13-2377

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD PIERRE LABISSIERE, aka GERARD PIERRE EVANS LABISSIERE,

Petitioner,

v.

ERIC HOLDER, JR., U.S. Attorney General,

Respondent.

ON REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1

I, Beth Werlin, attorney for Amicus Curiae, the American Immigration Council, certify that we are a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of our stock.

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Dated: March 21, 2014

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I. INTRODUCTION[1]

Amicus curiae American Immigration Council proffers this brief in support of Petitioner's claim that he complied with the procedural requirements for an ineffective assistance of counsel claim. While failure to comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), can lead to the forfeiture of an ineffective assistance of counsel claim, this Court has made clear that only "substantial compliance" with the requirements is necessary. *Yi Long Yang v. Gonzales*, 478 F.3d 133, 143 (2d Cir. 2007). In this case, the Board of Immigration Appeals (BIA or Board) incorrectly held that Petitioner, who was *pro se* and detained at the time of his appeal, did not satisfy the substantial compliance threshold.

The meaning and scope of "substantial compliance" is of utmost importance, and this Court should provide clear guidance directing that the phrase should be broadly interpreted. Where attorneys provide ineffective assistance of counsel, noncitizens who are not deportable or who are eligible for relief nonetheless may be ordered removed. Thus, this Court has found that ineffective assistance of counsel may deprive a person of a fair opportunity to present his or her case and

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[1] *Amicus curiae* states pursuant to Fed. R. App. P. 29(c) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief.

rise to the level of a due process violation. *See*, *e.g.*, *Rabiu v. INS*, 41 F.3d 879, 883 (2d Cir. 1994) (holding that an attorney's ineffective assistance "impinged upon the fundamental fairness of the proceeding, thereby depriving [petitioner] of his right to due process of law"). Yet, where an individual does not satisfy *Lozada*'s procedural requirements, immigration courts, the BIA and even this Court may decline to consider the merits of an ineffective assistance of counsel claim. Minor procedural missteps should not preclude consideration of colorable claims, especially where ineffective assistance is clear on the record, where the individual claiming ineffective assistance is *pro se* and/or detained, or where he has provided a valid explanation for failure to comply with the requirements.

II. STATEMENT OF INTEREST

The American Immigration Council ("Council") is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council has a longstanding commitment to meaningful access to counsel for noncitizens. The Council has advocated for a fair process for noncitizens seeking a remedy for ineffective assistance of counsel, appearing as *amicus curiae* in leading agency decisions on the issue, *Matter of Compean*, 25 I&N Dec. 1 (AG 2009) and *Matter of Assaad*, 23 I&N Dec. 553

(BIA 2003). Further, the Council previously has appeared as *amicus* before this Court on issues relating to the interpretation of federal immigration laws and policies. *See*, *e.g.*, *Sampathkumar v. Holder*, No. 11-4342 (2d Cir. amicus brief submitted Jan. 8, 2014); *Turkmen v. Ashcroft*, No. 13-0981 (2d Cir. amicus brief submitted Oct. 4, 2013).

III. ARGUMENT

A. A Substantial Compliance Standard Fulfills the Objectives of the *Lozada* Procedural Requirements.

The statutory right to counsel in immigration proceedings "is 'an integral part of the procedural due process to which [noncitizens are] entitled.'" *Iavorski v. INS*, 232 F.3d 124, 128 (2d Cir. 2000) (quoting *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993)). As this Court has noted, "[t]he importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake—the right to remain in this country, to reunite a family, or to work." *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008). Yet, far too often, noncitizens facing removal receive inadequate representation. *Id.* at 596 (noting the "disturbing frequency" of ineffective assistance of counsel in immigration cases before the Court).

As a result, the BIA has established a framework through which individuals who have been prejudiced by their attorneys' conduct may raise ineffective assistance of counsel claims. *See Matter of Assaad*, 23 I&N Dec. at 556-57 (discussing *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)).[2] According to the BIA, this framework, first announced by the BIA in *Matter of Lozada*, is necessary to achieve the following objectives: "to provide a basis for evaluating the many claims presented, to deter baseless allegations, and to notify attorneys of the standards for representing aliens in immigration proceedings." *Matter of Assaad*, 23 I&N Dec. at 556. The *Lozada* framework encompasses three procedural requirements:

> [1] A motion based upon a claim of ineffective assistance of counsel should be supported by an affidavit of the allegedly aggrieved respondent attesting to the relevant facts. . . .
>
> [2] Furthermore, before allegations of ineffective assistance of former counsel are presented to the Board, former counsel must be informed of the allegations and allowed the opportunity to respond. Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion.
>
> [3] Finally, if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate

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[2] Ineffective assistance of counsel claims frequently are raised through motions to reopen, but they also may be raised on direct appeal to the BIA. *See, e.g., Garcia-Martinez v. Dep't of Homeland Sec.*, 448 F.3d 511 (2d Cir. 2006) (requiring compliance with *Lozada* in ineffective assistance claim raised on direct appeal).

> disciplinary authorities regarding such representation, and if not, why not.

Matter of Lozada, 19 I&N Dec. at 639.

This Court has required only "substantial compliance" with, not "slavish adherence" to the *Lozada* requirements. *Yang*, 478 F.3d at 142-43. The Court's rejection of a strict, mechanistic application of the procedural requirements reflects sound policy. It accounts for the unique circumstances of each case and the practical challenges some noncitizens face in complying with the requirements; it minimizes unnecessary litigation and expense by resolving cases on the merits earlier in the process and avoiding unnecessary appeals; and it upholds the integrity of the removal process by striving to ensure that all noncitizens in removal proceedings have a fair opportunity to be heard.

A flexible approach is especially important when evaluating compliance with the third requirement, the filing of a bar complaint.[3] Rather than deterring

[3] Notably, the *Lozada* decision itself mandates the filing of a bar complaint only "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities" and provides that an alternative might be sufficient (i.e., providing an explanation as to why no complaint has been filed). *Matter of Lozada*, 19 I&N Dec. at 639. Nonetheless, subsequent Board decisions have found a number of explanations for not filing a bar complaint insufficient. *See In re Mohammed Jahangir*, A079-077-555, 2010 WL 2846312 (BIA Jun. 17, 2010) (unpublished) ("The respondent's statement that he did not 'have any idea to complain against the attorney' is not a sufficient explanation for failing to file a complaint . . . ."); *In re Roberto Perez-de la Torre*, A078-988-622, 2008 Immig. Rptr. LEXIS 8750, *3 (BIA Aug. 8, 2008) (unpublished) ("[T]he respondent's explanation that he did not file a complaint because prior counsel's failure to act

ineffective assistance claims in immigration court and reinforcing standards of practice for immigration lawyers, this requirement instead may encourage frivolous bar complaints that overwhelm state bars, making it impracticable "to identify meritorious complaints in order to impose sanctions." *Matter of Compean*, 24 I&N Dec. 710, 737 (AG 2009), *vacated*, 25 I&N Dec. 1 (AG 2009) (citing Committee on Immigration & Nationality Law, Association of the Bar of the City of New York, Comment on *Proposed Rule for Professional Conduct for Practitioners – Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (Jul. 30, 2008), filed (Sep. 29, 2008)). Further, there is no reason to believe that bar complaints provide immigration courts with additional evidence regarding ineffective assistance claims. Immigration judges and the BIA are unlikely to wait to receive corroboration of a claim prior to the ruling in a particular removal case.

While *Lozada*'s first and second procedural requirements—the affidavit and notice to prior counsel—regularly play a more effective role in helping to evaluate ineffective assistance claims, a strict and mechanistic application of these requirements in all cases also elevates form over substance. Providing and

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was innocent and unintentional, is not a reasonable explanation."); *In re Jose Escolero Ventura*, A037-913-413, 2007 Immig. Rptr. LEXIS 4449, *3 (BIA Jul. 6, 2007) (unpublished) ("The respondent's explanation that he did not file a bar complaint because he is detained and compliance may not avail him is not satisfactory, especially since he is represented by present counsel.").

reporting on notice to former counsel may be futile in certain cases, if, for example, a practitioner has already been disbarred or disciplined, or if an individual is unable to locate a former attorney. Similarly, denying a claim due to an insufficiently detailed affidavit would serve no purpose where a *prima facie* case of ineffective assistance is clear on the record.

This Court has "upheld the application of [the *Lozada*] requirements to screen ineffective assistance claims where appropriate," *Twum v. INS*, 411 F.3d 54, 59 (2d Cir. 2005), but as discussed, strict application of the requirements is not always necessary to achieve *Lozada's* objectives of deterring meritless claims or providing a basis to evaluate ineffective assistance claims. "Rather than over-deterrence, our aim has been balance. We have recognized that requiring strict compliance increases the danger of foreclosing those claims that are colorable and may be meritorious." *Piranej v. Mukasey*, 516 F.3d 137, 142 (2d Cir. 2008).

B. The Court Should Interpret "Substantial Compliance" with the *Lozada* Procedural Requirements Broadly.

This Court evaluates ineffective assistance of counsel claims for substantial, rather than strict, compliance with *Lozada*'s procedural requirements. Where, for example, the facts establishing ineffective assistance of counsel are "clear on the face of the record," the Court has found substantial compliance with *Lozada* based on the record itself. *See Yang*, 478 F.3d at 143. However, the Court has not clearly articulated the meaning and scope of "substantial compliance." As a result, the

BIA and immigration judges incorrectly interpret the phrase and, consequently, refuse to review potentially meritorious ineffective assistance of counsel claims. This poses special concern in cases where prior counsel's error is clear on the record, the noncitizen trying to present the claim is *pro se* and/or detained, or the noncitizen has provided valid reasons for failing to fully comply with *Lozada*. A broad interpretation of the phrase would strike the proper balance between continued adherence to the *Lozada* precedent and this Court's expressed concern with ensuring that individuals with meritorious claims have the opportunity to be heard.

1. Where Ineffective Assistance Is Clear on the Record, Further Compliance with the *Lozada* Requirements Should Be Waived.

In *Yang*, the Court recognized that a Petitioner had substantially complied with *Lozada*, without any discussion of how he met the specific procedural requirements, because ineffective assistance was "clear on the face of the record." 478 F.3d at 142-43.[4] Where the record clearly demonstrates ineffectiveness, the BIA should not evaluate compliance with the procedural requirements, but rather

[4] Similarly, the Ninth Circuit found that *Lozada* requirements may be waived altogether where the record plainly establishes ineffective assistance. *See, e.g.*, *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000) ("The facts are plain on the face of the administrative record—no need of an affidavit to establish them."); *cf. Rranci v. Att'y Gen. of the United States*, 540 F.3d 165, 174 (3d Cir. 2008) (waiving the bar complaint requirement where "the policy concerns on which [it] is based have been served").

should review the merits of the claim. To do otherwise would reflect an inefficient use of administrative resources and constitute arbitrary agency action.

Significantly, the Court and the BIA have applied the holding of *Yang* too narrowly, unnecessarily limiting the reach of the decision. For example, in this case, the BIA suggested that it could waive *Lozada* requirements only following "a clear *and obvious*" demonstration of ineffective assistance. *See* A.R. at 4 (citing *Yang*) (emphasis added). Such a heightened standard is especially inappropriate in a *pro se* appeal.[5] *See infra* III.B.2.a.

In other cases, the Court has tied a finding that ineffective assistance of counsel is "clear on the face of record" to the precise factual scenario in *Yang*, (i.e., where petitioner's former attorney had already been disbarred and an immigration judge relied upon the former attorney's credibility in the case). *See De Nong Chen v. Gonzales*, 247 Fed. Appx. 281, 283 (2d Cir. 2007) (unpublished) (holding that ineffectiveness was not clear on the record even though the BIA found the former attorney's brief to be deficient, noting that "facts here are distinct from the circumstances presented in *Yi Long Yang*"). Although other unpublished decisions have not interpreted *Yang* so narrowly, *see, e.g., Sabaratnam v. Holder*, 428 Fed. Appx. 110, 112 (2d Cir. 2011) (unpublished) (holding that concession by former

[5] Petitioner initially made his ineffective assistance claim in a *pro se* appeal to the BIA. Pet. Br. at 11. After Petitioner filed a *pro se* petition for review, this Court ordered the appointment of counsel. *Id.* at 13.

attorney on the record satisfied all *Lozada* requirements), in the absence of further guidance, the BIA may continue to misinterpret *Yang* as applying only in cases presenting the same narrow factual scenario.

In addition, while noncitizens claiming ineffective assistance of counsel have the burden of establishing their claims, immigration courts and the BIA need not ignore the administrative records before them. A review of the record for clear indications of ineffective assistance not only serves the interests of justice, but may further the goals set forth by the BIA in adopting the *Lozada* framework, by providing a basis to evaluate former counsel's ineffectiveness, encouraging adjudication only of meritorious claims, and efficiently resolving the case.

2. Immigration Judges and the BIA Should Consider Whether Relevant Factors Prevented Full Compliance With the *Lozada* Requirements.

Clear evidence of ineffective assistance should lead courts to waive some or all of *Lozada*'s procedural requirements. But the Court's focus on "balance" and not "over-deterrence," *see Piranej*, 516 F.3d at 142, suggests that certain other arguably imperfect attempts to comply also should be sufficient.[6] As in the

[6] Although some unpublished cases have suggested that strict compliance with *Lozada* is unnecessary only if ineffective assistance is "plain on the face of the administrative record," *see, e.g.*, *Samartsiev v. Holder*, 349 Fed. Appx. 586, 588 (2d Cir. 2009) (unpublished), the Court previously has applied a substantial compliance standard more generally. *See Jian Yun Zheng v. United States Dep't of Justice*, 409 F.3d 43, 46-47 (2d Cir. 2005) (applying the substantial compliance standard without consideration of whether the alleged ineffectiveness was plain on the record).

Petitioner's case, an individual may simply state in his motion that he has provided notice to a former attorney, rather than enclosing evidence of such notice. *See* A.R. at 4. Another individual may attempt to provide a detailed affidavit outlining the errors of a former attorney but not answer all of the reviewing court's questions about the scope of their agreement. *See, e.g.*, *Piranej*, 516 F.3d at 142-44. Or an individual may be unable to provide notice to his former attorney of specific allegations of ineffectiveness because he did not have access to the complete record of proceedings in his case. *See, e.g., Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1125 (9th Cir. 2000). Striking the proper balance—providing appropriate screening without deterring meritorious claims—calls for a more careful analysis in close cases, especially where an individual is prevented from fully complying with the *Lozada* requirements through no fault of his or her own.

a. Ineffective Assistance Claims by *Pro Se* and/or Detained Individuals

Unrepresented noncitizens with no legal training must navigate the same procedures that attorneys use when claiming that a client's former attorney provided ineffective assistance. Although the Court sometimes notes when individuals who fail to properly comply with *Lozada* act under the guidance of a new attorney, *see, e.g.*, *Garcia-Martinez*, 448 F.3d at 513 (noting that Petitioner "was duly represented by new counsel" when he raised an ineffective assistance claim); *Patel v. Holder*, 349 Fed. Appx. 668, 669 (2d Cir. 2009) (unpublished)

(same), it has not squarely addressed whether an individual's *pro se* status should impact the evaluation of imperfect *Lozada* compliance. *See Kun Guang Zheng v. INS*, 227 Fed. Appx. 88, 89 (2d Cir. 2007) (unpublished) (finding no substantial compliance by petitioner who was unrepresented at the Court of Appeals, but failing to discuss petitioner's representation status before the BIA); *Wen Xing Gao v. BIA*, 193 Fed. Appx. 10, 11 (2d Cir. 2006) (unpublished) (same). A broad interpretation of "substantial compliance" for *pro se* filers[7] would help ensure an opportunity for individuals without attorneys to be heard, without undermining the goals set forth in *Lozada*.

Attorneys play an important role in immigration proceedings. *See supra* p. 3. A 2011 study of New York Immigration Courts found that individuals represented by attorneys were 500 percent more likely to obtain relief from removal than those without legal representation. New York Immigrant

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[7] It appears that the BIA repeatedly has denied *pro se* ineffective assistance of counsel claims based upon failure to comply with the *Lozada* procedural requirements. *See, e.g.*, *In re Gabriel Herrera-Herrera*, A098-493-214, 2009 Immig. Rptr. LEXIS 4841, *1 (BIA Dec. 18, 2009) (unpublished) ("He has failed, however, to comply with the procedural requirements for an ineffective assistance of counsel claim as set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)."); *In re Jean Daniel Maurice*, A043-676-328, 2009 Immig. Rptr. LEXIS 2047, *2-*3 (BIA Aug. 20, 2009) (unpublished) (declining to equitably toll the motion to reopen deadline because respondent had not provided proof of notice to former counsel); *In re John Marcus Ramsay*, A030-062-041, 2007 Immig. Rptr. LEXIS 8213, *3 (BIA Feb. 22, 2007) (unpublished) ("We find that the respondent has not complied with the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1[st] Cir. 1988).").

Representation Study, *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings* 3 (2012), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf. The Executive Office for Immigration Review (EOIR) recognizes that counsel "usually identify and argue [] issues better on appeal," and "reduce[] procedural errors and enable[] the BIA to provide a more effective and timely case review." Dep't of Justice, EOIR Office of Legal Access Programs, http://www.justice.gov/eoir/probono/probono.htm.

Accordingly, unrepresented individuals are at a disadvantage during the complex process of pursuing an ineffective assistance of counsel claim. As an initial matter, the procedural requirements are not laid out in the immigration statute or regulations, but instead are set forth in a BIA legal opinion. The opinion uses legal terms—such as "affidavit" and "disciplinary authorities"—that may not be commonly understood by non-attorneys, particularly noncitizens who may be entirely new to the U.S. legal system. They require individuals to describe legal and professional errors and identify the appropriate disciplinary authority—which may not even be geographically close to where the lawyer is practicing or where the person lives—for their former attorneys. *Cf. Figeroa v. INS*, 886 F.2d 76, 79 (4th Cir. 1989) (describing adolescent Petitioner who could not speak English as "no doubt unaware of any action he might be able to take against [his former

attorney], such as filing either a complaint with the state bar or a legal malpractice claim").

In fact, this court has noted that "our removal system relies on IJs [immigration judges] to explain the law accurately to pro se [noncitizens]. Otherwise, such [individuals] would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal." *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *see also Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) ("It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006))). Immigration judges and the BIA should follow this approach when evaluating substantial compliance with *Lozada* requirements.

Not only is it unrealistic for some *pro se* litigants to understand the language of *Lozada* itself, but good faith efforts to comply with *Lozada* are further complicated by a host of sometimes contradictory decisions assessing compliance or substantial compliance with the procedural requirements. The Petitioner in this case was faulted for failing to "submit proof" that he provided notice of his claims to his former attorney; instead, he had stated his compliance with the notice requirement in his motion. A.R. at 4. Yet, it is unclear how an unrepresented

litigant should have known what the Board would require.[8] The *Lozada* decision itself only requires that the former attorney be "informed of the allegations and allowed the opportunity to respond." 19 I&N Dec. at 639. *See also Zheng*, 409 F.3d at 45 (noting that the BIA held the petitioner had not complied with *Lozada* "because she *did not indicate in her motion* whether she had informed her former attorney of her allegation." (emphasis added)). Similarly, although this Court found compliance with *Lozada* where a petitioner provided notice to his former attorney the day before filing a motion to reopen, *see Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993), the panel in a subsequent unpublished decision found no substantial compliance with *Lozada* following a similarly timed notice. *See Shan Xi Liu v. Holder*, 413 Fed. Appx. 317, 318-19 (2d Cir. 2011) (unpublished). Full adherence to *Lozada*, as defined by a patchwork of BIA and Court of Appeals decisions, is simply unrealistic for many unrepresented individuals unless courts uniformly take a broader view of what constitutes compliance.

The situation is exacerbated by the additional difficulties faced by individuals detained in immigration custody. These noncitizens are less likely to have legal representation. *See, e.g.*, New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* 3 (2011), *available at*

[8] Petitioner's notice to former counsel arguably complies even with a strict interpretation of the *Lozada* requirements. *See* Pet. Br. at 22-23.

http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (finding that 60 percent of detained immigrants in New York City were unrepresented, compared to 27 percent of non-detained immigrants in proceedings). Detainees also may be housed or transferred far from home, separating them from friends and family and complicating their ability to access documents they need for their cases. *See* Human Rights Watch, *A Costly Move* 13-16 (2011), *available at* http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf.

Due to the special difficulties faced by prisoners, federal courts have recognized that filings by *pro se*, detained individuals may be subject to more lenient procedural requirements. *See, e.g.*, *Houston* v. *Lack*, 487 U.S. 266, 270-71 (1988) (noting the "unique" circumstances of prisoners who "cannot take the steps other litigants can take to monitor the processing of" mailed documents and therefore holding that *pro se* prisoner's notice of appeal would be deemed filed when delivered to prison authorities); *Arango-Aradondo v. INS*, 13 F.3d 610, 612 (2d Cir. 1994) (under Fed. Rule of App. Proc. 25(a), detained noncitizen's petition for review was filed when placed in a prison mailbox).[9] Immigration judges and the BIA also should take into account the unique challenges faced by detained individuals when evaluating *Lozada* compliance.

[9] Even those individual in immigration custody who have attorneys will face unusual challenges in communicating with their attorney and others during the filing of a *Lozada* claim. *See, e.g.*, Human Rights Watch, *A Costly Move*, at 13-14.

It would not serve the goals described in *Lozada* to ignore the merits of a claim based on a minor or inadvertent procedural misstep, especially when there is a *prima facie* case for ineffective assistance. While deterring meritless claims is a valid goal, an overly mechanistic application of *Lozada* also could deter an individual who simply does not know how to file a bar complaint or faces other logistical challenges from filing a meritorious claim. This court should provide clear guidance that *prima facie* valid claims should not be dismissed due to procedural errors without providing an opportunity for litigants, especially those for whom compliance with *Lozada* is unusually onerous, to supplement their initial filings. *See infra* III.B.2.c.

b. Other Ineffective Assistance Claims

There are other situations where it is appropriate to require only substantial compliance, even if the person claiming ineffective assistance is represented by new counsel and/or is not detained. Competent attorneys pursuing ineffective assistance claims on behalf of their clients also may have a variety of valid reasons for not complying strictly with the *Lozada* requirements.

For example, as in *Yang*, the former attorney may already be suspended or disbarred, *see* 478 F.3d at 143, making a bar complaint pointless and a waste of money for litigants paying for an attorney's services. It also may be impossible or extremely time-consuming to obtain key documents, needed to provide a detailed

affidavit or accurate bar complaint, because they are in the possession of a former attorney or the government. *See*, *e.g. Ontiveros-Lopez*, 213 F.3d at 1125. Thus, in order to meet filing deadlines, an attorney may need to file a motion or appeal brief before he or she has time to fully comply with *Lozada*'s procedural requirements, especially if the attorney was retained shortly before the deadline.

Even where a filing deadline is not imminent, other circumstances may warrant a motion to reopen based on ineffective assistance before complying fully with *Lozada*. For example, an individual who is facing imminent removal might need to file an emergency motion to reopen with an application for a stay of removal in order to halt the removal pending consideration of an ineffective assistance claim. *See* Pet. Mot. to Reopen, Dk. #69-2, at 21-22 ("Respondent is not able to wait to receive a response . . . given the imminent threat of deportation and the Board's policy and practice that it will not consider a stay request unless it is filed in conjunction with a motion to reopen. BIA Practice Manual, Chapter 6.3 (Oct. 1, 2013)."); *cf. Figeroa*, 886 F.2d at 79 (noting that an attorney "probably recognized that neither a disciplinary proceeding nor a civil action against [client's former counsel] would have provided petitioner with much assistance in terms of his deportation proceedings. Their energies were properly directed at stopping the deportation . . .").

In situations like these, declining to consider the merits of ineffective assistance claims would not further the goals of *Lozada*. Courts should not cut off the process for the sake of efficiency where litigants with *prima facie* cases of ineffective assistance can provide a valid explanation for missing information and/or are working actively to obtain additional information. A broad interpretation of substantial compliance with *Lozada* also should permit examination of the underlying ineffectiveness claim in these cases.

c. Immigration Judges and the BIA May Request Additional Evidence

Employing a broad interpretation of substantial compliance will not require courts to reopen or permit appeals in cases in which there is insufficient evidence of ineffective assistance of counsel or credible evidence of bad faith. Instead, in cases where there appears to be a *prima facie* case of ineffective assistance of counsel, the agency can request or allow a litigant to provide supplemental evidence or can conduct a hearing in order to obtain more information.

This Court has not directly addressed how the BIA or the immigration courts should respond to *pro se* litigants or others who cannot comply with the procedural requirements of *Lozada*.[10] In the absence of a published decision, there is no uniform rule as to whether *pro se* litigants must be informed of specific

[10] However, the Court has recognized that certain ineffective assistance claims may be remanded for additional fact-finding where substantial compliance with *Lozada* was not established in an initial motion to reopen. *See Piranej*, 516 F.3d at 138-39.

deficiencies in their *Lozada* complaints and given an opportunity to remedy them. While some respondents have received time on appeal to "perfect" *Lozada* claims, *see In re Maria Salazar Lucho*, A097-916-033, 2006 Immig. Rptr. LEXIS 16997, *3 (BIA Jun. 6, 2006) (unpublished), the BIA has declined in other cases to review evidence submitted after the motion to reopen, *see In re Barbara Robinson*, A079-072-823, 2009 Immig. Rptr. LEXIS 2329, *2-*4 (BIA Sep. 2, 2009) (unpublished). In some cases, the BIA has informed the noncitizen about the possibility of filing a new motion to reopen, *see In re Kewarn Riylon Stephenson*, A042-260-632, 2005 Immig. Rptr. LEXIS 15895, *2-*3 (BIA Dec. 12, 2005) (unpublished), while in others, the BIA has merely noted respondent's failure to comply with *Lozada* without providing any additional information, *see supra* n.7. While factual and legal distinctions might account for the range of different treatment in these particular cases, a more uniform system would ensure that individuals with valid ineffective assistance claims, but a poor understanding of *Lozada*, do not slip through the cracks.

The First Circuit has encouraged immigration courts to accept additional information in ineffective assistance cases despite a noncitizen's initial lack of compliance with *Lozada*. *Saakian v. INS* involved a *pro se* litigant who made "persistent efforts" to have his ineffective assistance claim heard. 252 F.3d 21, 26 (1st Cir. 2001). The Court held that the BIA would deny due process by upholding

the denial of a motion to reopen for failure to comply with *Lozada* without "inviting [the petitioner] to remedy its deficiencies or noting [his] entitlement to file a second, properly supported motion." *Id*. This Court should also adopt a more flexible approach, providing *pro se* litigants and others who provide valid reasons for failure to fully comply with *Lozada* with an opportunity to supplement their filings.

IV. CONCLUSION

This Court has recognized that, where ineffective assistance of counsel is clear on the record, a person need only establish substantial compliance with the *Lozada* requirements. Yet further contours of "substantial compliance" remain undefined in published decisions, and in the absence of guidance, the BIA narrowly interprets, and misconstrues, the phrase. A published decision, broadly interpreting the term "substantial compliance" would better ensure that the treatment of ineffective assistance of counsel claims achieves an appropriate balance—deterring meritless claims without depriving individuals with valid claims of a meaningful opportunity to be heard.

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Dated: March 21, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) and 29(d) because this brief contains 5,139 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Additionally, this brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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Dated: March 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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