

District Judge Kymberly K. Evanson
Magistrate Judge Brian A. Tsuchida

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DZYUBAN DANILO,

Petitioner,

v.

ICE FIELD OFFICE DIRECTOR, *et al.*,

Respondents.

Case No. 2:25-cv-01919-KKE-BAT

FEDERAL RESPONDENTS'
SUPPLEMENTAL BRIEF RE:
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM

Pursuant to the Court's Order dated December 31, 2015 (Dkt. 11), Respondents hereby file this supplemental brief regarding Petitioner's claim of ineffective assistance of counsel raised for the first time in his response to Respondents' Return.

Before addressing the elements of ineffective assistance of counsel in immigration proceedings as it pertains to this claim, it is important to first explore the circumstances under which Petitioner Dzyuban obtained representation. The Immigration Court appointed a Qualified Representative (QR) to represent Petitioner pursuant to the decision issued by the United States District Court for the Central District of California in *Franco-Gonzalez, et al. v. Holder, et al.*, 2013 WL 3674492 (C.D. Cal. April 23, 2013). In *Franco-Gonzalez*, the Court found that Section 504 of the Rehabilitation Act requires "the appointment of a Qualified Representative as a

1 reasonable accommodation” for “individuals who are not competent to represent themselves by
2 virtue of their mental disabilities.” *Id.* at *3.¹ A “qualified representative” is defined not just as an
3 attorney, but also as a “law student or law graduate directly supervised by a retained attorney” or
4 “an accredited representative, all as defined in 8 C.F.R. § 1292.1.” *Id.* at n.4. An “accredited
5 representative” is defined in the regulation to include not just attorneys, law students and law
6 graduates not yet admitted to the bar, but also as individuals “whom EOIR has authorized to
7 represent immigration clients on behalf of a recognized organization...” who are authorized to
8 practice before DHS, as well as reputable individuals of good moral character who have a “pre-
9 existing relationship or connection with the person entitled to representation” and who are
10 “appearing without remuneration on an individual case basis at the person entitled to
11 representation.” 8 C.F.R. § 1292.1.

12 Thus, there is no requirement for the qualified representative to be an attorney, and
13 Respondents therefore question whether Petitioner can raise an ineffective assistance of counsel
14 claim when he had no right to *counsel* (i.e., an attorney) in the first place, regardless of the fact
15 that his QR was in fact an attorney who actively practices immigration law in Washington state.
16 *See* Form EOIR – 28, Notice of Entry of Appearance, attached as Exhibit A to Declaration of
17 Kristen R. Vogel.²

18 In any event, even if the Court were to assume that Petitioner can raise an ineffective
19 assistance of counsel claim based on the representation of a QR, he fails to properly do so in this
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21 _____
22 ¹ Because it found for the Plaintiffs on the Rehabilitation Act claim, the *Franco-Gonzalez* court did not address
whether the Immigration and Nationality Act or the Due Process Clause likewise requires appointment of a qualified
representative. *Franco-Gonzalez*, at *9-10.

23 ² Research conducted by the U.S. Attorney’s Office did not definitively answer this question. While non-citizens in
24 removal proceeds do not have a right to counsel, they do have a right to effective assistance if they choose to retain
counsel. *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008). Here, Petitioner did not *retain counsel*, he was appointed
a QR.

1 case. As a preliminary matter, an individual who wishes to assert claims that their attorney
2 provided ineffective assistance of counsel in immigration court proceedings must raise the claim
3 before the Immigration Judge (IJ) on direct review. “His failure to do so constitutes a failure to
4 exhaust administrative remedies and he may not raise this claim for the first time before a federal
5 court.” *Singh v. Gonzales, et al.*, 499 F.3d 969, 974 (9th Cir. 2007). Where “an alien petitioner fails
6 to pursue an administrative remedy without excuse, he may not ‘bypass the administrative scheme
7 that is in place to deal with[such] claims’ by presenting the claim for the first time in a habeas
8 petition.” *Id.* While the Ninth Circuit has recognized a limited exception to this exhaustion
9 requirement, the exception applies where the alleged ineffective assistance occurred *after* issuance
10 of a final order of removal. *Id.* at 979. Here, Petitioner takes issue with the representation he
11 received before there was any order of removal.

12 In cases where jurisdiction exists for the court to examine an ineffective assistance claim
13 in federal district court, the following standards apply. “Ineffective assistance of counsel amounts
14 to a violation of due process if ‘the proceeding was so fundamentally unfair that the alien was
15 prevented from reasonably presenting his case.’” *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir.
16 2008) (citations omitted). “To make out an ineffective assistance claim, an immigrant must show
17 (1) that counsel’s performance was deficient, and (2) that counsel’s deficiency caused prejudice.
18 Prejudice only results when counsel’s performance is ‘so inadequate that it may have affected the
19 outcome of the proceedings.’” *Id.* (citations omitted). Respondents respectfully submit that
20 Petitioner fails to assert sufficient factual allegations to meet these standards here.

21 Finally, to the extent this Court wants Respondents’ position on whether the QR’s
22 performance was deficient, Respondents were not privy to the conversations that Petitioner had
23 with his QR and thus can take no position on the merits.

24 //

1 DATED this 14th day of January, 2026.

2 Respectfully submitted,

3 CHARLES NEIL FLOYD
4 United States Attorney

5 *s/ Kristen R. Vogel*

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16 I certify that this memorandum contains 824 words,
17 in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of the United States Attorney for the Western District of Washington and of such age and discretion as to be competent to serve papers.

I further certify on today's date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following CM/ECF participant(s):

- 0 -

I further certify on today's date, I arranged for service of the foregoing on the following non-CM/ECF participant(s), via Certified Mail with return receipt, postage prepaid, addressed as follows:

Danilo Dzyuban, Pro Se Petitioner
A#
NW ICE Processing Center
1623 E. J Street, Suite 5
Tacoma, WA 98421-1615

DATED this 14th day of January, 2026.

s/ Hung Nguyen
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