No. 05-1265

In the Supreme Court of the United States

DUSTA LJUCOVIC, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to reopening of an administrative decision denying her application for asylum when petitioner (1) filed a motion to reopen well after the deadline for such a motion had passed and (2) alleged that the time for filing the motion should be tolled because her former attorney had negligently failed to give her prompt notice of the administrative decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B16) is not published in the *Federal Reporter* but is *reprinted in* 144 Fed. Appx. 500. The opinion of the Board of Immigration Appeals (Pet. App. C1-C5) is unreported. The decision of the immigration judge (Pet. App. E1-E18) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 2005. A petition for rehearing was denied on December 30, 2005 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on March 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the legal framework governing removal of aliens from the United States. The INA specifies the grounds on which aliens may be removed, see 8 U.S.C. 1227(a) (2000 & Supp. III 2003), and the manner in which removal proceedings are conducted, see 8 U.S.C. 1229, 1229a. The INA also limits the circumstances under which an alien may be removed to a country in which he is likely to experience various forms of persecution. One form of relief that is potentially available to removable aliens is asylum. See 8 U.S.C. 1158(b)(1). To establish eligibility for asylum, an alien must demonstrate, inter alia, a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (defining "refugee"); see 8 U.S.C. 1158(b)(1) (Attorney General may grant asylum if he determines that the applicant "is a refugee within the meaning of section 1101(a)(42)(A)").

2. Petitioner Dusta Ljucovic, an ethnic Albanian from the former Yugoslavia, entered the United States illegally in November 1990 and applied for asylum in 1996. Pet. App. B2, E1. Her asylum application was subsequently referred to an immigration judge (IJ), who considered the application in connection with removal proceedings initiated by the Immigration and Naturalization Service (INS). *Id.* at B2-B3, E1-E3. Petitioner was represented by counsel at the immigration hearing. *Id.* at B3.

Petitioner alleged that her departure from the former Yugoslavia was precipitated by her spousal mistreatment in an arranged marriage. Petitioner testified

that she had often been physically mistreated by her husband, and that on one occasion the local police had rebuffed her request for protection. She further testified that she had fled the country in order to escape the abuse and had ultimately reached the United States. Petitioner and her husband were divorced, apparently at the initiative of her husband, after she departed. Pet. App. E4-E10, E17.

The IJ concluded that petitioner had failed to establish her eligibility for asylum. Pet. App. E13-E18. The IJ found that the domestic violence to which petitioner was subjected was not "on account of" her religion or membership in a particular social group comprised of women of Albanian ethnicity. *Id.* at E15-E16. The IJ also ruled that petitioner had not proved that the Albanian police were unwilling to protect her, and that private domestic violence does not constitute persecution. *Id.* at E16-E17. Finally, the IJ found that petitioner's divorce constituted a material change of circumstances that substantially eliminated the basis for fearing further mistreatment by her former husband. *Id.* at E17.

3. On July 1, 2002, the Board of Immigration Appeals (BIA or Board) affirmed the IJ's decision. Pet. App. D1. In June 2003, petitioner, represented by new counsel, filed a motion in the BIA to reopen her asylum case. See *id.* at C1-C2. The motion requested that the Board reopen the case and either defer a decision on it pending issuance of rules regarding adjudication of gender-based asylum claims, or re-issue its prior decision with a new decision date so that petitioner could seek judicial review or depart from the United States without accruing unlawful presence that would bar her from re-admission to this country. See Mot. to Reopen 1.

Petitioner contended that she "ha[d] fully complied with the prerequisites for filing a motion to reopen based on ineffective assistance of counsel, as set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (1988)." Mot. to Reopen 1. While acknowledging that her motion to reopen was being filed more than 90 days after the BIA's decision, petitioner contended that the time for filing should be equitably tolled because her prior counsel had negligently failed to inform her of the BIA ruling. *Id.* at 2-3, 8. In particular, petitioner alleged that her failure to receive a copy of the Board's decision at an earlier date "most likely" resulted from the fact that her former attorney had recorded an erroneous zip code in transcribing her new address. *Id.* at 6.

On November 18, 2003, the BIA denied petitioner's motion to reopen. Pet. App. C1-C5. The Board noted that, as a general matter, a motion to reopen "must be filed with the Board not later than 90 days after the date on which the final administrative decision was rendered." *Id.* at C2. The BIA acknowledged that "equitable tolling * * * may apply when an alien is prevented from filing because of ineffective assistance of counsel, as long as the alien acts with due diligence in discovering the deception, fraud, or error." *Ibid.* It concluded, however, that petitioner had failed to make the showing required by the Board's prior decisions to establish ineffective assistance of counsel. The BIA explained that the affidavit submitted by petitioner in support of the motion to reopen "fails to set forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representation counsel did or did not make to [petitioner]. The affidavit merely recounts what her counsel failed to do, but does not mention what actions her counsel promised to under-

take." *Id.* at C3-C4. The BIA further held that the motion to reopen should be denied for the additional reason that petitioner had failed to show that she was prejudiced by her prior attorney's alleged ineffectiveness. *Id.* at C4.

4. The court of appeals affirmed the BIA's denial of reopening. Pet. App. B1-B16.[1] The court stated that a motion to reopen must generally be filed within 90 days after the date of the final administrative decision in the proceeding sought to be reopened, *id.* at B6, but that "[e]quitable tolling may apply when a petitioner has received ineffective assistance of counsel," *id.* at B7. The court further explained that "[p]etitioners alleging ineffective assistance of counsel must satisfy the requirements set forth in *Matter of Lozada*," *ibid.*, including the requirement that an allegation of ineffective assistance "must be supported by * * * an affidavit describing the agreement that was entered into with the attorney with respect to the actions to be taken and the representations made by the attorney," *id.* at B7-B8. The court of appeals found that, although petitioner's affidavit in support of the motion to reopen described the alleged deficiencies of her former attorney's representation, the affidavit did not "set forth any detail as to her agreement with [the attorney] about her representation and specifically does not state how she and [the attorney] agreed that she would be notified of any BIA decision." *Id.* at B9-B10. The court concluded that petitioner's "affidavit in support of her motion to reopen

[1] The appendix to the petition for a writ of certiorari contains an accurate reproduction of the text of the court of appeals' opinion in this case (see Pet. App. B1-B16), even though the caption (case name and Sixth Circuit docket number) as reproduced in the appendix corresponds to a different case.

based upon ineffective assistance of counsel falls short of the procedural *Lozada* requirements for failure to adequately describe the agreement she entered into with her attorney." *Id.* at B10.

The court of appeals also held, as an independent ground for its conclusion that petitioner was not entitled to reopening, that petitioner had failed to demonstrate prejudice resulting from the alleged ineffective assistance of her former attorney. Pet. App. B11-B15. The court explained that "[a] demonstration of prejudice requires that the petitioner establish that but for her attorney's actions, she would have been able to remain in the United States." *Id.* at B11. The court of appeals concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal to [the Sixth Circuit] under a substantial evidence review and that she would have been entitled to remain in the United States." *Id.* at B13. The court explained that, even if the spousal abuse to which petitioner had previously been subjected were properly regarded as a form of persecution, petitioner could not demonstrate a "well-founded fear of future persecution" because she had "divorced her husband * * * and thus would not be subject to his abuse were she to return to her native country." *Id.* at B14.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under established BIA precedent, "equitable tolling of deadlines and numerical limitations on motions to reopen may apply when an alien is prevented from filing

because of ineffective assistance of counsel." Pet. App. C2. The Board has made clear, however, that a motion alleging ineffective assistance of counsel must be supported by an affidavit "attesting to the relevant facts," including a detailed description of "the agreement that was entered into with former counsel with respect to the actions to be taken on appeal and what counsel did or did not represent to" the movant. *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (1988).[2] The courts of appeals have uniformly sustained that requirement as reasonable and have held that an alien's failure to comply with it may justify a denial of reopening. See *Wang* v. *Ashcroft*, 367 F.3d 25, 27 (1st Cir. 2004); *Jian Yun Zheng* v. *United States Dep't of Justice*, 409 F.3d 43, 46-47 (2d Cir. 2005); *Xu Yong Lu* v. *Ashcroft*, 259 F.3d 127, 134 (3d Cir. 2001); *Barry* v. *Gonzales*, 445 F.3d 741, 745-746 (4th Cir. 2006); *Lara* v. *Trominski*, 216 F.3d 487, 496-498 (5th Cir. 2000); *Hamid* v. *Ashcroft*, 336 F.3d 465, 468-469 (6th Cir. 2003); *Stroe* v. *INS*, 256 F.3d 498, 501 (7th Cir. 2001); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499 (8th Cir. 2005); *Reyes* v. *Ashcroft*, 358 F.3d 592, 597-598 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1362-1363 (10th Cir. 2004); *Gbaya* v. *United States Attorney Gen.*, 342 F.3d 1219, 1221-1223 (11th Cir. 2003).

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[2] The BIA also requires that, "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." *Lozada*, 19 I. & N. Dec. at 639. In addition, "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 disciplinary authorities regarding such representation, and if not, why not." *Ibid.* See Pet. App. B8, C2-C3. The court of appeals found that petitioner had complied with those requirements. See *id.* at B8-B9.

In the instant case, the BIA found that petitioner had "failed to comply with the *Lozada* requirements" because her "affidavit merely recount[ed] what her counsel failed to do, but d[id] not mention what actions her counsel promised to undertake." Pet. App. C4. The court of appeals sustained that determination, concluding that "[t]he BIA did not abuse its discretion in concluding that [petitioner] did not comply with the *Lozada* requirements." *Id.* at B11. That holding is correct. In any event, the question whether the BIA reasonably applied its own procedural regime to the facts of a particular case does not warrant this Court's review.

Petitioner contends (Pet. 10-13) that, in the absence of a written agreement between petitioner and her former counsel detailing the responsibilities that the attorney agreed to undertake, the adequacy of counsel's performance should be assessed by reference to the Michigan Rules of Professional Conduct. But even assuming, arguendo, that petitioner's former attorney failed to comply with professional norms, it does not follow that the BIA was required to reopen the administrative proceedings after the time for filing a motion to reopen had passed. As a matter of administrative discretion, the BIA under certain circumstances treats ineffective assistance of counsel as a ground for tolling the applicable deadline. The availability of tolling, however, depends on the movant's compliance with substantive and procedural requirements set forth in prior Board decisions.

As the BIA has explained, compliance with those requirements "is necessary if [the Board is] to have a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board. Where essential information is lacking, it is impossible to evaluate the substance of such [a] claim." *Lozada*, 19

I. & N. Dec. at 639. Petitioner suggests (Pet. 11) that a description of her agreement with former counsel was unnecessary in order for the Board to evaluate her own claim of ineffective assistance. In its pleading requirements for claims of ineffective assistance, however, the BIA has reasonably sought to elicit information concerning, inter alia, whether counsel has breached any express agreement as to the nature of the representation to be provided. Because petitioner failed to comply with one of those requirements, the Board permissibly declined to reopen the administrative proceedings on the basis of petitioner's untimely motion.

2. Petitioner contends (Pet. 13-16) that the alleged ineffectiveness of her former counsel violated her rights under the Due Process Clause. That claim lacks merit.

The ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991) (holding that, because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * * , a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam) ("Since respondent had no constitutional right to counsel [in a discretionary state appeal], he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely."). Petitioner appears to acknowledge that no right to appointed counsel exists in the context of removal proceedings. Pet. 14; see 8 U.S.C. 1229a(b)(4)(A) (providing that an alien in removal proceedings "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice

in such proceedings"). Thus, while the BIA may choose to treat ineffective assistance of counsel as a ground for reopening prior administrative decisions under specified circumstances, that practice is not mandated by the Constitution. The Sixth Circuit in this case and other courts of appeals have concluded that there is a due process right to effective assistance of counsel in removal proceedings, see note 4, *infra*; Pet. 14, but that conclusion is incorrect.[3]

The Court in *Torna* explained that the litigant in that case

> was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive [the litigant] of due process of law.

455 U.S. at 588 n.4; see *Coleman*, 501 U.S. at 753 (in a context where a litigant has no constitutional right to appointed counsel, "the attorney is the [litigant's] agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error") (internal quotation marks omitted). The same analysis applies here. Absent any constitutional obligation on the part of the federal government to furnish petitioner with appointed counsel during her removal proceedings, any deficiency in her retained counsel's

[3] The BIA, consistent with its usual practice of following circuit precedent, declined to find no due process right to effective assistance of counsel in *In re Assaad*, 23 I. & N. Dec. 553, 557-560 (2003).

performance cannot be attributed to the government for Fifth Amendment purposes. And, as in *Torna*, the BIA could not be said to have deprived petitioner of her rights under the Due Process Clause by denying her motion to reopen on the ground that it was untimely filed. Rather, an alien in removal proceedings generally "must bear the risk of attorney error" (*Coleman*, 501 U.S. at 753) (internal quotation marks omitted), subject to such exceptions as Congress and the BIA choose to adopt in order to protect aliens from the consequences of substandard performance by counsel in particularly egregious circumstances.

A departure from the principles announced in *Torna* and *Coleman* would be especially unwarranted in the immigration setting. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Congress has vested the Attorney General with broad discretion to establish procedures for the consideration of asylum applications, while providing aliens with the opportunity to retain counsel of their choice. See 8 U.S.C. 1158(d)(1) and (d)(4), 1229a(b)(4)(A). The BIA has treated ineffective assistance of counsel as a ground for reopening in certain circumstances but has established substantive and procedural requirements for aliens seeking to raise ineffective-assistance claims. In light of the deference this Court has consistently shown to decisions of the political Branches regarding the admission and removal of aliens, petitioner's claim of a constitutional right to reopening of the BIA decision, based on the alleged inef-

fectiveness of retained counsel in her removal proceedings, is especially misconceived.[4]

3. In any event, petitioner has not made out a claim to relief based on ineffective assistance of counsel. Petitioner contends (Pet. 16-25) that she was prejudiced by her former counsel's performance. The court of appeals stated that the determination as to prejudice turns on whether, "but for counsel's error, petitioner would have been entitled to continue residing in the United States." Pet. App. B8 (quoting *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001) (brackets omitted)). The question whether prejudice was established on the facts of this case does not warrant this Court's review, particularly because both the BIA and the court of appeals treated the absence of prejudice as simply an alternative ground for denying relief. See Pet. App. B11, C4. In any event, petitioner's argument lacks merit.

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[4] The court of appeals concluded that, because "Fifth Amendment guarantees of due process extend to aliens in deportation proceedings," petitioner had a Fifth Amendment right to the effective assistance of counsel. Pet. App. B7 n.2 (quoting *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699 (6th Cir. 2001)). That reasoning is unsound. In order to establish a violation of the Due Process Clause, a litigant must show that "the party charged with the deprivation [is] * * * a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The "state action" requirement "avoids imposing on the [government], its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Where, as in the context of removal proceedings, the United States is under no constitutional obligation to provide appointed counsel, any errors committed by retained counsel are not fairly attributable to the government. See *Torna*, 455 U.S. at 588 n.4 (explaining that the loss of Torna's right to seek Florida Supreme Court review "was caused by his counsel, and not by the State"). Thus, while arbitrary conduct by an IJ or other federal adjudicative official might under some circumstances effect a violation of the Due Process Clause, substandard performance by petitioner's retained attorney cannot.

a. Petitioner suggests (Pet. 16-20) that her former counsel's failure to inform her promptly of the BIA's decision deprived her of the opportunity for judicial review of the merits of her asylum claim. In finding that petitioner had not been prejudiced by counsel's alleged ineffective assistance, however, the court of appeals discussed her claim at some length. Pet. App. B13-B15. The court concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal to [the Sixth Circuit] under a substantial evidence review." *Id.* at B13. There is consequently no basis for petitioner's assertion (Pet. 20) that the court of appeals disregarded the merits of her claim in denying her petition for review.

b. Petitioner contends that, as a result of her former attorney's ineffective assistance, petitioner "lost the opportunity to establish that she is a bona fide refugee." Pet. 20 (capitalization omitted); see Pet. 20-22. In support of that contention, petitioner alleges that the IJ committed various errors in her conduct of the removal hearing. But while petitioner's motion to reopen asserted in passing (and without any supporting detail) that her former attorney "did not help [petitioner] identify or obtain corroborating evidence" and "did not meet with her prior to her interview with the [INS's] Chicago Asylum Office," see Mot. to Reopen 3, petitioner's claim of ineffective assistance was premised *solely* on counsel's asserted failure to provide her with timely notice of the BIA decision, see *id.* at 12-13. Because any errors committed by the IJ could not have been caused by counsel's subsequent failure to inform petitioner of the Board's decision, they provide no basis for concluding that petitioner was prejudiced by the asserted ineffective assistance.

c. Petitioner contends (Pet. 22-24) that she was deprived of an opportunity to pursue a "humanitarian asylum claim" based on an amendment to the asylum regulations that became effective January 5, 2001, during the pendency of her appeal to the Board. Here again, petitioner cannot establish any causal connection between her failure to pursue such a claim and her attorney's failure to provide her with timely notice when the Board issued its decision in July 2002. At any time during the pendency of her administrative appeal, petitioner could have filed a motion to remand or reopen her case for consideration of a claim based on the January 2001 regulatory amendments. See 8 C.F.R. 3.2(c)(4) (2001).

d. Petitioner contends (Pet. 24-25) that, because she did not receive timely notice of the BIA's July 2002 decision, she unknowingly accrued extended unlawful presence in this country that may subject her to adverse consequences in the future. The BIA considered that contention and correctly found that petitioner's claims of future harm were too speculative to constitute prejudice under the governing standard. See Pet. App. C4-C5. That fact-specific determination raises no issue of broad importance warranting this Court's review.

4. Petitioner contends (Pet. 25-27) that the court of appeals' decision in this case conflicts with the decisions of the Ninth Circuit in *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042 (2000), and *Singh* v. *Ashcroft*, 367 F.3d 1182 (2004). The alleged circuit conflict does not warrant the Court's review, particularly in the circumstances of this case. Although the Ninth Circuit held in *Dearinger* and *Singh* that an attorney's deficient performance in connection with removal proceedings can under some circumstances create a presumption of prejudice, the court has not treated that presumption as

irrebuttable. The same facts that led the Sixth Circuit to conclude that petitioner had failed to establish prejudice might have persuaded the Ninth Circuit that its presumption of prejudice had been overcome.

In the instant case, moreover, the Sixth Circuit's holding that petitioner had not established prejudice was one of two *independent* grounds for the court's denial of relief. The Sixth Circuit's decision rested in addition on petitioner's failure to provide the BIA a detailed description of her agreement with her former attorney, as required by the Board in *Lozada*. Because neither *Dearinger* nor *Singh* calls into question the BIA's authority to deny reopening based on the movant's noncompliance with the *Lozada* requirements, there is no reason to suppose that the BIA's decision not to reopen the administrative proceedings would have been overturned if this case had arisen in the Ninth Circuit. The existence of that alternative ground for the Sixth Circuit's decision would make this case an unsuitable vehicle for clarification of the circumstances under which an attorney's deficient performance should be deemed to have prejudiced his client.

a. In *Dearinger*, an alien's attorney filed a petition for review of the BIA's decision one day after the deadline for filing had expired, and the petition for review was dismissed as untimely. 232 F.3d at 1044. The alien's next friends subsequently filed a petition for habeas corpus, and the district court directed the government to reenter the BIA's order so that the alien could file a timely petition for review. *Ibid.* The Ninth Circuit affirmed the grant of habeas corpus relief, holding that counsel's ineffective assistance constituted a due process violation and that prejudice should be presumed. See *id.* at 1045-1046.

The Ninth Circuit held that prejudice from counsel's ineffective assistance "should be presumed," *Dearinger* 232 F.3d at 1045, but it did not address the circumstances under which that presumption might be rebutted, and it noted elsewhere in its opinion that the alien in such a case must show "plausible grounds for relief," *id.* at 1046. In the instant case, the Sixth Circuit examined the merits of petitioner's underlying claim, concluded that the IJ's decision would not likely have been overturned if petitioner had filed a timely petition for review, and held on that basis that petitioner had failed to demonstrate prejudice from counsel's error. Pet. App. B11-B15. If this case had arisen within the Ninth Circuit, nothing in *Dearinger* would have foreclosed the court from concluding, based on the same facts, that the presumption of prejudice had been overcome.

Unlike petitioner, moreover, the alien in *Dearinger* did not file a motion to reopen in the BIA, but instead sought habeas corpus relief in federal district court.[5] The Ninth Circuit therefore was not reviewing a BIA

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[5] The specific holding of *Dearinger*—*i.e.*, that the district court in that case acted properly in granting a writ of habeas corpus that directed the government to reissue the BIA's prior decision—has been superseded by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302. Under the REAL ID Act, the district courts lack habeas jurisdiction to review any question of fact or law regarding any action taken or proceeding brought to remove an alien. The Act added a new 8 U.S.C. 1252(a)(5), and amended 8 U.S.C. 1252(b)(9), to make clear that judicial review of all challenges to a removal order must proceed (if at all) in the courts of appeals. See REAL ID Act § 106(a)(1) and (2), 119 Stat. 310-311. Thus, the question addressed in *Dearinger*, which concerned the circumstances under which a federal district court may direct the BIA to reopen a prior administrative proceeding even though no reopening request has been presented to the Board, is unlikely to arise in any future case.

determination as to the propriety of reopening. The court of appeals in *Dearinger* did not discuss *Lozada*, and it did not question the Board's authority to establish reasonable substantive and procedural requirements governing motions to reopen based on allegations of ineffective assistance.[6]

b. In *Singh*, an alien's appeal from the IJ's denial of his asylum application was dismissed by the BIA on the ground that the alien had failed to submit a brief until nearly 20 months after the filing deadline. 367 F.3d at 1184. The alien subsequently filed an untimely motion to reopen premised on the allegation that his prior counsel had rendered ineffective assistance. *Id.* at 1185. The Ninth Circuit held that the alien had been prejudiced by his former attorney's failure to file a brief in the BIA. *Id.* at 1189. While acknowledging that "[t]he presumption of prejudice resulting from counsel's failure to file a brief may be rebutted," the court held that "[t]he presumption * * * is not rebutted if an alien is able to

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[6] The Ninth Circuit has recognized that "the *Lozada* requirements are generally reasonable, and under ordinary circumstances the BIA does not abuse its discretion when it denies a motion to remand or reopen based on alleged ineffective assistance of counsel where the petitioner fails to meet the requirements of *Lozada*." *Castillo-Perez* v. *INS*, 212 F.3d 518, 525 (2000). The Ninth Circuit has further held that the BIA may be required to grant reopening, notwithstanding the movant's non-compliance with the *Lozada* requirements, if the facts establishing ineffective assistance "are plain on the face of the administrative record." *Ibid.* (quoting *Escobar-Grijalva* v. *INS*, 206 F.3d 1331, 1335, amended, 213 F.3d 1221 (9th Cir. 2000)). In the instant case, however, petitioner's claim that her former counsel had breached a duty to inform her of the BIA decision was not based on anything in the administrative record of the prior agency proceedings, but was premised solely on extrinsic evidence.

show plausible grounds for relief." *Ibid.* (internal quotation marks omitted).

In the instant case, the Sixth Circuit concluded that petitioner had "present[ed] no compelling evidence suggesting that the IJ's decision would have been overturned on appeal * * * under a substantial evidence review." Pet. App. B13. The court explained that, even if the spousal abuse that petitioner had previously suffered were properly characterized as "persecution" within the meaning of 8 U.S.C. 1101(a)(42)(A), petitioner could not establish a well-founded fear of similar *future* mistreatment in light of her divorce from her husband. Pet. App. B14. The Ninth Circuit might conclude, based on that deficiency in petitioner's proof, that petitioner could not establish "plausible grounds for relief" (*Singh*, 367 F.3d at 1189), and that the presumption of prejudice was therefore rebutted on the facts of this case.

In addition, although the BIA in *Singh* refused to toll the time for filing the motion to reopen, see 367 F.3d at 1185, the government in that case did "not dispute that Singh ha[d] complied with the procedural requirements outlined in *Matter of Lozada*," *id.* at 1185 n.1. In holding that "the BIA abused its discretion in refusing to toll the filing deadline," the Ninth Circuit explained that "[a]s soon as Singh learned that his appeal had been denied, he acted with due diligence in learning of [former counsel's] deceit, in retaining new counsel, *and in complying with the* Lozada *requirements*." *Id.* at 1186 (emphasis added). In the instant case, by contrast, the BIA and the court of appeals both held that petitioner had *not* complied with *Lozada*'s requirement that an alien alleging ineffective assistance must describe "in detail the agreement that was entered into with former counsel with respect to the actions to be taken on appeal

and what counsel did or did not represent to the [alien] in this regard." 19 I. & N. Dec. at 639. Petitioner's non-compliance with the *Lozada* requirements furnished an independent ground for the BIA's denial of reopening here, and the court in *Singh* did not question the Board's authority to apply those requirements when a motion to reopen is based on allegations of ineffective assistance of counsel. The decision in *Singh* therefore provides no reason to conclude that petitioner would have obtained relief if this case had arisen in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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