

The National Immigration Project of the National Lawyers Guild prepared this template with the assistance of interns Lizzie Bird and Jordan Woodlief. It is not legal advice or a substitute for independent legal advice supplied by a legal representative familiar with a client's case. Nor is it a substitute for independent research, analysis, and investigation into local practices and legal authority in a given jurisdiction. NIPNLG last updated this template on August 26, 2022. If you found this resource useful, please consider donating to NIPNLG so that we may continue to provide free resources to immigrant defenders. Donate [here!](#)

Practitioner's Notes for Template Prosecutorial Discretion Request: Joint Motion to Reopen based on Due Process Concerns

- This template is intended for practitioners who represent a client who has been ordered removed following a hearing at which there were due process concerns and requests prosecutorial discretion following the vacatur of DHS's immigration enforcement priorities set out in the Mayorkas and Doyle Memoranda.
- The template contains bracketed placeholders for case-specific facts in [yellow highlighted text] and instructions/notes for practitioners in [blue highlighted text.] Some arguments and/or information in this template may be inapplicable to a given case.
- Highlighting and arguing the specific facts of a client's case are key to a persuasive request for prosecutorial discretion. Practitioners should cite to the record when asserting facts.
- The cases cited in this template do not constitute an exhaustive search of relevant case law in all jurisdictions. Practitioners should conduct legal research in their jurisdiction based on the facts of their case and ensure that the arguments are viable in their jurisdiction.
- Practitioners should add any additional arguments that may be available based on the circumstances of the case.
- If ICE OPLA declines to join in your motion to reopen, you could ask ICE OPLA for permission to title the unilateral motion to reopen as unopposed.
- If ICE OPLA declines to join in your motion to reopen and you file a unilateral motion to reopen, remember that motions to reopen are subject to a strict 90-day deadline from the time of the removal order. If the IJ issued the removal order over 90 days ago, you should present all applicable exceptions to the 90-day motion to reopen deadline. *See* INA § 240(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2); 8 C.F.R. § 1003.23(b)(1). These exceptions include equitable tolling, changed country conditions, the Violence Against Women Act (VAWA), and requesting that EOIR exercise its sua sponte authority.

[DATE]

Attn: Assistant Chief Counsel
Office of the Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Address

City, State, Zip Code

Email Address

**Re: Request for Prosecutorial Discretion: Joint Motion to Reopen
[NAME], A# XXX-XXX-XXX**

Dear Assistant Chief Counsel:

[NAME] respectfully requests that ICE OPLA exercise prosecutorial discretion and agree to join a motion to reopen in this case. [NAME] applied for [FORM OF RELIEF] on [DATE], which was denied after a fundamentally unfair hearing. Because [NAME] did not receive the due process to which [he/she/they] is constitutionally entitled, [NAME] requests that ICE OPLA join a motion to reopen to allow [NAME] to present [her/his/their] [RELIEF] claim at a new hearing. A joint motion to reopen in this case falls within and is an appropriate use of DHS's inherent prosecutorial discretion authority.

I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

[NAME] is a citizen of [COUNTRY] and entered the United States on or around [DATE] in [STATUS/without inspection]. [Include any of the following that are accurate:] [NAME] filed for [TYPE OF RELIEF] with USCIS on [DATE]. [NAME] was served with a Notice to Appear on [DATE] and [pled to the charges at a master calendar hearing on [DATE]/submitted written pleadings on [DATE]]. [NAME] filed for [FORM OF RELIEF] before the Court on [DATE]. [NAME] filed documentary evidence in support of this application on [DATE]. This court held an individual hearing on [NAME]'s [RELIEF] claim on [DATE] and issued an order of removal following a hearing.

[Outline the details of the hearing, including all relevant facts for which there may be due process issues. Summarize reasons for IJ's decision, including negative credibility determination if applicable.]

II. ARGUMENT

Prosecutorial discretion is the longstanding authority of a law enforcement agency, and an "indispensable feature of any functioning legal system," necessary to achieve fair and just outcomes in individual cases. Immigration and Customs Enforcement (ICE), *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>. Prosecutorial discretion also preserves limited government resources and ensures the efficiency and integrity of a law enforcement agency as a whole. *Id.* As

Client's Name and A#

the exclusive representative of Department of Homeland Security (DHS) in immigration removal proceedings, Office of the Principal Legal Advisor (OPLA) attorneys have the inherent authority to exercise prosecutorial discretion on a case-by-case basis in the handling and litigation of removal cases. *Id.* OPLA attorneys are “empowered and expected to use their professional judgment to do justice in each case,” including by joining motions to reopen and stipulating to relief in cases where the respondent has satisfied their burden to prove eligibility and merit favorable discretion. Memorandum from Kerry E. Doyle, “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion” (April 3, 2022).

[NAME] requests that ICE OPLA join a motion to reopen to allow [her/him/them] to present [her/his/their] application for [RELIEF] at a new hearing. A new hearing is appropriate because [due process violation e.g., interpretation errors] rendered [NAME]’s prior hearing fundamentally unfair. At that prior hearing, the [IJ, DHS attorney, and/or [NAME]’s own prior legal representative] failed to ensure that the hearing satisfied due process requirements. [Briefly summarize due process issues.] Therefore, a new hearing would allow [NAME] to have a full and fair opportunity to present [her/his/their] application for [RELIEF].

[Include any of the following headings/arguments that are applicable, or just use subheadings to describe applicable due process issues.]

Ultimately, joining in a motion to reopen would achieve a fair outcome for [NAME] and “advance DHS’s mission of administering and enforcing the immigration laws of the United States in an efficient and sensible way that promotes public confidence.” *See* Memorandum from Kerry E. Doyle, “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion” at 8 (April 3, 2022).

1. The Immigration Judge (IJ) did not preside over a fundamentally fair hearing.

An immigration judge’s authority to conduct hearings under INA § 240(b)(1) requires the judge to develop the court record and to ensure a “full and fair hearing” to which individuals are entitled under the Due Process Clause of the Fifth Amendment. *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021). In addition to constitutional protection, immigration law provides statutory and regulatory safeguards: noncitizens must have a “reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government.” INA § 240(b)(4)(B); *Jacinto v. INS*, 208 F.3d 725, 727-28 (9th Cir. 2000). When the immigration judge fails to provide these protections, and such failure results in prejudice, the respondent has not received the “full and fair hearing” the constitutional guarantee of due process requires. *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000).

Here, the [describe due process issues, e.g.: interpretation errors; the IJ’s failure to fully develop the record; the IJ’s failure to remain a neutral arbiter.] compromised the fundamental fairness of the hearing.

i. The IJ allowed interpretation errors to go uncorrected.

As part of the court's due process requirements, a respondent must be furnished with an accurate and complete translation of official proceedings, and translation services must be sufficient to enable the respondent to place [her/his/their] claim before the judge. *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984). A competent translation is fundamental to a full and fair hearing. *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003). A hearing is "of no value" when the respondent and the judge are not understood. *Augustin*, 735 F.2d at 37. Even where there is no due process violation, faulty or unreliable translations can undermine the evidence on which an adverse credibility determination is based. *He*, 328 F.3d at 598.

Here, interpretation errors and misunderstandings rendered [NAME]'s hearing fundamentally unfair. [describe interpretation / translation errors and/or misunderstanding and confusion during the hearing, and how these errors contributed (if applicable) to the IJ's negative credibility finding.]

ii. The IJ failed to develop the record.

An immigration judge's duty to fully develop the record in immigration court proceedings is an "essential requirement" of a full and fair hearing. *Quintero*, 998 F.3d at 623. In cases involving respondents seeking asylum or withholding of removal, the Board of Immigration Appeals (BIA) has explained that "a cooperative approach" is "particularly appropriate," and immigration judges "have a role in introducing [relevant] evidence into the record." *Id.* at 625 (quoting *Matter of S-M-J-*, 21 I&N Dec. 722, 723-4, 726 (BIA 1997)). A respondent is also entitled to a "reasonable opportunity" to examine the evidence against [her/him/them], to present evidence on [her/his/their] own behalf, and to cross-examine witnesses presented by the government. INA § 240(b)(4)(B).

[Describe IJ's failure to develop record: e.g., impatience, interrupting, failure to maintain decorum / patronizing tone, giving undue weight to credible fear interview notes, misstating testimony, and other issues that might have been avoided if IJ took time to patiently develop record.]

iii. [In the case of applicants for asylum] The IJ should have provided [NAME] an opportunity to obtain further corroborating evidence.

Government representatives and decision-makers "all bear the responsibility of ensuring that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim," and developing the record cooperatively is essential to this practice. *Matter of S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997); *see also, e.g., Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007) (describing the shared responsibility of parties and the immigration judge to assure that relevant evidence is included in the record and suggesting that "[f]urther inquiry could have included a request for corroborating evidence from former counsel regarding the manner in which the first asylum application was prepared") *Id.* at 162. By providing [NAME] the opportunity to obtain further corroborating evidence, the IJ could have encouraged the proper development of the record and nurtured a full and fair hearing.

In *Matter of S-M-J*, the BIA articulated a general corroboration rule: before the failure to produce corroborating evidence can be held against an applicant, the adjudicator must make explicit findings to determine (1) “whether it is reasonable to expect that the applicant’s personal experiences are easily subject to verification” and (2) “[whether] the explanation given by an asylum applicant for failing to provide such documentation is a reasonable one.” *S-M-J* at 738. The BIA further noted that “specific documentary corroboration of an applicant’s particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the [applicant], such as through friends, relatives, or co-workers.” *Id.* at 726. Additionally, for detained and/or unrepresented asylum applicants who face particularly serious obstacles in obtaining corroborating documentation, the BIA has underscored the need for IJs to “consider when impediments attendant to the asylum applicant’s situation have prevented the orderly or even the timely presentation of evidence that would corroborate the material facts which may be central to a specific claim.” *Id.* at 738 (Rosenberg, Bd. Mem., concurring).

[Describe how IJ neglected their duty by not providing an opportunity to obtain further corroborating evidence. In the case of a detained client, refer to language in *Toure v. A.G.*, 443 F.3d 310, 325 (3d Cir. 2006), and more generally, language in *Matter of Y-L*, 24 I&N Dec. 151 (BIA 2007) and *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997).]

[Include if applicable] Furthermore, the IJ failed to notify [NAME] that [he/she/they] failed to meet the burden of proof for corroborating evidence and provide an opportunity to respond. IJs have a duty to develop an applicant’s testimony, especially regarding an issue that the IJ might find dispositive. *Toure v. A.G.*, 443 F.3d 310, 325 (3d Cir. 2006); *see also, generally, Matter of Y-L*, 24 I&N Dec. 151 (BIA 2007); *Matter of S-M-J*, 21 I&N Dec. 722 (BIA 1997). If the IJ fails to provide notice that the evidence presented is inadequate, the IJ denies an applicant the opportunity to meet [her/his/their] burden by producing the corroborating evidence expected or explaining its absence. *See, e.g., Toure v. A.G.*, 443 F.3d 310, 335 (3d Cir. 2006).

[Discuss how notice and an opportunity to respond would have allowed [NAME] to produce corroborating evidence or explain its absence.]

iv. The IJ failed to remain a neutral arbiter.

As part of a full and fair hearing, all noncitizens are entitled to a “neutral and impartial arbiter of the merits of [their] claim and a reasonable opportunity to present evidence on [their] behalf.” *Abulashvili v. Att’y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011) (quoting *Cham v. Att’y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006)). No person may be deprived of [her/his/their] interests without “a proceeding in which [they] may present [their] case with assurance that the arbiter is not predisposed to find against [them].” *Id.* (quoting *Wang v. Att’y Gen.*, 423 F.3d 260, 269 (3d Cir. 2006)). As such, an IJ “has a responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party.” *Elias v. Gonzales*, 490 F.3d 444, 451 (6th Cir. 2007). Furthermore, even if the IJ does not intend to become an advocate for the government, judicial conduct is improper “whenever a judge appears biased, even if she actually is not biased.” *Abulashvili*, 633 F.3d at 207 (quoting *In re Antar (SEC v. Antar)*, 71 F. 3d 97, 101

(2d Cir. 1995)). Due process “cannot tolerate a situation where a supposedly neutral fact finder interjects herself into the proceedings to the extent of assuming the role of opposing counsel and taking over cross-examination for the government.” *Id.*

Here, the IJ’s failure to function as a neutral, impartial arbiter denied [NAME] due process. [Describe IJ’s failure to remain a neutral arbiter. E.g., assuming the role / becoming the functional equivalent of the DHS attorney by interrupting and taking over cross-examination (compare to *Abulashvili*).]

2. The DHS attorney failed to pursue justice.

OPLA attorneys play a significant role in helping to ensure that immigration proceedings meet legal and constitutional standards, and should endeavor to ensure that every noncitizen has the opportunity to have [her/his/their] case fairly heard. Distinct from any particular policy framework, OPLA attorneys are authorized and encouraged to exercise prosecutorial discretion in adhering to the principles of “upholding the rule of law; discharging duties ethically in accordance with the law and professional standards of conduct; following the guidelines and strategic directives of senior leadership; and exercising considered judgment in individual cases, consistent with DHS objectives and mindful of the Department’s limited resources.” ICE, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor*, <https://www.ice.gov/about-ice/opla/prosecutorial-discretion>. According to a longstanding principle articulated by Attorney General Robert H. Jackson, even when the government “technically loses its case, it has really won if justice has been done.” Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC’Y 18, 18-19 (1940). Government attorneys have positions of “such independence and importance that while [they] are diligent, strict, and vigorous in law enforcement, [they] can also afford to be just.” *Id.* The BIA has affirmed its commitment to this principle, stating that “[i]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.” *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997) (en banc).

Here, the OPLA attorney at [NAME]’s hearing failed to ensure that [NAME] had the opportunity to have [her/his/their] case fairly heard. [Describe DHS attorney’s failures e.g., asking “gotcha”-type, interrogative questions, seeking to trip up or trap respondent rather than getting to the truth, impatience in failing to give interpreter sufficient time to translate, and how this contributed to negative credibility determination.]

3. [NAME]’s prior legal representative provided ineffective assistance of counsel.

Noncitizens who are represented in removal proceedings have the right to effective assistance of counsel. *See, e.g., Gbaya v. U.S. Att’y Gen.*, 342 F.3d 1219, 1221 (11th Cir. 2003) (“It is well established that ‘[a]liens enjoy the right to the effective assistance of counsel in deportation proceedings.’”); *Fustaguio Do Nascimento v. Mukasey*, 549 F.3d 12, 17 (1st Cir. 2008) (“Ineffective assistance of counsel in a deportation proceeding is a denial of due process under

the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”) (quoting *Rodríguez–Lariz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002)). The Board has determined that evidence of ineffective assistance of counsel constitutes an exceptional circumstance and merits reopening of *in absentia* orders. *See, e.g., Matter of N-K- & V-S-*, 21 I&N Dec. 879 (BIA 1997); *Matter of Grijalva-Barrera*, 21 I&N Dec. 472 (BIA 1996).

To succeed on an ineffective assistance of counsel claim, the motion to reopen must meet certain requirements. The motion to reopen based on ineffective assistance of counsel must demonstrate that prior counsel’s conduct was ineffective, and that the ineffective assistance of counsel prejudiced the case. *Matter of Lozada*, 19 I&N Dec. 637, 638 (BIA 1988). Additionally, the motion must comply with specific procedural requirements. *Id.*

i. The prior attorney rendered ineffective assistance of counsel, which prejudiced [her/his/their] case.

The right to effective assistance of counsel in immigration proceedings stems from the Fifth Amendment’s guarantee of due process. *See Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). A legal representative’s performance in an immigration proceeding is a context-dependent inquiry into whether the attorney acted with “sufficient competence.” *Mohammed v. Gonzales*, 400 F.3d 785, 793 (9th Cir. 2005). Deficiency is established if the attorney’s representation does not adhere to reasonable professional standards. *Padilla v. Kentucky*, 559 U.S. 356, 375 (2010). [NAME]’s prior legal representative rendered ineffective assistance of counsel, which prejudiced [her/his/their] case [Describe the ineffective assistance of counsel: when was attorney retained? What were expectations at the start and how were these communicated? What was respondent’s understanding of them? When and how did they communicate? Was the attorney present at any hearing? Were there any consistencies or confusions in communication? Other evidence of representation falling below the standards of professional conduct.]

A respondent seeking reopening based on a claim of ineffective assistance of counsel must show a reasonable probability that, but for counsel’s error, [she/he/they] would have prevailed on [her/his/their] claim. *Matter of Melgar*, 28 I&N Dec. 169, 171-72 (BIA 2020) (explaining that prejudice requires the respondent to show “a reasonable probability” that, but for former counsel’s mistake, the respondent would have prevailed on the claim). [Discuss how there is a reasonable probability that but for the attorney’s error(s), the outcome of the proceedings would have been different.]

ii. [NAME] has strictly complied with the procedural requirements of *Matter of Lozada*.

Due process claims based on ineffective assistance of counsel must generally comply with the procedural requirements set forth in *Matter of Lozada*, which requires: (1) that the motion is supported by an affidavit of the respondent setting forth in detail the agreement that was entered into with counsel; (2) that counsel be informed of the allegations and be given an opportunity to

respond; and (3) that the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities. 19 I&N Dec. 637 (BIA 1988); 8 C.F.R. § 1208.4(a)(5)(iii).

[NAME] has complied with *Lozada*'s procedural requirements and submits evidence of this compliance. [Describe the notice provided to prior counsel (and response, if any), the complaint filed with relevant disciplinary authority and, if eligible for relief, include the application for relief and any available supporting documentation including a declaration from the client and you, the current legal representative.]

4. [NAME] is prima facie eligible for [RELIEF].

[NAME] presents new, material evidence that was [if accurate: due to the immigration judge's errors, as discussed above,] previously unavailable at the prior hearing and renders [him/her/them] facie eligible for [RELIEF].

[Describe basis for relief in detail, supported by documentary evidence that establishes prima facie eligibility. Use sub-headings if multiple bases for relief exist.]

B. [NAME] Merits OPLA's Prosecutorial Discretion.

The enduring principles of prosecutorial discretion support the reopening of removal proceedings where such reopening preserves limited government resources necessary to achieve just and fair outcomes in individual cases. Here, reopening [NAME]'s removal proceedings will ensure justice in this case and preserve OPLA's limited resources by avoiding the need for OPLA to review and respond to a lengthy unilateral motion to reopen and to launch a defense before the BIA and the U.S. Court of Appeals for the [Number] Circuit.

Over the past decades, DHS has released policy memos outlining the parameters of the agency's inherent prosecutorial discretion power. These memos have generally identified groups of people that are particularly amenable to prosecutorial discretion, positive equities that warrant the favorable consideration of cases, and negative factors that weigh in favor of enforcement.

Historically, compelling positive equities have included humanitarian factors such as the respondent's length of presence in the United States, contributions to public service, medical treatment in the United States, and history of victimization. DHS has also expressed its commitment to preserving family unity and prioritizing discretion for individuals who are eligible for relief. For example, in August 2021, ICE issued a directive outlining its commitment to protecting and assisting noncitizen victims of crime, including using prosecutorial discretion to facilitate access to justice and victim-based immigration benefits for noncitizen crime victims. ICE Directive 11005.3, "Using a Victim-Centered Approach with Noncitizen Crime Victims" (Aug 10, 2021).

Here, [NAME] presents multiple humanitarian factors that support the favorable exercise of prosecutorial discretion. [Describe any applicable humanitarian factors including, e.g., length of time in United States, public service work / contribution to local community, work history, serious illness, injury, or health condition, victim of crime, victim of domestic violence, family / role as sole caretaker.] [NAME] is also prima facie eligible for [RELIEF], as described above.

Recent memoranda have set out priority enforcement frameworks. For example, in May 2021, ICE OPLA issued a memo explaining that cases involving national security, border security, or public safety are enforcement priorities, and noting that OPLA should continue to address requests for joint motions to reopen on a case-by-case basis, “giving favorable consideration to cases that are not priorities.” Memorandum from John D. Trasviña, “Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities,” at 12 (May 27, 2021). Most recently, in April 2022, OPLA issued a guidance memo that reiterated its policy of prioritizing the removal of individuals who represent a threat to national security, public safety, or border security. Memorandum from Kerry E. Doyle, “Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion” (April 3, 2022). While OPLA is following this guidance only to the extent that it does not rely on or cite to the Mayorkas Memo, it represents the continuation of DHS’s longstanding practice of exercising prosecutorial discretion in a fair and just manner that preserves limited resources.

Here, [NAME]’s case presents no threat to national security, public safety, or border security. Regarding national security, [NAME] has absolutely no history of terrorist activities or human rights abuses. Regarding public safety, [NAME] does not present a threat to the community because they have never been arrested or convicted on criminal charges in the United States or any other [COUNTRY] [or, if the client has a criminal history, explain the client’s mitigating factors or rehabilitation efforts that signal that [she/he/they] [is/are] not a threat to public safety]. Regarding border security, [NAME] was not apprehended at the border or port of entry while attempting to unlawfully enter the United States [or, if the client was apprehended at the border or port of entry: [NAME] entered the United States in [DATE], and has been in the United States for X years. Exh X. [NAME] initially entered the United States fleeing persecution in [COUNTRY]. Exh X.] [More details on entry.]

III. CONCLUSION

For the foregoing reasons, [NAME] respectfully requests that ICE OPLA join a motion to reopen to allow [NAME] to present [her/his/their] case at a new hearing.

Respectfully submitted,

[Signature Block for the Legal Representative]

EXHIBIT LIST IN SUPPORT OF REQUEST FOR PROSECUTORIAL DISCRETION

TAB	DESCRIPTION	PAGES
A		
B		
C		
D		
E		
F		