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A “FUNDAMENTALLY UNFAIR” REMOVAL PROCEEDING: DENIAL OF DUE PROCESS AND INEFFECTIVE ASSISTANCE OF COUNSEL IN *CONTRERAS v. ATTORNEY GENERAL*

HAYLEY TRAHAN-LIPTAK*

Abstract: On January 4, 2012, in *Contreras v. Attorney General of the United States*, the U.S. Court of Appeals for the Third Circuit held that the Fifth Amendment due process right to effective assistance of counsel does not apply to immigration filings prior to removal proceedings. The court reasoned that this is the case even if counsel’s mistakes jeopardize a subsequent removal proceeding. In so holding, the court failed to recognize that the fundamental fairness of a removal hearing may be based on years of process and that pre-proceeding asylum applications are inextricably linked with removal procedures themselves. This decision leaves immigrants without a remedy when their attorneys make mistakes that negatively affect their removal proceedings.

INTRODUCTION

In January 2008, immigration attorney Tahir Mella met with Margarito Contreras to discuss Margarito’s recently denied petition for employment-based permanent residency in the United States on behalf of him and his wife, Norma.¹ Although Mella knew, or should have known, that the deadline to file an appeal had long passed, he requested one thousand dollars from the immigrant family to file an untimely motion to reconsider the visa petition.² Mella did not advise the Contrerases of other options.³ When immigration officials rejected the motion, Mella’s office again represented the Contrerases at their deportation proceedings for an additional fee of fifty-five hundred dollars.⁴ Instead of appearing himself, Mella sent an inexperienced immi-

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¹ See *Contreras v. Att’y Gen. of U.S.*, 665 F.3d 578, 581, 582 (3d Cir. 2012).

² *Id.* at 582, 586.

³ *In re Contreras*, No. A088 194 669, 2010 WL 4213253, at *1 (B.I.A. 2010), *aff’d sub nom.* *Contreras v. Att’y Gen. of U.S.*, 665 F.3d 578 (3d Cir. 2012).

⁴ *Contreras*, 665 F.3d at 582.

gration attorney who misrepresented the facts of the Contrerases' appeal of their denied visa petition.⁵ Moreover, the attorney requested that the court rule for voluntary departure, a request the Immigration Judge (IJ) thought would "shock[] and confuse[]" the Contrerases.⁶ At the final hearing in April 2008, yet another attorney from Mella's firm requested voluntary departure, which the court granted.⁷

On August 18, 2008, the Contrerases filed a motion to reopen their case on the basis of prior ineffective assistance of counsel.⁸ The IJ denied the motion and the Contrerases appealed to the Board of Immigration Appeals (BIA).⁹ The BIA agreed with the IJ, finding that the Contrerases had (1) failed to demonstrate that the immigration hearing itself was unfair, and (2) failed to show that counsel's actions during the removal proceedings had prevented them from reasonably presenting a case.¹⁰

On appeal, the Third Circuit upheld the denial of the Contrerases' motion to reopen the case.¹¹ The court held that although ineffective assistance of counsel during removal proceedings is recognized under the Fifth Amendment as a violation of due process, counsel's mistakes must be so severe that the fundamental fairness of the proceedings is violated.¹² Though the court agreed that absent Mella's mistakes the proceeding might have resulted differently, the court found no prejudice at the hearing itself.¹³ Instead, the Third Circuit held that due process for immigration proceedings ensures only a fundamentally fair *hearing* and does not apply to pre-proceeding immigration petitions.¹⁴

By finding that the Contrerases' hearing was fair despite Mella's "inept conduct," the court failed to recognize that the fundamental fairness of a removal hearing may be based on years of process starting well before removal proceedings begin.¹⁵ Because pre-proceeding ap-

⁵ *See id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; *In re Contreras*, 2010 WL 4213253, at *1.

⁹ *Contreras*, 665 F.3d at 582–83.

¹⁰ *In re Contreras*, 2010 WL 4213253, at *2.

¹¹ *Contreras*, 665 F.3d at 581.

¹² U.S. CONST. amend. V; *Contreras*, 665 F.3d at 584, 586.

¹³ *Contreras*, 665 F.3d at 585–86.

¹⁴ *See id.* at 580–81.

¹⁵ *See id.* at 580–81, 585–86. The court admitted that "attorney incompetence" can make the complex immigration system "insurmountable," but held that "because counsel's substandard performance occurred before the removal proceedings," there was no remedy. *Id.* at 587. During a removal hearing, aliens may instead rely on pre-proceeding applications, including previously filed applications for visas, labor certifications, and asylum

plications are inextricably linked with removal measures, the court's refusal to apply due process protections to pre-proceeding mistakes narrows due process for immigrants.¹⁶

I. THE CONTRERASES' DENIED VISA PETITION, VOLUNTARY REMOVAL, AND APPEAL

Margarito Contreras and his wife Norma Contreras entered the United States from Mexico in 1993 and 1998, respectively.¹⁷ In 2000, Margarito began to seek employment-based permanent residence in the United States, also known as obtaining a "green card."¹⁸ Margarito qualified for a green card as a beneficiary of a labor certification application filed before April 30, 2001.¹⁹ Following the process laid out in 8 U.S.C. § 1255, Margarito hired immigration attorney Tahir Mella to submit an ETA-750 Labor Certification Application on behalf of Margarito's employer, Barrels Italian Foods and Restaurant.²⁰

It took the Department of Labor five years to approve the labor certification application submitted by Mella.²¹ Mella then took the next step of filing a visa petition with the United States Custom and Immigration Service (USCIS).²² At this time, Mella was required to prove that Margarito's employer could pay the agreed-upon wage.²³ In November 2007, the USCIS denied the visa petition because there was no showing

applications, to show they are eligible to stay in the country. *See* 8 U.S.C. § 1229a (2006) (explaining that an alien may use "visa or other entry document[s], if any, and any other records and documents" in meeting the alien's burden of proof that he or she "is lawfully present in the United States pursuant to a prior admission").

¹⁶ *See* 8 U.S.C. § 1229a; *Contreras*, 665 F.3d at 585–87; *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005). The court's decision in *Contreras* limits earlier applications of due process, where the court did not restrict when ineffective assistance may occur, only that it may be found when an alien is prevented from reasonably presenting his or her case. *See Zheng*, 422 F.3d at 106.

¹⁷ *Contreras v. Att'y Gen. of U.S.*, 665 F.3d 578, 581 (3d Cir. 2012).

¹⁸ *Id.*

¹⁹ *Id.*; *see also* 8 U.S.C. § 1255(i) (2006) (permitting aliens who enter the United States without inspection and who are beneficiaries of an application for a labor certification to apply for a status adjustment of permanent residency).

²⁰ 8 U.S.C. § 1182(a)(5)(A) (2006); *Contreras*, 665 F.3d at 581; *see also* 8 U.S.C. § 1255(i). An adjustment to alien status pursuant to 8 U.S.C. § 1255(i) requires (I) an alien and his sponsoring employer show via an ETA-750 labor certificate that there are insufficient workers of appropriate skill and qualifications in the area, and (II) that the alien's admittance will not adversely affect the employment or wages of other like employed workers in the United States. 8 U.S.C. § 1182(a)(5)(A).

²¹ *Contreras*, 665 F.3d at 581.

²² *Id.*

²³ *Id.*

that the company could pay this wage.²⁴ The USCIS gave Contreras thirty-three days to appeal.²⁵

Mella met with Margarito in January 2008, well past the thirty-three day appeal deadline.²⁶ Mella offered to file a motion to reopen the visa petition and in exchange, Margarito paid him the requested one thousand dollars.²⁷ Mella decided instead to file a motion to reconsider the USCIS's initial visa denial, even though that deadline had also passed.²⁸ Mella never told Margarito that the deadline had passed or that he could file a new Application for Employment Certification instead.²⁹

The Department of Homeland Security initiated removal proceedings against the Contrerases in the spring of 2008 and the couple paid Mella another fifty-five hundred dollars for him to personally represent them at the removal hearing.³⁰ Instead of appearing himself as promised, Mella sent several other attorneys from his office, who, according to the IJ, "might not [have been] fully aware of the immigration laws," evidenced, in part, by their ignorance of the meaning of a priority date.³¹ The attorneys sent to represent the Contrerases told the IJ that a timely appeal had been filed, even though that was not the case, and then, rather than asking for a continuance, requested voluntary departure for the Contrerases.³² The IJ continued the case to allow counsel time to more adequately prepare.³³ A second hearing was held in April 2008, during which Mella sent yet another attorney from his firm who requested only voluntary departure on behalf of the Contrerases.³⁴ The IJ granted the request and gave the Contrerases time to voluntarily leave the United States.³⁵

The day before their period of voluntary departure was to expire, the Contrerases filed a motion with the immigration court to reopen the case based on Mella's previous ineffective assistance of counsel.³⁶

²⁴ *Id.*

²⁵ *Id.* at 581–82.

²⁶ *Id.* at 582.

²⁷ *Contreras*, 665 F.3d at 582.

²⁸ *Id.*

²⁹ *Id.*; *In re Contreras*, No. A088 194 669, 2010 WL 4213253, at *1 (B.I.A. 2010), *aff'd sub nom.* *Contreras v. Att'y Gen. of U.S.*, 665 F.3d 578 (3d Cir. 2012).

³⁰ *Contreras*, 665 F.3d at 582.

³¹ *Id.* at 582 & n.1.

³² *Id.* at 582.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Contreras*, 665 F.3d at 582.

The Contrerases claimed that Mella's assistance was ineffective both before and during the removal process.³⁷ They contended that in filing the labor certification application prior to the removal proceeding, Mella disregarded the fact that Margarito's employer could not pay the required wage.³⁸ They further contended that Mella then failed to file a timely motion to reconsider the denied visa petition.³⁹ Additionally, they argued that Mella and the attorneys sent on his behalf were ineffective during the hearing by misrepresenting the status of the appeal and by not requesting a continuance instead of voluntary departure.⁴⁰

The IJ denied the appeal, explaining that she did not have jurisdiction over the Application for Employment Certification, and finding that Mella did not prejudice the Contrerases during the removal proceeding itself.⁴¹ First, the IJ found that Mella's failure to request a continuance was not a failure to request relief.⁴² The IJ referred to the original record, where she stated that she was unwilling to grant the Contrerases a continuance without evidence of a timely appeal of the rejected visa petition.⁴³ Thus, the IJ found that the Contrerases were not eligible for any relief aside from voluntary departure and that their motion did not show ineffective assistance of counsel during the course of the removal proceedings.⁴⁴

The Contrerases appealed the IJ's decision to the BIA.⁴⁵ The BIA affirmed the IJ's decision and dismissed the appeal, stating that in order to reopen a claim the previous counsel's negligence must be "so egregious that it rendered the *hearing* unfair."⁴⁶ Again, the BIA noted a lack of jurisdiction to address the claim of ineffective assistance of counsel during the earlier visa petition process.⁴⁷ Regarding the hearing mistakes, the BIA found that the IJ's weighing of the Contrerases' factual basis was not clearly erroneous and therefore, there was no reversible error.⁴⁸ Ultimately, the BIA concluded that the Contrerases did

³⁷ *See id.* at 583.

³⁸ *Id.* at 581, 583.

³⁹ *Id.* at 583.

⁴⁰ *Id.*

⁴¹ *In re Contreras*, 2010 WL 4213253, at *1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at *2, *3. (emphasis added).

⁴⁷ *See In re Contreras*, 2010 WL 4213253, at *2.

⁴⁸ *Id.* at *3 (pointing to the proposition that when there are multiple permissible views of the evidence, a fact finder's choice is not clearly erroneous and is therefore not reversible) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985)).

not show that the hearing before the IJ was unfair “during the course of the removal proceedings”⁴⁹ Following the BIA’s decision, the Contrerases appealed to the U.S. Court of Appeals for the Third Circuit.⁵⁰

II. INEFFECTIVE ASSISTANCE OF COUNSEL IN DEPORTATION PROCEEDINGS UNDER THE FIFTH AMENDMENT

To address the Contrerases’ claim that Mella’s mistakes warranted a reopening of their case, the Third Circuit considered right to counsel standards under both the Fifth and Sixth Amendments.⁵¹ Although a right to effective counsel is recognized in criminal cases under the Sixth Amendment, the Third Circuit previously held that such a right does not apply to civil cases, including immigration proceedings.⁵² Still, appellate courts have differentiated deportation proceedings from traditional civil cases due to their impact on the immigrant’s liberty.⁵³ Therefore, the Fifth Amendment right to due process has been found to apply to deportation proceedings.⁵⁴

A. Identifying Ineffective Assistance of Counsel in Removal Proceedings

The Third Circuit, reflecting the decisions of most circuit courts, recognizes ineffective assistance of counsel in immigration removal proceedings as a violation of due process under the Fifth Amendment.⁵⁵ In 2007, in *Fadiga v. Attorney General*, the Third Circuit found that counsel at a hearing may be so incompetent as to create a “fundamentally unfair” proceeding, giving rise to a Fifth Amendment due

⁴⁹ *See id.*

⁵⁰ *Contreras*, 665 F.3d at 583.

⁵¹ *Contreras v. Att’y Gen. of U.S.*, 665 F.3d 578, 584 (3d Cir. 2012).

⁵² *Id.*; *Fadiga v. Att’y Gen. of U.S.*, 488 F.3d 142, 157 n.23 (3d Cir. 2007) (noting the Sixth Amendment does not apply to civil cases, including immigration proceedings); *see* U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 680, 706–07 (recognizing that the proper standard for attorneys under the Sixth Amendment is “reasonably effective assistance”).

⁵³ *See, e.g., Fadiga*, 488 F.3d at 157 n.23 (citing *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 381 (3d Cir. 2003) (Rendell, J., dissenting), which distinguished deportation proceedings from civil cases based on the possible deprivation of an alien’s liberty).

⁵⁴ *Contreras*, 665 F.3d at 584; *see* U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); *Fadiga*, 488 F.3d at 157 (applying the Fifth Amendment to deportation proceedings).

⁵⁵ *Contreras*, 665 F.3d at 584; *see, e.g., Fadiga*, 488 F.3d at 162, 163 (recognizing that when counsel’s mistakes prejudice the client’s interest, it may violate due process); *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005) (recognizing a claim of ineffective assistance of counsel during removal proceedings under the Fifth Amendment); *see also Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *United States v. Perez*, 330 F.3d 97, 101 (2d Cir. 2003).

process claim.⁵⁶ Under *Fadiga*, appellees must show that counsel's ineffective performance substantially prejudiced them and prevented them from reasonably presenting their case.⁵⁷

To identify ineffective assistance of counsel, the Third Circuit in *Fadiga* adopted the "two-part, error-and-prejudice test" used in 2000 by the Second Circuit in *Iavorski v. INS*.⁵⁸ First, the court asks if "competent counsel would have acted otherwise."⁵⁹ If so, the court looks to whether counsel's incompetent performance prejudiced the individual.⁶⁰ Such prejudice is shown if it is reasonably likely that the removal proceedings would have resulted differently absent counsel's errors.⁶¹ Therefore, the test requires a showing that the original removal order is unfair because the IJ would not have entered such an order had there been effective representation.⁶² Prior to *Contreras*, the Third Circuit applied this test only to counsel's ineffectiveness during removal proceedings and had not discussed ineffectiveness occurring before such proceedings commenced.⁶³

To address the Contrerases' claim of ineffective assistance of counsel before removal proceedings, the Third Circuit, lacking direct circuit precedent, turned to *Balam-Chuc v. Mukasey*.⁶⁴ In 2008, in *Balam-Chuc*, the Ninth Circuit found that the mistakes at issue were made before the initiation of removal proceedings, and thus did not relate to the substance of the removal proceeding itself.⁶⁵ Therefore, *Balam-Chuc* constrained the Fifth Amendment due process right to the proceeding itself and refused to recognize any due process rights for legal assistance outside of the actual removal hearing.⁶⁶ To determine if due process was violated, the Third Circuit in *Contreras* applied the *Balam-Chuc* standard to assess the timing of Mella's ineffectiveness.⁶⁷

⁵⁶ *Fadiga*, 488 F.3d at 155.

⁵⁷ *Id.*

⁵⁸ *Id.*; see *Iavorski v. INS*, 232 F.3d 124, 128–29 (2d Cir. 2000).

⁵⁹ *Fadiga*, 488 F.3d at 157 (quoting *Iavorski*, 232 F.3d at 129).

⁶⁰ *Id.* (citing *Zheng*, 422 F.3d at 107).

⁶¹ *Id.* at 160.

⁶² *Id.* at 159.

⁶³ See *Contreras*, 665 F.3d at 585.

⁶⁴ *Id.* (applying the Ninth Circuit's analysis in *Balam-Chuc v. Mukasey*, 547 F.3d 1044 (9th Cir. 2008), to the instant case).

⁶⁵ *Id.*; *Balam-Chuc*, 547 F.3d at 1051 (holding that "the Fifth Amendment simply does not apply to the preparation and filing of a petition that does not relate to the fundamental fairness of an ongoing proceeding").

⁶⁶ See *Balam-Chuc*, 547 F.3d at 1051.

⁶⁷ See *Contreras*, 665 F.3d at 585–86; *Balam-Chuc*, 547 F.3d at 1051.

B. *Third Circuit Finds a Fundamentally Fair Hearing*

In their appeal to the Third Circuit, the Contrerases argued that their Fifth Amendment right to due process had been violated in two ways.⁶⁸ First, the Contrerases argued that Mella's mistakes of incorrectly filing and appealing visa petitions prior to the hearing jeopardized their application.⁶⁹ Second, they claimed their counsel at the proceeding was defective for misleading the IJ and failing to request a continuance.⁷⁰ The court considered each allegation independently.⁷¹

1. Third Circuit Holds That Fundamental Fairness Is Unaffected by Ineffective Assistance of Counsel Prior to a Removal Hearing

The court first considered the Contrerases' claim of ineffective assistance of counsel prior to the removal hearing.⁷² The Contrerases argued that although Mella knew a labor certification would be denied because Margarito's employer could not pay the required wage, he futilely filed a labor certification application with the Department of Labor.⁷³ The Contrerases then claimed that Mella failed to timely file a motion to reconsider the visa petition once it was denied.⁷⁴ The court reviewed both the decision of the IJ and the BIA, noting they would reopen the case only if the IJ had abused her discretion, or reverse the finding if the denial of the appeal was "arbitrary, irrational, or contrary to law."⁷⁵

The Third Circuit first applied the *Fadiga* standard, requiring that ineffective assistance of counsel must harm the fundamental fairness of the proceeding.⁷⁶ Mella's contested mistakes, however, were made during the course of the filing of the visa application and not during the hearing or other parts of the removal proceedings.⁷⁷ In fact, the court noted, the removal proceedings did not begin until after Mella's "substandard performance" occurred.⁷⁸ Therefore, Mella's deficient performance had no impact on the fundamental fairness of the removal

⁶⁸ *Contreras*, 665 F.3d at 583.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 583–84.

⁷² *Id.* at 584.

⁷³ *Id.* at 583.

⁷⁴ *Contreras*, 665 F.3d at 583.

⁷⁵ *Id.*

⁷⁶ *Id.* at 584; *see Fadiga*, 488 F.3d at 155.

⁷⁷ *Contreras*, 665 F.3d at 585–86.

⁷⁸ *Id.* at 587.

proceedings.⁷⁹ The Third Circuit found that the Contrerases were still able to present their case and available arguments to the IJ during the hearing, and thus were not prejudiced by Mella's mistakes.⁸⁰

2. Mella's Mistakes Did Not Cause Prejudice at Trial

In addition to their pre-proceeding ineffective assistance of counsel claim, the Contrerases argued that Mella and the other attorneys from his office provided defective assistance during the proceeding.⁸¹ Specifically, the Contrerases alleged that counsel mistakenly claimed that Margarito's denied visa petition had been timely appealed and also that counsel failed to request a continuance.⁸² The Contrerases contended that had their counsel requested a continuance, the additional time would have allowed Margarito's employer to reapply for a visa on his behalf, or at the very least spared them the threat of a ten-year bar of admissibility.⁸³

In addressing the appeal, the Third Circuit found that these mistakes had not prejudiced the Contrerases.⁸⁴ Although the attorney who was sent by Mella to appear on the Contrerases' behalf initially told the IJ that an appeal had been filed, she later admitted she was mistaken.⁸⁵ Thus, the Third Circuit found that the IJ was not misled to believe that there had been a timely appeal and the misstatement regarding the status of the appeal was not prejudicial.⁸⁶

Additionally, the Third Circuit determined that counsel's request for a continuance did not prejudice the Contrerases' interest.⁸⁷ The court pointed to the record that stated that without evidence of a timely appeal of the visa petition denial, the IJ would not have granted a con-

⁷⁹ *Id.* at 585–86.

⁸⁰ *Id.* at 586. The court found that “inept conduct prior to the removal proceedings . . . did not compromise the fundamental fairness of the removal proceedings themselves.” *Id.* at 585–86.

⁸¹ *Id.* at 583.

⁸² *Id.*

⁸³ *Contreras*, 665 F.3d at 583, 588; see 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006) (stating that an alien who has departed or has been removed from the United States after being unlawfully present for a year or more is ineligible for re-admission to the United States within ten years of the alien's removal).

⁸⁴ *Contreras*, 665 F.3d. at 587.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.* The Third Circuit reasoned that “competent counsel would not have requested a third continuance . . . because, based on the IJ's previous comments, such a request would have been futile.” *Id.*

tinuance.⁸⁸ Because a timely appeal had not been filed, any request for a continuance would likely have been denied.⁸⁹ The court reasoned that an IJ has wide discretion to grant requests, and concluded that she did not abuse this discretion by denying the continuance.⁹⁰

Finally, the court found that had counsel requested a continuance, it was unlikely that it would have protected the Contrerases from a ten-year ban of admissibility.⁹¹ The IJ likely would not have granted a continuance, and therefore, the Contrerases would have been involuntarily removed had their counsel not sought voluntary departure.⁹² Because the Contrerases had already lived in the United States illegally for over a year, they were still subject to the ten-year ban for voluntary or involuntary removal.⁹³ In light of the above, the Third Circuit found that Mella's mistakes did not prejudice the Contrerases because the result of the removal proceeding would likely have been the same regardless of counsel's actions during the hearing itself.⁹⁴

III. When Ineffective Assistance of Counsel Prejudices Aliens: The Application of Due Process to Pre-Hearing Procedures

The heart of the Contrerases' appeal was their claim of ineffective assistance of counsel prior to the removal hearing.⁹⁵ The Contrerases argued that Mella's mistake prejudiced them at the removal proceeding and thus violated their Fifth Amendment right to due process.⁹⁶

A. Using the Error-and-Prejudice Test to Determine Fundamental Fairness

To address the Contrerases' claim of ineffective assistance of counsel prior to the removal proceeding, the Third Circuit turned to the standard recognized in *Fadiga v. Attorney General of the United States*: to

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Contreras*, 665 F.3d at 587. IJs are not required to grant continuance requests if it is merely speculative that a visa application for the immigrants will be approved in the future.

Id.

⁹¹ *Id.* at 588; see also 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006).

⁹² *Contreras*, 665 F.3d at 588.

⁹³ 8 U.S.C. § 1182(a)(9)(B)(i)(II); *Contreras*, 665 F.3d at 588.

⁹⁴ See *Contreras*, 665 F.3d at 585–88.

⁹⁵ See *Contreras v. Att'y Gen. of U.S.*, 665 F.3d 578, 583 (3d Cir. 2012); *In re Contreras*, No. A088 194 669, 2010 WL 4213253, at *2 (B.I.A. 2010), *aff'd sub nom.* *Contreras v. Att'y Gen. of U.S.*, 665 F.3d 578 (3d Cir. 2012) (stating that the Contrerases' "arguments of ineffective assistance of counsel center on [Margarito's] pursuit of his application for adjustment of status by way of an employment-based visa petition").

⁹⁶ *Contreras*, 665 F.3d at 583–84.

prejudice the immigrant's interests, counsel's ineffectiveness "must be so severe as to undermine the fundamental fairness of the removal proceedings."⁹⁷ The court in *Contreras v. Attorney General of the United States* acknowledged that the traditional two-part error-and-prejudice test is applied to determine whether counsel's mistakes prevented the alien from presenting his or her case, yet declined to apply it.⁹⁸

Instead of the error-and-prejudice test, the Third Circuit adopted the Ninth Circuit's holding in *Balam Chuc v. Mukasey*, that due process is not violated if the visa petition filing is unrelated to the ongoing removal proceeding.⁹⁹ Applying this standard to the Contrerases, the court found that the fundamental fairness of the removal proceeding was not harmed because the proceeding began after Mella's filing mistakes.¹⁰⁰ The court acknowledged that Mella's handling of the Contrerases' visa petition "fell well short of the decency and professionalism" expected from an immigration attorney.¹⁰¹ Nevertheless, the court found that the Contrerases were still able to present arguments at their hearing; there were just no helpful arguments or evidence available to them.¹⁰²

By finding that due process did not apply to Mella's pre-proceeding mistakes, the Third Circuit restricted the due process typically afforded to ineffective assistance of counsel claims.¹⁰³ By not applying the error-and-prejudice test to pre-proceedings mistakes, the *Contreras* court overlooked that these mistakes compromised the fairness of the hearing itself.¹⁰⁴

⁹⁷ *Id.* at 584; *Fadiga v. Att'y Gen. of U.S.*, 488 F.3d 142, 155 (3d Cir. 2007).

⁹⁸ *See Contreras*, 665 F.3d at 584–85 (addressing the error-and-prejudice test but declining to apply it to the instant case after reaching the conclusion that the Fifth Amendment does not protect pre-proceeding ineffective assistance of counsel). The error-and-prejudice test was first developed in *Strickland v. Washington* to determine ineffective assistance of counsel in criminal cases. *See Strickland v. Washington*, 466 U.S. 688, 694 (1984). The Ninth Circuit applied the test to removal proceedings in *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 857–58 (9th Cir. 2004), and the Third Circuit applied the test for the same purpose in *Fadiga v. Attorney General of United States*, 488 F.3d 142, 155, 157 (3d Cir. 2007).

⁹⁹ *Id.* at 585; *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050–51 (9th Cir. 2008).

¹⁰⁰ *Contreras*, 665 F.3d at 585–87.

¹⁰¹ *Id.* at 587.

¹⁰² *Id.* at 586.

¹⁰³ *See id.* at 585–86; *Fadiga*, 488 F.3d at 152, 163 (finding counsel's failure to review asylum petition prior to filing did not produce a fundamentally fair hearing, thus denying the alien due process).

¹⁰⁴ *See Contreras*, 665 F.3d at 586. Courts of appeals, including the Third Circuit, have overturned cases that incorrectly use the error-and-prejudice test standard because they failed to properly analyze the fundamental fairness of a hearing. *See Fadiga*, 488 F.3d at 161

Had the court followed the well-established error-and-prejudice test, it would likely have found that Mella's mistakes substantially prejudiced the Contrerases.¹⁰⁵ First, the test asks, "whether 'competent counsel would have acted otherwise.'"¹⁰⁶ Here, the Third Circuit admitted that Mella went on a "fool's errand," called his conduct "inept" and "well short of the decency and professionalism [the court] expect[s] from the immigration bar."¹⁰⁷ Therefore, it was clear that the court felt competent counsel should have, and would have, acted otherwise.¹⁰⁸

Second, the error-and-prejudice test asks, "whether counsel's poor performance prejudiced the alien."¹⁰⁹ Prejudice is revealed if the alien can show that he was prevented from "reasonably presenting his case" and that there is a "reasonable likelihood" that his proceeding would have resulted differently absent counsel's mistakes.¹¹⁰ While the Third Circuit pointed out that the Contrerases did not have any arguments or evidence that would have provided relief at the hearing, it acknowledged that absent Mella's mistakes the IJ may have continued the removal proceeding.¹¹¹ Accordingly, the Contrerases were prejudiced by counsel's poor performance because there may have been a different result had Mella acted otherwise.¹¹²

Under the error-and-prejudice test, Mella's pre-proceeding mistakes show substantial prejudice.¹¹³ By ignoring this test and consider-

(requiring that the court ask if there was a reasonable likelihood that the outcome of a hearing would be different without counsel's mistakes); *Javorski v. INS*, 232 F.3d 124, 128–29 (2d Cir. 2000) (finding a hearing is unfair if competent counsel would act differently and the alien is harmed by counsel's mistakes).

¹⁰⁵ See *Contreras*, 665 F.3d at 584–85; *Fadiga*, 488 F.3d at 162 (applying the error-and-prejudice test to show that counsel's performance fell below the "objective standard" and "severely compromised" the alien's ability to present arguments).

¹⁰⁶ *Contreras*, 665 F.3d at 584 (quoting *Javorski*, 232 F.3d at 128–29).

¹⁰⁷ *Id.* at 585–87.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at 584.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 585–86.

¹¹² See *Contreras*, 665 F.3d at 585–86; *Fadiga*, 488 F.3d at 154–55 (finding counsel's poor performance prejudiced the alien because there was a reasonable likelihood that the alien would have won at his hearing absent counsel's mistakes).

¹¹³ See *Contreras*, 665 F.3d at 585; *Fadiga*, 488 F.3d at 154–55 (finding prejudice when counsel's performance fell below the reasonable standard, creating the reasonable likelihood that the appeal would have resulted differently absent counsel's mistakes); see also *Rabiu v. INS*, 41 F.3d 879, 883 (2d Cir. 1994) (noting that counsel's failure to file an appeal was below the standard of competency and pointing to the likelihood that the alien would have prevailed otherwise).

ing simply when the ineffective assistance occurred, the court limited the application of due process to the actual legal proceedings.¹¹⁴

B. *Failure to Recognize Ineffective Assistance of Counsel During Pre-Proceeding Assistance Limits Due Process in Removal Proceedings*

The Fifth Amendment guarantees due process, which in removal proceedings means aliens are entitled to the process of a fundamentally fair hearing.¹¹⁵ Yet, removal proceedings are closely linked to pre-proceeding applications because such applications are routinely used as evidence, arguments, and defenses in removal hearings.¹¹⁶ In fact, a removal hearing focuses on an alien's legal status, a status dependent on existing visa petitions, green cards, and other adjustments of status.¹¹⁷ Thus, when counsel makes mistakes on visa petitions, potential arguments change or disappear.¹¹⁸ The result of counsel's incompetence before the hearing, like the result for the Contrerases, can be devastating at the hearing itself.¹¹⁹

By finding that Fifth Amendment due process does not apply to ineffective pre-hearing assistance, the Third Circuit limited due process previously available to aliens.¹²⁰ Here, the court admits that the Contrerases deserved better than Mella's representation, yet it eliminates any remedy by failing to apply the due process standard to pre-

¹¹⁴ See *Contreras*, 665 F.3d at 585–86. The Third Circuit previously held that ineffective assistance of counsel denies due process when the alien is prevented from reasonably presenting his case, yet did not restrict when ineffectiveness could occur. See *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005).

¹¹⁵ U.S. CONST. amend. V; *Contreras*, 665 F.3d at 584.

¹¹⁶ See 8 U.S.C. § 1229a (2006) (explaining that an alien may use a “visa or other entry document, if any, and any other records and documents” in meetings the alien's burden of proof that he or she “is lawfully present in the United States pursuant to a prior admission”); see, e.g., *Patel v. Ashcroft*, 375 F.3d 693, 696 (8th Cir. 2004) (stating that evidence of a visa petition establishes “primary evidence of eligibility” for adjustment of status).

¹¹⁷ See generally 8 U.S.C. § 1227 (stating classes of deportable aliens); 8 U.S.C. § 1255 (2006) (stating aliens that are eligible for adjustment of status based, in part, on visa petitions).

¹¹⁸ See *Contreras*, 665 F.3d at 585; see also *Fadiga*, 488 F.3d at 148, 162 (finding that counsel's failure to review the application before the hearing or to tell his client about the potential for witnesses to testify at the hearing restricted the alien's arguments and diminished his credibility at the hearing).

¹¹⁹ See *Contreras*, 665 F.3d at 586; *Fadiga*, 488 F.3d at 148, 162.

¹²⁰ U.S. CONST. amend. V. Compare *Contreras*, 665 F.3d at 586 (recognizing counsel's substandard performance yet denying a remedy because it occurred too early), with *Zheng*, 422 F.3d at 107 (requiring that an alien only demonstrate that counsel's assistance was ineffective and that the alien was prejudiced by counsel's actions).

proceeding assistance.¹²¹ Without a right to effective counsel prior to the hearing itself, aliens have no due process remedy when immigration attorneys make careless or dishonest mistakes that harm their removal proceedings.¹²² The majority's opinion will lead to deportation and bars of admissibility for aliens with legitimate visa petitions, but who receive ineffective assistance of counsel prior to their hearings.¹²³

CONCLUSION

The Third Circuit correctly identified that aliens have a due process right under the Fifth Amendment in removal proceedings. This due process right may be violated when ineffective assistance of immigration counsel reduces the possibility of achieving a "fundamentally fair hearing." The Contrerases argued that their attorney's mistakes during the filing of their visa petition and during the removal hearing violated their due process right to a fundamentally fair hearing. The Third Circuit, however, differentiated between effective assistance of counsel at the removal hearing itself and the assistance in pre-proceeding immigration petitions and held that Fifth Amendment due process does not apply to ineffective pre-hearing assistance. In the current immigration system, pre-proceeding assistance from an immigration attorney is vital to the development and presentation of arguments and defenses in a removal hearing. Accordingly, the Third Circuit's decision decreases the due process rights available to undocumented aliens, particularly those simultaneously defending removal proceedings and applying for adjustment of status.

¹²¹ See *Contreras*, 665 F.3d at 587; *Balam-Chuc*, 547 F.3d at 1050.

¹²² See *Contreras*, 665 F.3d at 587; *Balam-Chuc*, 547 F.3d at 1050.

¹²³ See *Contreras*, 665 F.3d at 586, 587; see also *Balam-Chuc*, 547 F.3d at 1051 (recognizing that limiting due process to existing removal proceedings meant the alien and his family would be deported because his attorney failed to file a timely visa application).