since it could conceivably justify reopening whenever an alien relies to his or her detriment on faulty advice from any third party. In sum, because Mr. He does not fall into any of the categories listed within § 292.1, he cannot be viewed as "counsel" in the fifth amendment sense.

With respect to claimed deficiencies in their attorney's representation, the BIA did not abuse its discretion in finding that petitioners failed to comply with the procedural requirements for bringing a *Lozada* claim. By filing their motion to reopen with the BIA on the same day they sent former counsel a letter alleging his ineffectiveness, petitioners failed to comply with the *Lozada* requirement that counsel be afforded an opportunity to respond *before* allegations of ineffectiveness are presented to the BIA. This sensible rule gives parties and their counsel an opportunity to sharpen the issues in review, and to present administrative authorities immediately with a fully joined controversy. To endorse petitioners' contrary view would be to encourage a system in which immigration authorities would be compelled to hold motions to reopen in abeyance for some indefinite period, awaiting some response from former counsel. This Court need not determine how long in advance former counsel must be notified, given the complete absence of any time gap in the first place. It

should be left to the BIA, in appropriate cases, to develop such measures.

Finally, even if there were some error in the BIA's decision holding that petitioners failed to comply with the procedural requirements outlined in *Lozada*, that error was effectively cured when the BIA addressed the merits of their motion. In that opinion, the BIA addressed and rejected petitioners' substantive claims, (JA 2-3), and thus petitioners received a substantive ruling from the BIA on their case.

ARGUMENT

I. THE BIA ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONERS' MOTION TO REOPEN

A. Governing Law and Standard of Review

This Court reviews the BIA's discretionary denial of a motion to reopen for an abuse of discretion." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001). The abuse of discretion standard is a difficult one to satisfy. *Id.* "An abuse of discretion may be found . . . where the [challenged] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the [agency] has acted in an arbitrary or capricious manner." *Zhao*, 265 F.3d at 93 (citations omitted). *See also Morgan v. Gonzales*, 445 F.3d 549, 551 (2d Cir.

2006) (holding that IJ abuses discretion if decision rests on legal error or clearly erroneous factual finding, or if decision "cannot be located within the range of permissible decisions") (internal quotation marks omitted).

In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), the BIA held that an alien must satisfy certain evidentiary requirements before he can pursue a claim for ineffective assistance of counsel. An alien must submit: (1) an affidavit setting forth in detail the agreement with former counsel concerning what action would be taken and what counsel did or did not represent in this regard; (2) proof that the alien notified former counsel of the allegations of ineffective assistance and allowed counsel an opportunity to respond; and (3) if a violation of ethical or legal responsibilities is claimed, a statement as to whether the alien filed a complaint with any disciplinary authority regarding counsel's conduct and, if a complaint was not filed, an explanation for not doing so. This Court adopted the *Lozada* test in *Esposito v. INS*, 987 F.2d 108, 110-11 (2d Cir. 1993), and reaffirmed the rule in *Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 47 (2d Cir. 2005).

"Deportation hearings are civil, not criminal, proceedings." *Rabiu v. INS*, 41 F. 3d 879, 882 (2d Cir. 1994) (citing *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 241 (2d Cir. 1992)). Therefore, in order for petitioners to prevail on a claim of ineffective assistance of counsel, they "must show that [their] counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *Id.* at 882. In order

to show a deprivation of fundamental fairness, petitioners must allege facts sufficient to show "that competent counsel would have acted otherwise," and "that [they were] prejudiced by [their] counsel's performance." *Id.* (citing *Esposito*, 987 F.2d at 111 (internal quotation marks omitted)). A reviewing court uses its own judgment to determine whether an attorney's conduct was ineffective. *Id.* In order for petitioners to show that their attorney's poor performance caused them actual prejudice, "[they] must make a prima facie showing that [they] would have been eligible for the relief requested and that [they] could have made a strong showing in support of [their] application." *Id.* at 883 (citing *Miranda-Lores v. INS*, 17 F.3d 84, 85 (5th Cir. 1994)).

Where an appeal turns on the sufficiency of the factual findings underlying the BIA's determination that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004); *Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004). "Because asylum and withholding of removal determinations require intensive factual inquiries that appellate courts are ill-suited to conduct, the INA tightly circumscribes our review of factual findings," and the scope of this Court's review under the substantial evidence test is "exceedingly narrow." *Xiao Ji Chen v. Gonzales*, 2006 WL 3690954, at *12 (2d Cir. Dec. 7, 2006) (internal quotation marks omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

B. Discussion

The BIA acted well within its broad discretion in denying petitioners' motion to reopen based on their claim of ineffective assistance of counsel. Petitioners' claim that the BIA erred as a matter of law by refusing to consider their claim as to Xiong He ("Mr. He") is without merit and should be rejected by this Court. Moreover, the BIA did not abuse its discretion in denying petitioners' motion to reopen by concluding that they failed to comply with the procedural requirements of *Lozada* and that nonetheless they failed to establish that they were prejudiced by their former counsel.

1. The BIA Correctly Concluded That Petitioners Could Not Assert an Ineffective-Assistance-of-Counsel Claim with Respect to Mr. He, Because Mr. He Was Not Their Attorney or Legal Representative

Petitioners first argue that the Board erred "as a matter of law" by effectively concluding that *Lozada* claims can

be advanced only against a party's attorney or legal representative. Pet. Br. at 25-28. In support of their argument, they cite a number of cases from the Ninth Circuit for the proposition that a claim of ineffective assistance of counsel may be asserted against a non-legal representative. *Id.* For a number of reasons, this claim fails.

First and foremost, petitioners' claim misconceives the legal basis for recognizing ineffective-assistance-of-counsel claims. Although the Sixth Amendment right to counsel applies only to criminal, and not civil, proceedings, courts have recognized that the Due Process Clause of the Fifth Amendment protects the "fundamental fairness" of immigration proceedings, and that the effectiveness or ineffectiveness of counsel must be judged against that standard. *See Rabiu,* 41 F.3d at 882. In one of the earliest cases discussing the test, however, this Court noted that Congress has expressly delineated that right by statute:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) *by such counsel, authorized to practice in such proceedings, as he shall choose.*

8 U.S.C. § 1362 (emphasis added); *Paul v. U.S. INS*, 521 F.2d 194, 198 (2d Cir. 1975). The Attorney General has promulgated detailed regulations outlining who may

appear as counsel for an alien, including attorneys, law students subject to close attorney supervision, specially BIA-accredited representatives from nonprofit organizations, and accredited foreign officials. *See* 8 C.F.R. § 292.1(a)(1), (2), (4), (5), (6); 8 C.F.R. § 1.1(f). The regulations provide that "[a]n appearance *shall be filed* on the appropriate form by the attorney or representative appearing in each case." 8 C.F.R. § 292.4 (a) (emphasis added). Moreover, "[a] notice of appearance in application or petition proceedings must be signed by the applicant or petitioner to authorize representation in order for the appearance to be recognized by the Service." *Id.*

In carefully circumscribed situations, these regulations also permit other "reputable individuals" to represent aliens before immigration authorities. 8 C.F.R. § 292.1(a)(3). Such a person must be of "good moral character," § 292.1(a)(3); must be appear "on an individual case basis, at the request of the person entitled to representation," § 292.1(a)(3)(i); must appear "without direct or indirect remuneration and file[] a written declaration to that effect," § 292.1(a)(3)(ii), and must generally have a "pre-existing relationship or connection" with the alien, § 292.1(a)(3)(iii). The regulations include the important caveat that immigration authorities must affirmatively permit such lay representation, and that unaccredited immigration services do *not* qualify. Specifically, the regulations permit a lay representative to appear provided that:

> [h]is appearance is permitted by the official before whom he wished to appear (namely, a special inquiry officer, district director, officer-in-charge, regional commissioner, the Commissioner, or the Board), *provided that such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so.*

8 C.F.R. § 292.1(a)(3)(iv) (emphasis added). Under the Attorney General's regulations, then, someone like Mr. He could not have represented petitioners before the IJ or the BIA without express official approval – which, of course, they neither sought nor obtained, since an attorney appeared on their behalf. Moreover, even if one were to accept petitioners' representations that they paid Mr. He to prepare their written asylum applications, the regulations would have absolutely barred Mr. He from appearing on petitioners' behalf.

The central problem with petitioners' claim, therefore, is that they allege ineffective assistance of counsel by a person who could not have legally appeared on their behalf as "counsel," as that term has been defined by regulation. To accept petitioners' argument, one would have to accept the premise that the Constitution is offended whenever an alien relies to his detriment on bad advice from a third party who is not representing him before immigration authorities. A more slippery slope would be hard to imagine. Nearly every alien relies on advice from someone or another when preparing a claim.

If an alien can reopen his proceedings based on misplaced reliance on his interpreter, or an immigration service, he might also complain about poor advice received from any other purportedly knowledgeable person in his community – whether community organizers; religious leaders; or owners of that multitude of businesses which are frequented by immigrant populations, ranging from check-cashing, to money-wiring, to international mailing, to travel agencies. And what of reliance on bad advice from other aliens, whether friends or family members, acting out of altruism or for cash, who based that advice on personal experiences with the immigration system? The permutations, and hence the potential for abuse, is limitless.

Because the right in question here is the effective assistance of *counsel*, the Court must draw some meaningful line between those third parties who can and cannot be considered "counsel" for due process purposes. The most reasonable, and the only readily policed, line is one that includes attorneys and agency-recognized "legal representatives" as "counsel" whose ineffectiveness may give rise to due process concerns, and leaves other third parties on the other side of the line. In support of their argument to the contrary, petitioners cite a line of Ninth Circuit cases. For the reasons that follow, those cases do not justify relief here.

First, at least some of the Ninth Circuit cases involve the exceptional situation in which the alien erroneously believed that the third party upon whom he relied was an attorney. *See Albillo-DeLeon v. Gonzales*, 410 F.3d 1090,

1099 (9th Cir. 2005); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999). These cases therefore fit comfortably within the longstanding rule that, in the Sixth Amendment context, a person is entirely deprived of "counsel" if he is represented by a person "who, for failure to meet substantive bar admission requirements, has never been admitted to the practice of law in any jurisdiction." *United States v. Novak*, 903 F.2d 883 (2d Cir. 1990); *see also Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983). Because petitioners do not argue here that they ever wrongly believed Mr. He to be an attorney, or even an accredited legal representative, they cannot avail themselves of this rule.

To the extent that petitioners rely on Ninth Circuit case law for the broader notion that third-party ineffectiveness can give rise to due process violations, they considerably overread those decisions. The Ninth Circuit itself has described its cases as standing for a much more limited proposition: "ineffective assistance of counsel, where a nonattorney *engaged in fraudulent activity* causes an essential action in his or her client's case to be undertaken ineffectively, may *equitably toll the statute of limitations*." *Albillo-DeLeon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005). This rule contains two essentially qualifiers, neither of which applies here: (1) the nonattorney must have engaged in some sort of fraudulent activity, and (2) the "ineffective assistance" of the nonattorney may justify equitable tolling of a limitations period.

As noted above, the classic fraudulent activity considered by the Ninth Circuit involves a non-attorney

posing as an attorney. Thus, in *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999), the alien had been duped into believing that he had hired an attorney. Lopez contacted an office called "Attorney Services," where he met a man named Noel "who stated that he was an attorney and would assist Lopez." *Id.* at 1098. Lopez paid Noel for "legal representation"; Noel filed an asylum application on Lopez's behalf; and Noel (falsely) represented to Lopez that he would appear on his behalf at various immigration proceedings, at which Lopez's attendance was not needed. *Id.* After Lopez was ordered deported *in absentia* due to his failure to appear at his asylum hearing, Lopez contacted separate counsel and eventually learned that Noel was only a notary public – not an attorney. *Id.* at 1099. Lopez filed a motion to reopen based on Noel's fraud, but by this time, the time period for filing a motion to reopen had passed. The IJ held that Lopez had failed to comply with *Lozada* by failing to prove that he had served Noel with a complaint, and by failing to file a complaint with the state bar. *Id.* The BIA, in turn, refused to equitably toll the limitations period. *Id.* The Ninth Circuit granted Lopez's petition for review, holding that the Noel's fraud equitably tolled the limitations period, and that the motion to reopen was therefore timely. *Id.* at 1100. Further, the court noted without elaboration that Lopez's ineffective-assistance claim "appear[ed] to have merit." *Id.*

The Ninth Circuit faced a similar situation involving a fake lawyer in *Albillo-DeLeon*. Albillo-DeLeon retained Jovel Mendez, "who he believed to be an attorney, to file on his hehalf a motion to reopen proceedings" under a

provision of the INA. 410 F.3d at 1094. Mendez never filed the motion, but falsely assured Albillo-DeLeon that he had done so. *Id.* Only after obtaining his own file from the Immigration Court through a FOIA request did Albillo-DeLeon learn that Mendez was in fact an immigration consultant and notario, and that he had not filed his motion. *Id.* As in *Lopez*, Albillo-DeLeon retained a real lawyer, who filed an out-of-time motion to reopen, asking that his tardiness be excused on the basis of Mendez's mendacity. The IJ and BIA refused to do so, relying on the time bar, but the Ninth Circuit held that equitable tolling was justified in light of Mendez's fraudulent conduct. *Id.* at 1099-1100.

Although the Ninth Circuit has extended this rule to cases in which the alien knew that the person he had hired was not an attorney, each of those cases (like *Lopez* and *Albillo-DeLeon*) involved some other variant of fraud, in addition to mere ineffectiveness. Thus, in *Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002), the alien, Fajardo, submitted an application for political asylum prepared by Pedro Serra, someone the alien referred to as an "immigration paralegal." *Id.* at 1019. Serra also accompanied Fajardo to her interview before the Asylum Officer. *Id.* After her application was denied, the INS issued an order to show cause which was sent to Fajardo at 909 S. Bonnie Brae, Los Angeles, CA 90006 – the residence of Serra. *Id.* Fajardo failed to appear at her deportation hearing and she was ordered deported in abstentia. *Id.* Serra filed a motion to reopen stating that Fajardo "did not know" of the original hearings and that is why she failed to appear. *Id.* There was no mention of

Serra's failure to notify Fajardo of the hearing in the motion to reopen. *Id.* The motion to reopen was denied because the IJ concluded she did not appear due to a failure to notify INS of her change of address. *Id.* Thereafter, Fajardo's cousin referred her to Michael Levin ("Levin"), a family friend. *Id.* Levin is not a lawyer, but Fajardo paid Levin $1,000 for the appeal. In March 1998, the BIA denied the appeal as untimely. *Id.* As in *Lopez* and *Albillo-DeLeon*, Fajardo retained a real lawyer, who filed an out-of-time motion to reopen, asking that her in abstentia deportation order be rescinded based on the misconduct of Serra and Levin. *Id.* at 1021 The IJ and BIA refused to do so, relying on the time bar, but the Ninth Circuit held that equitable tolling was justified in light of the "deceptive actions" of Serra and Levin. *Id*. at 1022.

Petitioners' reliance on these Ninth Circuit cases for the proposition that a claim of ineffective assistance of counsel may be asserted against a non-legal representative fails because there is no evidence that Mr. He engaged in some sort of fraudulent or deceptive activity, or that the "ineffective assistance" of Mr. He justifies equitable tolling of a limitations period. (JA 209-12). Rather, the evidence establishes that Mr. He was retained as a professional translator/interpreter for petitioners. His role was to translate certain documents on behalf of petitioners and there has been no claim that Mr. He engaged in any fraud in that regard.

Unless this Court agrees with petitioners that due process is implicated by the ineffective assistance of non-

counsel third parties, their claim with regard to Mr. He must fail. As a factual matter, Mr. He clearly does not fall within any of the category of individuals or organizations entitled to represent a party before an IJ or the BIA. *See* 8 C.F.R. §§ 1.1(j), 292.1. Moreover, nothing in the record supports a finding that Mr. He was authorized to act on behalf of petitioners or that he was retained for such purposes. *See Arango-Arandondo v. INS*, 13 F.3d 610, 614-15 (2d Cir. 1994) (discussing how regulations permit non-legal representative to act on behalf of an alien). Indeed, petitioners do not claim that Mr. He ever held himself out as their representative or that he was authorized to act on their behalf. In fact, petitioners were represented by counsel before the IJ and had ample opportunity to correct any mistakes in their asylum application and personal affidavits. They chose not to do so. The fact that petitioners paid Mr. He for his translation services does not alter this conclusion, or even the (contested) allegation that he completed the forms in error or misadvised them how to proceed at their hearing does not alter this fact. (JA 171-75; 257-64).

Petitioners' claim that Mr. He is affiliated with their former counsel is also without merit and contrary to the record. The fact that Mr. He may have referred petitioners to their former counsel for representation does not transform him into a representative for purposes of a *Lozada* claim. Moreover, as explained above, the fact that Mr. He acted as an interpreter for petitioners does not bring him within the purview of an ineffective assistance of counsel claim. Such a holding by this Court would create a far reaching rule that anyone who did anything on

behalf of an alien, regardless of how minor or remote such an act might be, could be subjected to an ineffective assistance of counsel claim. As such, the BIA did not abuse its discretion when it concluded that Mr. He did not act as petitioners legal representative and that Mr. He was not affiliated with petitioners' former counsel.[8]

2. The BIA Reasonably Concluded That Petitioners Failed To Comply with *Lozada*'s Procedural Requirements

Petitioners next argue that the BIA abused it discretion in finding that they failed to comply with the procedural requirements of *Lozada*. The BIA held, however, that petitioners failed to comply with the requirement that they notify their former counsel of the allegations made and provide him with an opportunity to respond. (JA 2). Specifically, the BIA concluded that, because petitioners only gave their former counsel notice on the same day they filed their motion to reopen, former counsel was not given an opportunity to respond. (JA 2). *See Lozada*, 23 I. & N. Dec. at 639 ("Furthermore, *before* allegations of

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[8] Although petitioners assert that they have fully complied with the procedural requirements of *Lozada* and they were prejudiced by Mr. He's conduct, that issue is not properly before this Court as the BIA never addressed that issue. As such, in the event that this Court concludes that the BIA abused its discretion in finding that Mr. He did not act as petitioners' representative or that he was affiliated with petitioners' prior counsel, this Court should remand the matter to the BIA for consideration.

ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond."). (emphasis added). Such a finding by the BIA is reasonable, particularly since one of the primary goals of the procedural requirements is to provide counsel with an adequate opportunity to respond to any allegations made by a former client. Moreover, this *Lozada* requirement makes it far more likely that counsel will have responded by the time the BIA first looks at the motion to reopen, thereby enabling it to decide the matter with both sides of the story available to it. Here, it was not unreasonable for the BIA to conclude that giving notice on the same day that a motion reopen was being filed was inadequate.[9]

The First Circuit has reached just that conclusion in similar circumstances. In *Asaba v. Ashcroft*, 377 F.3d 9 (1st Cir. 2004), the court affirmed the BIA's denial of a *Lozada* motion which the alien had filed just three days after mailing his allegations of misconduct to his prior attorney. Under those circumstances, the court held that

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[9] Petitioners argue that any noncompliance in this regard should be excused, on the ground that former counsel has never responded and that "substantial compliance" has therefore been made. But such post hoc rationalizations ignore the fact that enforcing the procedural requirements of *Lozada* serves the systemic goal of encouraging prospective compliance with those rules, and that greater compliance makes it more likely that parties will present a fully joined record to the BIA in a *Lozada*-based motion to reopen.

the alien had not complied with the *Lozada* requirements.[10] *See also Lara v. Trominski*, 216 F.3d 487, 498 (5th Cir. 2000) (explaining that the general application of *Lozada* requirements is not an abuse of discretion); *Hamid v. Ashcroft*, 336 F.3d 465, 469 (6th Cir. 2003) (explaining that sound policy reasons support compliance with the procedural requirements of *Lozada*); *Dakane v. U.S. Att'y Gen.*, 371 F.3d 771, 775 (11th Cir. 2004) (recognizing that a petitioner claiming ineffective assistance of counsel in a motion to reopen must show "substantial, if not exact, compliance with the procedural requirements of *Lozada*").

The BIA also explained that the notice given by petitioners only provided their former counsel with general allegations of what they claimed he did wrong and what actions they claim should have been undertaken by former counsel. There was no specific evidence or information outlining to petitioners' former counsel what they alleged served as a basis for their ineffective assistance of counsel claim. (JA 2). Other than Petitioners' unsupported assertions that their former counsel "did not review or prepare the case," (JA 2), there was no evidence in the record that their former counsel was sufficiently advised of the allegations against him. (JA 219-23). It cannot be said that the BIA's decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only

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[10] *See also Visoka v. U.S. Attorney General*, 2006 WL 3307471 (11th Cir. Nov. 15, 2006) (unpub.) (affirming BIA's denial of an alien's *Lozada* motion, filed on same day alien mailed allegations of misconduct to prior attorney).

summary or conclusory statements. The BIA explained in detail that petitioners failed to properly apprise their former counsel of the allegations against him and thus they cannot say that the BIA has acted in an arbitrary or capricious manner.

Furthermore, even if there were some error in the BIA's decision finding that petitioners failed to comply with the procedural requirements for bringing a *Lozada* claim, that error was effectively cured when the BIA issued its written opinion denying Petitioners' motion to reopen on the merits. In that opinion, the BIA addressed Petitioners' substantive claim, (JA 3), and thus Petitioners received a substantive ruling from the BIA on their case. Specifically, the BIA concluded that petitioners failed to demonstrate how their former counsel may have affected the outcome of their case. This Court has previously held that "in order to prevail on an ineffective assistance of counsel claim, an alien must show that [her] counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing." *Jian Yun Zheng*, 409 F.3d at 46. Petitioners provided minimal, if any, concrete evidence that their former counsel's performance caused them actual prejudice. In essence, petitioners are attempting to use the *Lozada* forum as a mechanism to overturn the IJ's adverse credibility finding – a decision they failed to timely appeal to this Court.[11]

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[11] There is no claim by petitioners before this Court that their former counsel failed to file a timely appeal of the BIA's denial of their asylum and withholding claims.

Moreover, petitioners claim in this Court that, had their former counsel adequately prepared them for their hearing, thereby permitting them to explain why their documentary submissions contradicted their oral testimony, they would have been prima facie eligible for asylum. However, the IJ provided petitioners with ample opportunity to explain the numerous inconsistencies within the record and they failed to do so. (JA 76-102). Petitioners could have, and should have, explained to the IJ that they their asylum applications and personal declarations failed to contain the female petitioner's claim of a forced abortion due to error on the part of their representatives. Indeed, the female petitioner was questioned at length regarding the omission of her alleged forced abortion and fine as a result of the abortion on both her asylum application and her amended personal affidavit. (JA 78-89).

The IJ cogently explained that petitioners' documentary evidence and oral testimony contradicted each other as to the timing of the alleged forced abortion and as to any fine based on the forced abortion. (JA 41-48) The IJ further explained that neither petitioner provided any details of the alleged forced abortion. (JA 41-48). The IJ also explained that petitioners claim that they were persecuted based on their religion was not credible based on inconsistencies between the documentary evidence and oral testimony and thus was a fabricated claim by both petitioners. (JA 48-50). In sum, petitioners have not shown that their former counsel's performance was so ineffective as to have impinged upon the fundamental fairness of their hearing. *Jian Yun Zheng*, 409 F.3d at 46.

Finally, other than Petitioners' unsupported assertions to the contrary, there is no evidence in the record that the BIA failed to review petitioners' evidence in reaching its conclusion that Petitioners were not prejudiced by their former counsel's conduct. While the BIA must consider the evidence submitted before it, *see Chen v. Gonzales*, 417 F.3d 268, 275 (2d Cir. 2005) (explaining that failure to consider all evidence deprives Court of the ability to adequately review a claim), there is no basis for concluding that the BIA failed in that task here. *See Xiao Ji Chen*, mem. op. at 28-29 n.17 (unless record compels otherwise, an IJ is presumed to have taken into account all of the evidence before him). Accordingly, the BIA here properly exercised its discretion to deny Petitioners' motion to reopen.

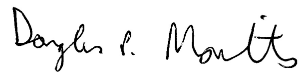
CONCLUSION

For each of the foregoing reasons, the petitions for review should be denied.

Dated: January 17, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

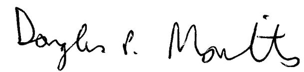


DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,777 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



DOUGLAS P. MORABITO
ASSISTANT U.S. ATTORNEY

Addendum

8 C.F.R. § 1.1(j) Definitions

(j) The term representative refers to a person who is entitled to represent others as provided in §§ 292.1(a)(2), (3), (4), (5), (6), and 292.1(b) of this chapter.

8 C.F.R. § 292.1 Representation of others

(a) A person entitled to representation may be represented by any of the following:

(1) Attorneys in the United States. Any attorney as defined in § 1.1(f) of this chapter.

(2) Law students and law graduates not yet admitted to the bar. A law student who is enrolled in an accredited law school, or a law graduate who is not yet admitted to the bar, provided that:

(i) He or she is appearing at the request of the person entitled to representation;

(ii) In the case of a law student, he or she has filed a statement that he or she is participating, under the direct supervision of a faculty member, licensed attorney, or accredited representative, in a legal aid program or clinic conducted by a law school or non-profit organization, and that he or she is appearing without direct or indirect remuneration from the alien he or she represents;

(iii) In the case of a law graduate, he or she has filed a statement that he or she is appearing under the supervision of a licensed attorney or accredited representative and that he or she is appearing without direct or indirect remuneration from the alien he or she represents; and

(iv) The law student's or law graduate's appearance is permitted by the official before whom he or she wishes to appear (namely an immigration judge, district director, officer-in-charge, regional director, the Commissioner, or the Board). The official or officials may require that a law student be accompanied by the supervising faculty member, attorney, or accredited representative.

(3) Reputable individuals. Any reputable individual of good moral character, provided that:

(i) He is appearing on an individual case basis, at the request of the person entitled to representation;

(ii) He is appearing without direct or indirect remuneration and files a written declaration to that effect;

(iii) He has a pre-existing relationship or connection with the person entitled to representation (e.g., as a relative, neighbor, clergyman, business associate or personal

friend), provided that such requirement may be waived, as a matter of administrative discretion, in cases where adequate representation would not otherwise be available;

and

(iv) His appearance is permitted by the official before whom he wished to appear (namely, a special inquiry officer, district director, officer-in-charge, regional commissioner, the Commissioner, or the Board), provided that such permission shall not be granted with respect to any individual who regularly engages in immigration and naturalization practice or preparation, or holds himself out to the public as qualified to do so.

(4) Accredited representatives. A person representing an organization described in § 292.2 of this chapter who has been accredited by the Board.

(5) Accredited officials. An accredited official, in the United States, of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien's consent.

(6) Attorneys outside the United States. An attorney other than one described in § 1.1(f) of this chapter who is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he/she resides and who is engaged in such practice. Provided that he/she represents persons only in matters outside the geographical confines of the United States as defined in

section 101(a)(38) of the Act, and that the Service official before whom he/she wishes to appear allows such representation as a matter of discretion.

(b) Persons formerly authorized to practice. A person, other than a representative of an organization described in § 292.2 of this chapter, who on December 23, 1952, was authorized to practice before the Board and the Service may continue to act as a representative, subject to the provisions of § 292.3 of this chapter.

(c) Former employees. No person previously employed by the Department of Justice shall be permitted to act as a representative in any case in violation of the provisions of 28 CFR 45.735-7.

(d) Amicus curiae. The Board may grant permission to appear, on a case-by-case basis, as amicus curiae, to an attorney or to an organization represented by an attorney, if the public interest will be served thereby.

(e) Except as set forth in this section, no other person or persons shall represent others in any case.

ANTI-VIRUS CERTIFICATION

Case Name: Li v. BCIS

Docket Number: 04-3921-ag(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 1/17/2007) and found to be VIRUS FREE.

____
Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: January 17, 2007