Assistance of Counsel in Removal Proceedings (II)


The Acting Director of the Executive Office for Immigration Review shall initiate rulemaking procedures as soon as practicable to evaluate the pre-Compean framework for reviewing claims of ineffective assistance of counsel in deportation proceedings and to determine what modifications should be proposed for public consideration.

Pending the issuance of a final rule, the Board of Immigration Appeals and Immigration Judges should apply the pre-Compean standards to all pending and future motions to reopen removal proceedings based upon ineffective assistance of counsel.

June 3, 2009

OPINION IN REMOVAL PROCEEDINGS
MATTER OF ENRIQUE SALAS COMPEAN, RESPONDENT
MATTER OF SYLLA BANGALY, RESPONDENT
MATTER OF J-E-C-, ET AL., RESPONDENTS


In Lozada, the Board established the procedural requirements for filing a motion to reopen deportation (now removal) proceedings based upon a claim of ineffective assistance of counsel and required the alien to show that he was prejudiced by the action or inaction of his counsel. Lozada, 19 I. & N. Dec. at 639–40. The Compean decision acknowledged that the Lozada framework had “largely stood the test of time,” having been expressly reaffirmed by the Board fifteen years after its initial adoption. Compean, 24 I. & N. Dec. at 731; see also Assaad, 23 I. & N. Dec. at 556–57 (affirming the application of Lozada to removal proceedings). Nonetheless, Compean both rejected Lozada’s constitutional reasoning and
ordered the Board not to rely upon the *Lozada* framework, even as a
discretionary matter. Instead, *Compean* set forth, as an exercise of the
Attorney General’s administrative discretion, a new substantive and
procedural framework for reviewing all such claims and a formulation of
the prejudice showing different from that followed by many courts, de-
spite the limited discussion of the *Lozada* framework in the briefs submit-
ted in *Compean* by the parties and amici curiae. *Compean* further provid-
ed that this new administrative framework should apply “henceforth,”
even though the decision acknowledged it might conflict with the *Loza-
da*-based approach taken by a number of federal courts of appeals. See

For the reasons stated herein, I have determined that it is appropriate to
reconsider the January 7, 2009 decision.

Establishing an appropriate framework for reviewing motions to reopen
immigration proceedings based on claims of ineffective assistance of
counsel is a matter of great importance. I do not believe that the process
used in *Compean* resulted in a thorough consideration of the issues in-
volved, particularly for a decision that implemented a new, complex
framework in place of a well-established and longstanding practice that
had been reaffirmed by the Board in 2003 after careful consideration. The
preferable administrative process for reforming the *Lozada* framework
is one that affords all interested parties a full and fair opportunity to
participate and ensures that the relevant facts and analysis are collected
and evaluated.

Accordingly, I direct the Acting Director of the Executive Office for
Immigration Review to initiate rulemaking procedures as soon as practi-
cable to evaluate the *Lozada* framework and to determine what modifica-
tions should be proposed for public consideration. After soliciting infor-
mation and public comment, through publication of a proposed rule in the
Federal Register, from all interested persons on a revised framework for
reviewing claims of ineffective assistance of counsel in immigration
proceedings, the Department of Justice may, if appropriate, proceed with
the publication of a final rule.

In *Compean*, the introduction of a new procedural framework depended
in part on Attorney General Mukasey’s conclusion that there is no consti-
tutional right to effective assistance of counsel in removal proceedings.
Because that conclusion is not necessary either to decide these cases
under pre-Compean standards or to initiate a rulemaking process, this Order vacates Compean in its entirety. To ensure that there is an established framework in place pending the issuance of a final rule, the Board and Immigration Judges should apply the pre-Compean standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed. The litigating positions of the Department of Justice will remain unaffected by this Order. Finally, prior to Compean, the Board itself had not resolved whether its discretion to reopen removal proceedings includes the power to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after a final order of removal had been entered. Given the absence of a pre-Compean standard of the Board to apply pending issuance of a final rule, I resolve the question in the interim by concluding that the Board does have this discretion, and I leave it to the Board to determine the scope of such discretion.

Turning to the merits of the particular cases at issue, I find that, for the reasons stated by the Board, its orders denying reopening of the three matters reviewed in Compean were appropriate under the Lozada framework and standards as established by the Board before Compean. On that basis, I concur with Attorney General Mukasey’s decision to affirm the Board’s decisions denying reopening of these matters. Compean, 24 I. & N. Dec. at 743.

ERIC H. HOLDER, JR.
Attorney General