No. 06-1675

In the Supreme Court of the United States

RAMZAN ALI LAKHANI, PETITIONER

v.

PETER D. KEISLER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying petitioner's motion to reopen removal proceedings based on a claim of ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted at 223 Fed. Appx. 351. The decision of the Board of Immigration Appeals (Pet. App. 4-5) is unreported. The prior decision of the court of appeals (Pet. App. 9-18) is not published in the *Federal Reporter* but is reprinted at 162 Fed. Appx. 350. The prior decision of the Board of Immigration Appeals (Pet. App. 6-8) and the decision of the immigration judge (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2007. The petition for a writ of certiorari was filed on June 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, immigration to the United States is controlled by the issuance of immigrant visas, which are obtained from consular officers abroad under the authorization of the Secretary of State. See 8 U.S.C. 1154, 1201 (2000 & Supp. V 2005). The Attorney General has discretion to relieve an alien already in the United States of the need to travel abroad to obtain an immigrant visa by adjusting the alien's status to that of lawful permanent resident, if the alien was lawfully admitted to the United States and meets other requirements. See 8 U.S.C. 1255(a).[1] A favorable exercise of discretion to adjust an alien's status is "a matter of grace, not of right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

One of the requirements for adjustment of status is that "an immigrant visa [be] immediately available to [the alien] at the time his application [for adjustment] is filed." 8 U.S.C. 1255(a)(3). An alien can satisfy that requirement by showing that a spouse who is a United States citizen has filed a visa petition for the alien's benefit and that the petition has been approved. See *INS* v. *Miranda*, 459 U.S. 14, 15 (1982) (per curiam). An alien may not obtain adjustment of status, however, on the basis of a marriage entered into while "administrative or judicial proceedings are pending regarding the alien's

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[1] Petitioner relies on 8 U.S.C. 1255(i), which enables a qualified alien to obtain adjustment of status without regard to how the alien entered the United States. See Pet. 2-3, 7, 24. Because petitioner appears to have been lawfully admitted to the United States, it is not clear why he has invoked Section 1255(i) rather than Section 1255(a). Which provision is the applicable one, however, has no bearing on the question presented in the certiorari petition.

right to be admitted or remain in the United States," unless the alien "establishes by clear and convincing evidence * * * that the marriage was entered into in good faith * * * and [that] the marriage was not entered into for the purpose of procuring the alien's admission as an immigrant." 8 U.S.C. 1255(e). A regulation that implements 8 U.S.C. 1255 (2000 & Supp. V 2005) provides that, in the case of an alien who has been placed in removal proceedings, "the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file." 8 C.F.R. 1245.2(a)(1).

With exceptions not relevant here, an alien may file a motion to reopen removal proceedings "within 90 days of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005). In *In re Arthur*, 20 I. & N. Dec. 475 (1992), the Board of Immigration Appeals (BIA) held that it would thereafter decline to grant motions to reopen for consideration of applications for adjustment of status "based upon unadjudicated visa petitions which fall within the ambit of [Section 1255(e)]," *id.* at 479—*i.e.*, in cases in which the marriage was entered into while removal proceedings were pending and the visa petition had not been approved. The BIA reaffirmed that holding in *In re H-A-*, 22 I. &. N. Dec. 728 (1999). In *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (2002), however, on the basis of revisions to policies governing motions to reopen, the BIA modified the holdings of *Arthur* and *H-A-*. *Velarde-Pacheco* held that, when a marriage has been entered into while removal proceedings are pending and a petition for an immigrant visa has not yet been adjudicated, "a properly filed motion to reopen *may* be granted, in the exercise of discretion, to provide an alien an oppor-

tunity to pursue an application for adjustment [of status]," but only if (1) the motion "is timely filed"; (2) the motion "is not numerically barred"; (3) the motion "is not barred * * * on * * * procedural grounds"; (4) the motion "presents clear and convincing evidence indicating a strong likelihood that the [alien's] marriage is bona fide"; and (5) the Immigration and Naturalization Service (INS)[2] "does not oppose the motion or bases its opposition solely on *Matter of Arthur*" (*i.e.*, on the ground that the visa petition has not been adjudicated). *Id.* at 256 (emphasis added).

2. Petitioner is a native and citizen of Pakistan. In October 1998, he entered the United States as a nonimmigrant visitor. He was authorized to remain in the United States for one year, but remained in the country beyond that period. In March 2003, DHS commenced removal proceedings against petitioner, alleging that he was present in the United States in violation of law (see 8 U.S.C. 1227(a)(1)(B)). Petitioner conceded that he was removable, but applied for withholding of removal, on the ground that he would be persecuted if he returned to Pakistan. In the alternative, petitioner requested voluntary departure. Pet. App. 10, 19-20.

3. a. The immigration judge (IJ) found that petitioner was removable; denied his application for withholding of removal; and denied his request for voluntary departure. Pet. App. 19-30. In denying his application for withholding of removal, the IJ found that petitioner's evidence, including his testimony, was incredible, and that, even if it was not, it did not satisfy the legal stan-

[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security (DHS). See 6 U.S.C. 251 (Supp. V 2005).

dards for withholding of removal. *Id.* at 20-28. In denying his request for voluntary departure, the IJ found that petitioner was disentitled to that form of relief because he had submitted fraudulent evidence. *Id.* at 28-29.

b. In November 2003, petitioner appealed the IJ's decision to the BIA. Pet. App. 12. While the appeal was pending, petitioner filed a motion to remand the case to the IJ for consideration of his application for adjustment of status. *Id.* at 8. The application was based on petitioner's marriage to a United States citizen in August 2004 and his wife's filing of a petition for an immigrant visa on petitioner's behalf. *Ibid.* In support of the motion to remand, petitioner submitted a copy of a visa petition that, according to petitioner, had been filed with DHS at the same time that he filed the motion to remand with the BIA (*i.e.*, in October 2004). Admin. R. 7, 64-65. Petitioner also submitted copies of other documents as evidence of his marriage.[3] DHS opposed the motion to remand, on the ground that petitioner had not presented clear and convincing evidence that his marriage was *bona fide*. Supp. Admin. R. 78 (citing *Velarde-Pacheco*, *supra*).

The BIA dismissed petitioner's appeal and denied his motion to remand. Pet. App. 6-8. In dismissing petitioner's appeal, the BIA affirmed the IJ's findings and

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[3] The documents included an apartment-lease agreement for April through November 2004 that was signed by petitioner and his wife; their marriage license; undated photographs apparently taken at the wedding; petitioner's wife's driver's license, which reflected that she had taken his surname; a September 2004 notice from a utility company, which also reflected that petitioner's wife had taken his surname; and credit cards indicating that petitioner and his wife had a joint account. Admin. R. 46-47, 49-60.

held that the IJ's conduct during the removal proceedings was not improper. *Id.* at 6-7. The BIA declined to consider whether the IJ erred in not granting a continuance based on a pending labor-certification application or lacked jurisdiction because the notice to appear was not issued by an authorized immigration officer, finding that neither issue had been pressed before or passed upon by the IJ. *Id.* at 8. In denying the motion to remand, the BIA explained that the requirements for a motion to remand are the same as those for a motion to reopen, and that a motion to remand for consideration of an application for adjustment of status, like a motion to reopen for that purpose, will not be granted when the alien's marriage to a United States citizen "was entered into after the commencement of proceedings" and the visa petition filed on behalf of the alien is "unadjudicated." *Ibid.* (citing *Arthur*, *supra*, and *H-A-*, *supra*). The BIA held that, because petitioner was married "after removal proceedings were initiated" and "there is no indication in the record or motion that the [visa petition] has been approved," petitioner "has not shown *prima facie* eligibility for adjustment of status." *Ibid.*

c. The court of appeals denied petitioner's petition for review. Pet. App. 9-18. The court rejected petitioner's contention that the IJ had violated his statutory and constitutional rights by failing to grant a continuance to allow petitioner to pursue relief related to his pending labor-certification application. *Id.* at 13-17.

4. In March 2006, petitioner filed a motion to reopen with the BIA. Pet. App. 4. The motion was based on the asserted "ineffective assistance of [petitioner's] prior counsel" and requested that the BIA remand the case to the IJ so that petitioner could "pursue adjustment of his status." Supp. Admin. R. 22, 25. In support of his

ineffective-assistance claim, petitioner alleged that prior counsel had filed the immigrant-visa petition with the wrong office (*i.e.*, "the Houston District Office of the U.S. Citizenship and Immigration Services" rather than "the Texas Service Center");[4] that the motion to remand filed by prior counsel was deficient (in some unspecified way); and that prior counsel had taken the wrong step after the motion to remand was denied (by filing a petition for review with the court of appeals rather than a motion to reconsider with the BIA). *Id.* at 23-24. In support of the motion to reopen, petitioner submitted additional evidence concerning his marriage.[5]

Petitioner also submitted a letter from prior counsel responding to the allegations of ineffective assistance. In the letter, prior counsel pointed out that, under *Velarde-Pacheco*, the BIA had no authority to remand the case because DHS opposed the motion to remand on the ground that petitioner had not established the *bona*

[4] In the motion to reopen, petitioner stated that his wife had re-filed the visa petition with the correct office in February 2006. Supp. Admin. R. 24; see *id.* at 100-101.

[5] With the exception of a September 2004 bank statement reflecting a shared account apparently established during that month, an October 2004 utility bill in the name of petitioner's spouse, and a December 2004 credit-card bill indicating that petitioner had purchased airline tickets for himself and his wife, Supp. Admin. R. 152-153, 160, 162-163, the new evidence was from 2005 and 2006 (*i.e.*, it postdated the filing of the motion to remand). The evidence from 2005 and 2006 included 2004 and 2005 tax returns jointly filed by petitioner and his wife; a one-year apartment-lease agreement dated May 2005 that was signed by petitioner and his wife; utility bills from June 2005 and January 2006 in petitioner's wife's name; an insurance card from September 2005 reflecting a shared automobile policy; bank statements from November 2005 and January 2006 reflecting a shared checking account; and notarized statements from relatives dated February 2006. Supp. Admin. R. 121-126, 135-136, 138-146, 148-151, 158-159, 166-168.

fides of his marriage; that the only basis for the ineffective-assistance claim was therefore that prior counsel had not submitted sufficient evidence that the marriage was *bona fide* (such that DHS would not have opposed the motion on the ground that it was not); and that prior counsel had submitted all the evidence that petitioner provided him. Supp. Admin. R. 117-118.

DHS opposed petitioner's motion to reopen. Pet. App. 4. It took the position that, even if prior counsel had submitted sufficient evidence of a *bona fide* marriage, it would have opposed the motion to remand on another ground—namely, that petitioner presented fraudulent evidence at the removal hearing. Supp. Admin. R. 4-5.

The BIA denied the motion to reopen. Pet. App. 4-5. It held that the motion was untimely, because the motion was not filed within 90 days of the BIA's prior decision, and that equitable tolling was unwarranted, because petitioner failed to establish that his prior counsel rendered ineffective assistance. *Id.* at 4 (citing 8 C.F.R. 1003.2(c) and *Fajardo* v. *INS*, 300 F.3d 1018 (9th Cir. 2002)). The BIA explained that "an attorney's tactical decisions in the preparation and presentation of an alien's case before the [BIA] do not rise to the level of ineffective assistance of counsel," and that, in this case, "former counsel's decision to submit a petition for review before the * * * Fifth Circuit instead of filing a motion to reopen or reconsider with the [BIA] was a tactical decision that does not amount to ineffective assistance of counsel." *Id.* at 5 (citing *Magallanes-Damian* v. *INS*, 783 F.2d 931, 934 (9th Cir. 1986)). The BIA also explained that petitioner had not "alleged that his prior counsel had additional documentation regarding the bona fides of his marriage that could have been

submitted with his motion to remand for adjustment of status." *Ibid.* Finally, the BIA explained that petitioner had not "established that his prior counsel committed ineffective assistance before the [BIA], based upon his assertion that his prior counsel filed his visa petition * * * with the improper office of the DHS." *Ibid.*[6]

5. The court of appeals denied petitioner's petition for review in an unpublished per curiam opinion. Pet. App. 1-3.

The court first rejected petitioner's contention that the BIA violated his due-process rights when it denied his motion to reopen based on his claim of ineffective assistance of counsel. Pet. App. 1-2. The court explained that petitioner's ineffective-assistance claim "relates to the denial of his motion to remand to pursue an adjustment of status"; that an application for adjustment of status "is a request for discretionary relief" and thus "is not a right protected by due process"; and that, "[b]ecause counsel's alleged deficiencies merely restricted [petitioner's] chance of obtaining discretionary relief," petitioner "had no due process right to effective assistance in pursuit of that relief." *Id.* at 2 (citing *Gutierrez-Morales* v. *Homan*, 461 F.3d 605, 609 (5th Cir. 2006)).

The court next rejected petitioner's contention that the BIA abused its discretion when it denied his motion to reopen based on his claim of ineffective assistance of counsel. Pet. App. 2-3. The court explained that the motion to reopen was untimely, because it was filed more than 90 days after the final administrative deci-

[6] DHS records reflect that, in May 2006, approximately one month after the BIA's decision denying the motion to reopen, the immigrant-visa petition filed on petitioner's behalf was approved.

sion, and that petitioner was not entitled to equitable tolling of the 90-day period, because he failed to establish ineffective assistance of counsel. *Ibid.* (citing 8 C.F.R. 1003.2(c)(2)).

ARGUMENT

Petitioner renews his contention (Pet. 15-26) that the BIA abused its discretion in denying his motion to reopen the removal proceedings based on his claim of ineffective assistance of counsel. The court of appeals correctly rejected that contention, and further review is unwarranted.

1. As an initial matter, there is no basis in this Court's decisions for concluding that aliens in removal proceedings have a due-process right to the effective assistance of privately retained counsel. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the Government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does *not* require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution, because counsel's ineffectiveness can be "imputed to the State" only when the Constitution itself requires the provision of counsel. *Id.* at 754 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)); see also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085-1086 (2007) (counsel's miscalculation of limitations period did not support equitable tolling, particularly in post-conviction context, where there is no constitutional right to counsel, even though State had

appointed counsel for prisoner in that case); *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary review by state supreme court of affirmance of conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant in every suit and every administrative proceeding is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted); accord *Stroe* v. *INS*, 256 F.3d 498, 499-501 (7th Cir. 2001) (Posner, J.). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962); see also *Lawrence* v. *Florida*, 127 S. Ct. at 1085-1086.[7]

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[7] In *In re Assaad*, 23 I. & N. Dec. 553 (B.I.A. 2003), review dismissed, 378 F.3d 471 (5th Cir. 2004) (per curiam), the INS argued that, in light of *Coleman*, aliens have no due-process right to the effective assistance of counsel. The BIA declined to adopt that position, how-

2. Even if aliens in removal proceedings do have a due-process right to the effective assistance of privately retained counsel, as the court of appeals assumed here, there is no due-process right to the effective assistance of counsel in pursuit of discretionary relief, including the relief at issue in this case (*i.e.*, adjustment of status). The court below so held (Pet. App. 2), and its holding is correct.

As the Eleventh Circuit has explained, "the failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest." *Mejia Rodriguez* v. *Reno*, 178 F.3d 1139, 1146 (1999) (citing *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)), cert. denied, 531 U.S. 1010 (2000). For that reason, "an attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for * * * a purely discretionary 'act of grace.'" *Id.* at 1148 (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956), in turn quoting *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935)). Other courts of appeals have reached the same conclusion, including the Fifth Circuit, which so held in *Gutierrez-Morales* v. *Homan*, 461 F.3d 605, 609-610 (2006), the decision on which it relied here (Pet. App. 2); accord, *e.g.*, *Guerra-Soto* v. *Ashcroft*, 397 F.3d 637, 640-641 (8th Cir. 2005); *Dave* v. *Ashcroft*, 363 F.3d 649, 652-653 (7th Cir. 2004).[8]

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ever, because of precedent in the courts of appeals that recognizes such a right. *Id.* at 558-560.

[8] Petitioner argues (Pet. 16) that, because he sought withholding of removal before the IJ, and because withholding of removal is not a form of discretionary relief, he had a due-process right to the effective assistance of counsel throughout the proceedings even under the rule applied by the court of appeals. That argument is mistaken. Petitioner

There is reason to think that the Second and Ninth Circuits would reach a contrary conclusion. In *United States* v. *Copeland*, 376 F.3d 61 (2004), a case not involving a claim of ineffective assistance of counsel, the Second Circuit held that "a denial of an established right to be informed of the possibility of [discretionary] relief [from removal] can, if prejudicial, be a fundamental procedural error" under 8 U.S.C. 1326(d)(3), such that the defendant in an illegal-reentry prosecution can collaterally challenge the removal order. 376 F.3d at 72. And in *Fernandez* v. *Gonzales*, 439 F.3d 592 (2006), the Ninth Circuit stated, in dictum, that "ineffective assistance of counsel claims, which are predicated on the right to a full and fair hearing, are not affected by the nature of the relief sought." *Id.* at 602 n.8 (citation omitted). As far as we are aware, however, neither the Second Circuit, the Ninth Circuit, nor any other court of appeals has squarely held, in a published opinion specifically addressing the contrary argument, that an alien in removal proceedings has a due-process right to the effective assistance of privately retained counsel in pursuit of

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alleges that his prior counsel was ineffective only insofar as counsel sought to obtain adjustment of petitioner's status, and that form of relief is indisputably discretionary. See 8 U.S.C. 1255(a) ("[t]he status of an alien * * * may be adjusted by the Attorney General[] in his discretion"); 8 U.S.C. 1255(i)(2) ("the Attorney General may adjust the status of the alien"); see also *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) ("Because Jamieson is seeking the discretionary relief of adjustment of status, there is no constitutionally-protected liberty interest at stake."). An alien does not have a due-process right to the effective assistance of counsel in seeking a form of relief in which there is no liberty interest merely because the alien has also sought at least one form of relief in which there *is* such an interest.

discretionary relief.[9] In any event, this case would not be an appropriate one for resolving any such conflict, because, as explained below, see pp. 14-18, *infra*, petitioner could not prevail on his ineffective-assistance claims even if there were a due-process right to effective assistance of counsel in removal proceedings and even if that right extended to requests for discretionary relief.

3. Petitioner appears to raise three claims of ineffective assistance of counsel: that prior counsel filed a deficient motion to remand with the BIA; that, after the motion to remand was denied, prior counsel should have filed a motion to reconsider with the BIA rather than a petition for review with the court of appeals; and that prior counsel filed the immigrant-visa petition with the wrong office. See Pet. 7-10, 18-19; Supp. Admin. R. 23-25. Even assuming that there is a right to the effective assistance of counsel in removal proceedings, and that the right extends to requests for discretionary relief, an alien cannot prevail on an ineffective-assistance claim

[9] The decisions on which petitioner relies (Pet. 15-16, 18-19) do not squarely conflict with the decision below. The Fifth Circuit's prior decision in *Haitian Refugee Ctr.* v. *Smith*, 676 F.2d 1023 (1982), did not involve a claim of ineffective assistance of counsel, and, in any event, this Court does not sit to resolve intra-circuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). The Ninth Circuit's decisions in *Siong* v. *INS*, 376 F.3d 1030 (2004), and *Mohammed* v. *Gonzales*, 400 F.3d 785 (2005), did involve a claim of ineffective assistance of counsel, but they did not specifically address the question whether such a claim is barred when the relief at issue is discretionary. The same is true of the Ninth Circuit's decision in *Cortez-Herrera* v. *Gonzales*, No. 04-75735, 2007 WL 1482395 (May 22, 2007), which in any event is unpublished. Since those decisions did not "squarely address[] the issue," and "at most assumed the applicability" of ordinary ineffective-assistance principles when the alien seeks discretionary relief, the Ninth Circuit would be "free to address the issue" *de novo* in future cases. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993).

unless "the representation afforded [hi]m was so deficient as to impinge upon the fundamental fairness of the hearing," and, "as a result, the alien suffered substantial prejudice." *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) (quoting *Paul* v. *United States INS*, 521 F.2d 194, 198 (5th Cir. 1975), and citing *Ogbemudia* v. *INS*, 988 F.2d 595, 598 (5th Cir. 1993)); see Pet. 16 (acknowledging that, "in order to assert ineffective assistance of counsel," an alien "must show: (1) that counsel failed to perform with sufficient competence, and (2) that the petitioner was prejudiced by counsel's performance"). "Prejudice," in this context, means that the alien "would have been entitled to [the] relief [sought]" if his counsel had not performed deficiently. *Miranda-Lores* v. *INS*, 17 F.3d 84, 85 (5th Cir. 1994); see Pet. 22 (acknowledging that, to establish prejudice, alien must make "strong showing," or at least demonstrate "reasonable likelihood," that result would have been different had counsel not performed deficiently). In denying the motion to reopen, the BIA held that petitioner could not make the required showing with respect to any of his ineffective-assistance claims. Pet. App. 5. As explained below, that holding is correct.

Petitioner repeatedly asserts (Pet. 9-10, 18-19, 23-26) that the motion to remand was deficient because it did not comply with the requirements of *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002). He does not say which requirement he has in mind, but presumably it is the fourth: that the motion "present[] clear and convincing evidence indicating a strong likelihood that the [alien's] marriage is bona fide." *Id.* at 256. Petitioner's prior counsel did not perform deficiently in attempting to satisfy that requirement, because prior counsel maintains that he submitted all the documenta-

tion that petitioner provided him, Supp. Admin. R. 117-118; see note 3, *supra* (describing documents submitted with motion to remand), and petitioner does not dispute that claim. As the BIA explained in denying the motion to reopen, petitioner "has not alleged that his prior counsel had additional documentation regarding the bona fides of his marriage that could have been submitted with his motion to remand for adjustment of status." Pet. App. 5.

Even if petitioner *had* made such an allegation, the only additional documentation identified by petitioner that existed at the time of the filing of the motion to remand would not have materially strengthened the case that his marriage was *bona fide*. See note 5, *supra* (describing evidence submitted with motion to reopen). There is thus no reason to suppose that, had the additional evidence been submitted in support of the motion to remand, DHS would have decided not to oppose the motion on the ground that petitioner had not presented clear and convincing evidence that his marriage was *bona fide*. See Supp. Admin. R. 78 (opposing motion to remand on that ground). And even if the evidence *had* been sufficient to establish the *bona fides* of petitioner's marriage, DHS would have opposed the motion to remand on the independent ground that petitioner presented fraudulent evidence at the removal hearing, as DHS made clear in opposing petitioner's motion to reopen. Supp. Admin. R. 4-5. Since, under *Velarde-Pacheco*, the BIA has no discretion to grant a motion to remand for consideration of an application for adjustment of status when DHS opposes the motion on a ground other than that the visa application has not been approved, see 23 I. & N. Dec. at 256, the motion to remand would not have been granted even if the additional

documentation had been submitted. Accordingly, even if petitioner could demonstrate that his prior counsel performed deficiently in filing the motion to remand, he could not demonstrate prejudice.[10]

Petitioner's prior counsel did not render ineffective assistance in deciding not to file a motion to reconsider for the same reasons that he did not render ineffective assistance in filing the motion to remand. Because there is no indication that prior counsel had any more evidence of the *bona fides* of petitioner's marriage in February 2005, when the motion to remand was decided, than in October 2004, when the motion to remand was filed, prior counsel did not perform deficiently in deciding not to file a motion to reconsider. And because, even if prior counsel had filed a motion to reconsider with the additional documentation that was then available, it is clear that DHS would have opposed a remand on a ground other than that the visa application had not been approved, petitioner cannot demonstrate prejudice from the decision not to file a motion to reconsider.[11]

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[10] Contrary to petitioner's assertion (Pet. 19-23), the filing of a deficient motion to remand is not prejudicial per se. Petitioner relies (Pet. 19-20) on *Chike* v. *INS*, 948 F.2d 961 (5th Cir. 1991), but, unlike the alien in that case, who was unable to file a brief before the BIA because he was not given notice of the briefing schedule, *id*. at 961-962, petitioner was not "denied the opportunity to be heard before the [BIA]," *id*. at 962. The BIA considered petitioner's motion to remand and denied it on the merits. Pet. App. 8.

[11] It is not clear that an alien is even *permitted* to include supporting documentation with a motion to reconsider. The regulations provide that, unlike a motion to reopen, which "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material," 8 C.F.R. 1003.2(c)(1), a motion to reconsider "shall state the reasons for the

Finally, any error in the filing of the immigrant-visa petition with DHS does not give rise to a due-process claim of ineffective assistance of counsel. The right assumed to exist by the court of appeals is the "constitutional right to effective counsel *in removal proceedings*." Pet. App. 2 (emphasis added); accord, *e.g.*, *Gutierrez-Morales*, 461 F.3d at 609. As the BIA explained in denying petitioner's motion to reopen, petitioner cannot "establish[] that his prior counsel committed ineffective assistance [in removal proceedings] before the [BIA]"—a part of the Executive Office for Immigration Review in the Department of Justice—"based upon his assertion that his prior counsel filed his visa petition * * * with the improper office of the DHS." Pet. App. 5. And no circuit precedent of which we are aware holds that an alien has a due-process right to the effective assistance of counsel in filing a petition for a visa with DHS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2007

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motion by specifying the errors of fact or law in the prior [BIA] decision and shall be supported by pertinent authority," 8 C.F.R. 1003.2(b)(1).