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Competency Issues in Removal Proceedings: An Update

by Ilana Snyder

It is well settled that a criminal defendant will not stand trial if he is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a), (d). It is also well established that "[d]eportation is not a criminal proceeding," *Carlson v. Landon,* 342 U.S. 524, 537 (1952), and therefore "a lack of competency in civil immigration proceedings does not mean that the hearing cannot go forward." *See Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011); *accord Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006); *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977). Yet immigration proceedings "must [still] conform to the Fifth Amendment's requirement of due process." Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings,* Immigration Law Advisor, Vol. 3, No. 4, at 1 (Apr. 2009) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Paramount among these due process rights is that a respondent must receive a full and fair hearing, *Carlson*, 342 U.S. at 537–38, in which the respondent has a "reasonable opportunity" to examine and present evidence, *see* section 240(b)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4)(B), an ability to consult with his counsel, if represented, *see Matter of M-A-M-*, 25 I&N Dec. at 479, and an opportunity to testify fully in support of his claims for relief from removal, *see Matter of E-F-H-L-*, 26 I&N Dec. 319, 324 (BIA 2014). The first part of this article examines Board decisions clarifying procedures for determining competency, and the second part examines regulations and decisions elucidating the safeguards that an Immigration Judge may need to consider to protect the Fifth Amendment rights of respondents with a mental illness or cognitive disability.[1]

The author notes that additional procedures to address mental competency issues have been implemented in the Ninth Circuit pursuant to the orders in *Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014), and *Franco-Gonzalez v. Holder,* No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). *See infra* note 1.

Determining Competency

Assessing Competency Where Indicia of Incompetency Are Observed

In its landmark *Matter of M-A-M-* decision, the Board held that Immigration Judges must assess an alien's competency where indicia of incompetency are observed. 25 I&N Dec. at 484. The respondent, a native and citizen of Jamaica, was admitted to the United States as a lawful permanent resident in 1971. In 2008, the Department of Homeland Security ("DHS") placed the respondent into removal proceedings. The respondent, appearing pro se, "had difficulty answering basic questions, such as his name and date of birth" and indicated that he had been diagnosed with schizophrenia. *Id.* He also informed the Immigration Judge that he needed medication. *Id.* At the next hearing, the respondent stated that he had a history of mental illness and requested a change of venue to be closer to family, a request that was denied. *Id.* In four additional hearings, the respondent's mental health was referenced. At a merits hearing before a different Immigration Judge, the Immigration Judge admitted the respondent's mental health evaluations into the record and noted the respondent's mental competency issues but did not make a finding regarding competency. *Id.* at 475–76. On appeal, the respondent argued that the Immigration Judge erred in not assessing his mental competency. *Id.* at 476.

In a decision remanding the record for further proceedings, the Board ordered the Immigration Judge, to "take steps to assess the respondent's competency, make a finding regarding his competency, apply safeguards as warranted, and articulate her reasoning." *Id.* at 484. The Board made several significant holdings in the case. The Board first held that respondents in removal proceedings are presumed to be competent. *Id.* at 477. Next, the Board instructed Immigration Judges who observe indicia of incompetency to further determine if a respondent is competent to participate in immigration proceedings. *Id.* at 479–80. Where no indicia of incompetency are observed, the Board concluded that there is no duty to examine an alien's competency. *Id.* at 477 (citing *Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008)). "Indicia of incompetency" are either observed by the Immigration Judge or evidenced in the record. *Id.* at 479. An Immigration Judge's observation of "certain behaviors by the respondent, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction," may constitute indicia of incompetency. *Id.* Evidence-based indicia may include "medical reports or assessments from past medical treatment or from criminal proceedings, as well as testimony from medical health professionals." *Id.* at 479. Additionally, evidence may include: "school records regarding special education classes or individualized education plans; reports or letters from teachers, counselors, or social workers; evidence of participation in programs for persons with mental illness; evidence of applications for disability benefits; and affidavits or testimony from friends or family members." *Id.* at 479–80.

In this competency inquiry, the Immigration Judge must determine if the "alien is competent to participate in immigration proceedings." *Id.* at 479. "[T]he test . . . is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id.* After the inquiry, the Immigration Judge must articulate his or her reasoning in concluding whether an alien is sufficiently competent to proceed. *Id.* at 480–81. If the respondent lacks sufficient competency to proceed, the Board instructed Immigration Judges to institute "safeguards" to ensure a fair hearing. *Id.* at 481 (citing section 240(b)(3) of the Act). In cases where the alien is found to be competent to proceed, the hearing can move forward without "safeguards," but with the caveat that "competency is not a static condition," meaning that the Immigration Judge may later need to evaluate whether the alien is still competent to represent him or herself. *See id*. at 480 (quoting *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)).

Mental Competency Determinations Are Fact-Finding, Nonadversarial Proceedings

In *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015), the Board clarified the burden of proof, standard of proof, and standard of review for mental competency determinations. The respondent, a native and citizen of Haiti, had been admitted to the United States as a lawful permanent resident in 1997. *Id.* at 679. He later committed two drug offenses that made him removable. *Id.* at 680. The respondent presented evidence of his "long history of mental illness, starting in childhood, when he began experiencing auditory and visual

hallucinations." *Id.* He also presented "three separate forensic evaluations" used to determine his competency in criminal proceedings, testimony of the attorney who represented him in the criminal trial, and additional mental health records from another detention center. *Id.* The Immigration Judge found that this record evidenced indicia of incompetency and conducted an individualized mental health assessment in accordance with *Matter of M-A-M-*. *Id.* at 680–81, 684. The Immigration Judge considered the respondent's testimony at his hearings and the documentary evidence regarding his mental health (while also noting that the respondent had not provided updated mental health records in the final months preceding his merits hearing) and concluded that the respondent was competent to proceed. *Id.* at 684.

On appeal, the respondent argued that the Immigration Judge erred by "misallocating the burden of proof" in the competency determination. *Id.* at 679. Specifically, the respondent argued that he should "bear the initial burden to raise a competency issue," but that once indicia of incompetency are identified, the DHS should bear the burden "to show, by a preponderance of the evidence, that the alien is competent to proceed or that safeguards can be put into place to protect his or her due process rights." *Id.* at 681. The Board disagreed with the respondent's argument that mental competency determinations in immigration proceedings should be governed by the standards used in Federal criminal trials, concluding instead that the allocation of proof applied should be similar to that "employed in Federal habeas proceedings, which are also civil in nature." *Id.* at 682–83. The Board held "that neither party bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Id.* at 683 (citing *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1225 (9th Cir. 1993)). With respect to the standard of proof to be applied, the Board utilized the preponderance of the evidence standard, noting that the Supreme Court has endorsed applying this standard to competency issues in criminal cases. *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348, 355–62 (1996)).

The Board next considered the standard of review for competency determinations and concluded that "[a] finding of competency is a finding of fact." *Id.* at 684. Since the Board reviews findings of fact for clear error, 8 C.F.R. § 1003.1(d)(3)(i), the Board held that it reviews competency findings under this standard. *Id.* In applying this standard of review, the Immigration Judge's competency determination was held to be not clearly erroneous. *Id.*

Safeguards

If an alien is deemed mentally incompetent in removal proceedings, the Immigration Judge must prescribe "safeguards" to protect the hearing rights and privileges of the alien. Section 240(b)(3) of the Act. The Code of Federal Regulations identifies necessary procedural safeguards to protect the due process rights of incompetent aliens in immigration proceedings, *see, e.g.*, 8 C.F.R. § 1240.10(c), but it is the duty of the Immigration Judge to ensure that the safeguards he or she implements are sufficient to afford the alien a fair hearing. *See Carlson*, 342 U.S. at 537–38 (noting that Congress requires that aliens in deportation proceedings be provided with a "full hearing" conducted "in a manner consistent with due process").

Necessary Safeguards: Service of the Notice To Appear and Admissions of Removability

Immigration Judges likely face the question of which procedural safeguards must and may be implemented in a mentally incompetent respondent's case. Where an incompetent respondent is unrepresented, an Immigration Judge is prohibited from accepting an admission of removability from the respondent. 8 C.F.R. § 1240.10(c). In such cases, identifying an individual involved in the alien's life (hereinafter referred to as a "facilitator") who is willing and able to help the Immigration Judge fully implement the safeguards will help to move proceedings along. *See generally Matter of Gomez-Gomez*, 23 I&N Dec. 522, 528 (BIA 2002) (noting that "an adult relative who receives notice on behalf of a minor alien bears the responsibility to assure that the minor appears for the hearing"). The regulations suggest that "a near relative, legal guardian, or friend" may potentially fill this role, since they are listed as individuals who may accompany an alien during pleadings. *See* 8 C.F.R. § 1240.10(c).

The requirements for service of the Notice to Appear ("NTA") will differ if the alien is confined. When an incompetent alien who cannot understand the nature of proceedings is "confined in a penal or mental institution

or hospital," the DHS is required to serve the "person in charge of the institution or the hospital" with the NTA. 8 C.F.R. § 103.8(c)(2)(i). For mentally incompetent aliens, whether or not they are detained, the DHS must serve the person with whom the incompetent alien resides and, whenever possible, a "facilitator." *See* 8 C.F.R. § 103.8(c)(2)(ii). The facilitator, roommate, or guardian cannot himself lack competency and must not be a minor. *See Matter of E-S-I-*, 26 I&N Dec. 136, 142 (BIA 2013).

In *Matter of E-S-I-*, the Board clarified these requirements for service of the charging document. The respondent, a lawful permanent resident, had been transferred from a mental institution to the custody of the DHS. In an earlier decision, the Board had concluded that the respondent's transfer from a mental institution constituted indicia of incompetency and that the DHS erred in not serving the person in charge of the facility pursuant to 8 C.F.R. § 103.8(c)(2)(i). *Id.* at 137. The DHS subsequently issued a new NTA. The Immigration Judge found that the respondent lacked the competency to proceed and that the DHS had again failed to properly serve the person in charge of the institution, this time at the DHS's Otay Mesa Detention Facility. *Id.* The Immigration Judge terminated proceedings, citing 8 C.F.R. § 103.8(c)(2)(i). *Id.* On appeal, the DHS argued that it was not required to serve the person in charge of the Otay Mesa facility since it is not a "penal or mental institution or hospital," and that service of the document on an Assistant Officer in Charge was proper. *See id.* at 137–38.

In a decision remanding the record for further proceedings, the Board explained that while "detention in the immigration context is not punitive," the term "confinement" for the purposes of 8 C.F.R. § 103.8(c) means a "custodial setting of *any type*." *See id.* at 140 (emphasis added). In so holding, the Board imposed a uniform approach, "focus[ing] on the fact of confinement, rather than on the nature of the institution." *Id.* Thus, service of the NTA has not been effectuated on "persons who lack mental competency and are in a custodial setting of any type," unless the DHS serves the person of authority in the institution or his delegate. *Id.* Additionally, the Board held that also serving the respondent, even if he or she is believed to be incompetent, is a "prudent course of action," because competency may not be ascertainable at the time of service. *Id.*

Additional Safeguards: Docketing Tools and the Asylum Context

For both the detained and nondetained mentally incompetent alien, the Immigration Judge may excuse the respondent's physical appearance in Immigration Court where a facilitator, guardian, or attorney agrees to appear on the alien's behalf. *See* 8 C.F.R. §§ 1240.4, 1240.43. Moreover, the Immigration Judge may choose to close the hearing to the public and may reserve appeal rights for the respondent. *Matter of M-A-M-*, 25 I&N Dec. at 482–83. The Immigration Judge may actively aid in the development of the record and may also docket or manage the case to facilitate the alien's acquisition of counsel or treatment, and even continue the case where "good cause" is shown. *See id.* Ultimately, in evaluating any additional safeguards to apply, the Immigration Judge should consider the particular circumstances of the case and articulate his or her consideration of safeguards for the record. *Id.*

Docketing Tools: Administrative Closure

In *Matter of M-A-M-*, the Board contemplated administrative closure as a possible alternative where sufficient safeguards cannot be instituted to ensure that a respondent is competent to proceed. 25 I&N Dec. at 483. The Board noted that administratively closing proceedings may be an alternative while other options, such as seeking treatment for a respondent, are explored. *Id.* In a case not directly pertaining to mental competency issues, the Board again addressed the subject of administrative closure in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). The Board held that an Immigration Judge must evaluate a motion for administrative closure under the "totality of the circumstances." *Id.* at 696. *Matter of Avetisyan* is most noted for overruling *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996), which required both parties to agree to administrative closure before the Immigration Judge could temporarily remove the case from his or her docket. Perhaps of relevance in the mental competency context is the Board's determination that administrative closure may be suitable where "an action or event that is relevant to immigration proceedings but . . . outside the control of the parties or the court . . . may not occur for a significant or undetermined period of time." *Id.* at 692. On the other hand, administrative closure may be inappropriate to await "an event or action that may or may not affect the course of an alien's immigration proceedings (such as

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CIRCUIT COURT DECISIONS FOR DECEMBER 2015 AND CALENDAR YEAR 2015 TOTALS

by John Guendelsberger

The United States courts of appeals issued 193 decisions in December 2015 in cases appealed from the Board. The courts affirmed the Board in 168 cases and reversed or remanded in 25, for an overall reversal rate of 13.0%, compared to last month's 11.3%. There were no reversals from the Fourth, Fifth, and Eighth Circuits.

The chart below shows the results from each circuit for December 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	1	2	66.7
Second	41	40	1	2.4
Third	15	13	2	13.3
Fourth	11	11	0	0.0
Fifth	10	10	0	0.0
Sixth	8	7	1	12.5
Seventh	7	4	3	42.9
Eighth	5	5	0	0.0
Ninth	82	68	14	17.1
Tenth	4	3	1	25.0
Eleventh	7	6	1	14.3
All	193	168	25	13.0

The 193 decisions included 99 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 50 direct appeals from denials of other forms of relief from removal or from findings of removal; and 44 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	99	87	12	12.1
Other Relief	50	43	7	14.0
Motions	44	38	6	13.6

The 12 reversals or remands in asylum cases involved protection under the Convention Against Torture (5 cases), particular social group (2 cases), well-founded fear (2 cases), credibility, the particularly serious crime bar, and corroboration. The seven reversals or remands in the "other relief" category addressed a section 212(h) waiver (two cases), cancellation of removal (two cases), application of the categorical approach, adjustment of status, and ineffective assistance of counsel. The six motion to reopen cases involved ineffective assistance of counsel (two cases), changed country conditions, the 1-year filing bar to asylum eligibility, a remand to address issues raised on appeal but not fully considered, and a remand to consider evidence not fully addressed.

The chart below shows the combined numbers for January through December 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	40	30	10	25.0
Ninth	927	759	168	18.1
Tenth	61	51	10	16.4
First	36	31	5	13.9
Third	117	104	13	11.1
Eleventh	82	75	7	8.5
Sixth	72	67	5	6.9
Second	289	269	20	6.9
Fourth	111	104	7	6.3
Eighth	46	44	2	4.3
Fifth	122	119	3	2.5
All	1903	1653	250	13.1

Last year's reversal rate at this point (January through December 2014) was 15.9%, with 2172 total decisions and 345 reversals or remands.

The numbers by type of case on appeal for calendar year 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	953	821	132	13.9
Other Relief	509	431	78	15.3
Motions	441	401	40	9.1

Reversals and Remands Over the Last 10 Years

As the chart below indicates, over the last 10 calendar years we have seen a steady downward trend in the total number of circuit court decisions reported each year. This trend continued in 2015. The increase in the number and percentage of reversals or remands in 2014 and 2015 appears to reflect remands to apply intervening developments in the case law in two areas: (1) Board and circuit court law clarifying the definition of "particular social group" for asylum and (2) Supreme Court and circuit court decisions clarifying the application of the categorical approach to criminal grounds of removal.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Total Cases	5398	4932	4510	4829	4050	3123	2711	2408	2172	1903
Reversals/Remands	944	753	568	540	466	399	253	263	345	250
% Reversals/Remands	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9	13.1

The reversal/remand rates by circuit for the last 10 calendar years are shown in the following chart.

Circuit	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
First	7.1	3.8	4.2	5.6	8.6	19.0	10.4	10.5	16.3	13.9
Second	22.6	18.0	11.8	5.5	4.9	4.9	4.8	7.8	12.1	6.9
Third	15.8	10.0	9.0	16.4	10.7	11.3	6.7	8.5	15.5	11.1
Fourth	5.2	7.2	2.8	3.3	5.2	5.2	4.6	2.9	12.3	6.3
Fifth	5.9	8.7	3.1	4.0	13.5	2.9	7.5	1.9	5.9	2.5
Sixth	13.0	13.6	12.0	8.6	8.7	6.8	6.6	3.1	7.1	6.9
Seventh	24.8	29.2	17.1	14.3	21.0	19.4	8.5	25.7	19.6	25.0
Eighth	11.3	15.9	8.2	7.7	8.1	7.5	7.5	6.3	1.6	4.3
Ninth	18.1	16.4	16.2	17.2	15.9	18.6	14.4	13.9	22.8	18.1
Tenth	18.0	7.0	5.5	1.8	4.9	9.5	6.3	11.4	5.6	16.4
Eleventh	8.6	10.9	8.9	7.1	6.5	6.8	5.8	16.3	5.6	8.5
All	17.5	15.3	12.6	11.2	11.5	12.8	9.3	10.9	15.9	13.1

RECENT COURT OPINIONS

Fourth Circuit:

Etienne v. Lynch, No. 14-2013, 2015 WL 9487933 (4th Cir. Dec. 30, 2015): The Fourth Circuit denied the petition for review challenging the Board's determination that the petitioner's conviction for conspiracy to violate Maryland's controlled substance laws was for an aggravated felony under the Act. The petitioner argued that for purposes of the categorical approach, the term "conspiracy" under section 101(a)(43)(U) of the Act, 8 U.S.C. § 1101(a)(43)(U), should be given the prevailing contemporary definition, which requires an overt act, rather than the common-law definition, which does not. The court disagreed with the petitioner's argument, relying on the Supreme Court's holding "that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." The court found no indication of congressional intent that would rebut the common-law presumption in this context. The court was unpersuaded by the petitioner's reliance on the Supreme Court's decision not to apply the common-law definition

of "burglary" when applying the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). The court distinguished burglary, the common-law definition of which bears little resemblance to the various modern State crimes of the same name, from conspiracy, the common-law definition of which remains in effect in a third of the States. The court also found it significant that while the common-law definition of burglary is more restrictive than its present-day descendants, the common-law definition of conspiracy is broader than the modern variations that require an overt action. It therefore held that a State conspiracy conviction need not require an overt act for the offense to qualify as an aggravated felony.

Sixth Circuit:

Marouf v. Lynch, No. 14-4136, 2016 WL 66607 (6th Cir. Jan. 6, 2016): The Sixth Circuit granted the petition for review of the denial of asylum to a family of stateless Christian Palestinians who had resided in the West Bank. The court reversed the Immigration Judge's adverse credibility finding, concluding that it was "not supported by substantial evidence." The court found that the petitioners' "thorough and coherent account of their repeated persecution . . . compels the conclusion that they testified credibly." The court focused on an adjudicator's need to be sensitive to the possibility of seeming inconsistencies being attributable to translation errors, particularly where the record was otherwise composed of "consistent statements and corroborating evidence." The court noted that the Immigration Judge did not give the petitioners an opportunity to explain a discrepancy. Addressing an alleged inconsistency regarding an injury to a relative's arm or hand, the court referenced a dictionary of "Conversational Eastern Arabic (Palestinian)" to establish that "in colloquial Palestinian Arabic the same word can be used to mean both arm and hand." Addressing an inconsistent statement as to what year an attack had occurred, the court stated that this discrepancy might have been the result of a translation error, but even if not, the discrepancy would be insufficient to support an adverse credibility finding. The court referenced its prior holdings that a witness's difficulty in recalling the date of a traumatic incident "is not particularly probative of . . . credibility." The court concluded that a reasonable adjudicator would be compelled to reach a contrary conclusion as to credibility.

Seventh Circuit:

Gutierrez-Rostran v. Lynch, No. 15-2216, 2016 WL 147546 (7th Cir. Jan. 13, 2016): The Seventh Circuit granted the petition for review of the agency's denial of withholding of removal, concluding that the Board had erred in assessing the likelihood of the petitioner's persecution. The court also discussed the difficulty in applying the proper standard to assess the likelihood of persecution. The Immigration Judge found that although the petitioner was credible, he had not met his burden to establish that it was more likely than not that he would face persecution if returned to Nicaragua. The court concluded, in part, that the Immigration Judge and Board erred in giving insufficient weight to the petitioner's assertion, which was based on hearsay, that his cousin had been killed by Sandinistas. The Immigration Judge determined that the motive behind this killing was not established, while the Board deemed the petitioner's assertion to be "speculative." The court disagreed. While the Supreme Court has held that the "more likely than not" standard governs an application for withholding of removal, the circuit court stated that this standard "can't be taken literally in the immigration context" because of the difficulty in quantifying a greater than 50 percent chance of persecution. The court concluded that the Board's decision denying the petitioner's application was not adequately reasoned and returned the record to the Board for further proceedings consistent with the opinion.

Lopez v. Lynch, No. 14-3805, 2016 WL 125532 (7th Cir. Jan. 12, 2016): In denying the petition for review, the Seventh Circuit concluded that the petitioner's conviction for dealing cocaine under Indiana Code § 35-48-4-1(a)(1)(C) was for an aggravated felony under section 101(a)(43)(B) of the Act. The petitioner sought review of the Board's determination that the conviction was for a particularly serious crime without specifically deciding whether the offense was an aggravated felony. The Seventh Circuit noted that it had jurisdiction to determine de novo whether the conviction was for an aggravated felony. Applying the categorical approach, the court found that the trafficking offense under the Indiana statute is broader than the corresponding generic aggravated felony that is set forth in section 101(a)(43)(B) and defined in relation to the Federal Controlled Substances Act. Specifically, the court noted that the State statute proscribes *financing* the manufacturing or distribution of illegal drugs, while the Federal statute does not. Applying the modified categorical approach, the court looked to the charging document, which in this case consisted of an information that conformed to the Indiana statutory format. The

information specified that the offense entailed the delivery of cocaine. Delivery is an element that is also contained in the generic Federal definition. The court distinguished its approach in this case from its holding in *United States v. Lewis*, 405 F.3d 511 (7th Cir. 2005). In *Lewis*, the court held that affidavits attached to the information are regarded as police reports, which cannot be relied on under the modified categorical approach. The court explained that unlike the police report in *Lewis*, which contained details of the defendant's conduct as to how he committed the crime, the information in this case identified what crime the petitioner had committed. More specifically, the information stated that the petitioner had delivered cocaine. The court held that the petitioner's aggravated felony offense is per se a particularly serious crime, rendering him ineligible for both asylum and withholding of removal (because he was sentenced to at least 5 years' imprisonment). The court concluded that a remand pursuant to the holding in *SEC v. Chenery*, 318 U.S. 80 (1943), which requires a court to uphold an agency's decision based on the agency's own analysis, was unnecessary under the "futility doctrine" since the agency would necessarily reach the same result.

Ninth Circuit:

Rios v. Lynch, 807 F.3d 1123 (9th Cir. 2015): The Ninth Circuit granted the petition for review of the Board's denial of withholding of removal where the court concluded that the Immigration Judge and the Board had not properly considered the petitioner's claim for relief based on his family's opposition to a gang. At his hearing before the Immigration Judge, the petitioner stated that he feared harm from a gang that had killed his father outside of church and then killed a cousin who was cooperating with the authorities as a witness. The gang also threatened the petitioner's sister—who was neither a witness nor cooperating with the authorities. The petitioner testified that his fear of persecution was based on his Evangelical religion, but he added that the gang had targeted his family, in part because they refused to help absolve the gang members of responsibility for the murders. In his appeal to the Board, the petitioner reiterated his fear based on his religion, while clarifying that he also feared persecution based on his family's opposition to the gang. The court agreed with the Board that the petitioner had not established a sufficient nexus between his fear and his religious beliefs but determined that he had also raised a claim based on membership in a particular social group consisting of his family. While the Immigration Judge had found that the petitioner was not a member of a particular social group composed of "witnesses against gangs," the court concluded that the petitioner's claim based on his fear of retaliation against his family had not been addressed. The court discussed the development of the law pertaining to particular social groups, including the Board's clarification of the "social distinction" requirement in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). The court stated that "[e]ven under this refined framework, the family remains the quintessential particular social group." While the Ninth Circuit's prior case law had observed that persecutors are more likely to target individual family members as part of a particular social group where the family ties are linked to race, religion, or political affiliation, the court declined to require that family ties be intertwined with another protected ground in order to establish a particular social group. The court remanded the record for further analysis of the petitioner's particular social group claim.

Almanza-Arenas v. Lynch, 809 F.3d 515 (9th Cir. 2015) (en banc): In a rehearing en banc, the Ninth Circuit granted the petition for review of the Board's precedent decision, *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009). The Board had upheld an Immigration Judge's determination that the petitioner did not establish that his conviction for vehicle theft in violation of section 10851(a) of the California Vehicle Code was not for a crime involving moral turpitude. In its decision, the court applied the Supreme Court's intervening holding in *Descamps v. United States*, 133 S. Ct. 2276 (2013), to determine that a violation of the State statute is not categorically a crime involving moral turpitude. As the parties acknowledged, the California statute punishes the taking of a vehicle with either the intent to permanently or *temporarily* deprive the owner of his or her property. The court concluded that the latter offense is not turpitudinous. The court therefore next examined whether the California statute was divisible. Based on its holding in *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014), the court determined that the statute was not divisible because the State's jury instructions do not require a unanimous agreement as to whether the defendant intended to take the vehicle temporarily or permanently. Thus, the differing intents cannot properly be regarded as separate "elements" of

the offense but are, instead, different "means" to commit the same offense. The court concluded that the statute is not divisible under applicable precedent and that the petitioner had therefore not been convicted of a crime involving moral turpitude. The decision contained two concurring opinions.

Jang v. Lynch, No. 11-73587, 2015 WL 9286697 (9th Cir. Dec. 22, 2015): The Ninth Circuit denied the petition for review of the Board's decision upholding an Immigration Judge's denial of a native North Korean's asylum application where the petitioner was deemed to have resettled in South Korea. The petitioner suffered persecution in North Korea before escaping that country in 1998. He then resided for more than 4 years in South Korea, where he was granted citizenship, was issued a passport, attended college, and obtained employment. The petitioner admitted that he had no fear of returning to South Korea, where his sister and brother continue to reside. The Immigration Judge concluded that the petitioner was not eligible for asylum because he had been firmly resettled in South Korea. The petitioner argued before the Board and the court of appeals that the North Korean Human Rights Act of 2004 ("NKHRA") precludes applying the firm resettlement bar to North Koreans who have resided in South Korea. The petitioner relied on section 302 of the NKHRA, which states that "North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any right to citizenship they may enjoy under the Constitution of the Republic of Korea" (South Korea). The NKHRA further states that North Koreans shall not be considered citizens of South Korea for purposes of refugee or asylum status in the United States. The court found that the language of the NKHRA was intended to avoid a statutory barrier that would prevent a North Korean national from establishing refugee status in the United States simply because he or she is entitled by operation of law to citizenship in South Korea. However, the court found that the NKHRA "has no effect on the analysis of whether a North Korean has 'firmly resettled' in South Korea (or anywhere else)."

BIA PRECEDENT DECISION

In *Matter of Calvillo Garcia*, 26 I&N Dec. 697 (BIA 2015), the Board held that a term of confinement in a substance abuse treatment facility imposed as a condition of probation constitutes a "term of confinement" under section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), for purposes of determining whether an offense is an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act.

The lawful permanent resident respondent, who had a prior controlled substance conviction, was charged with an aggravated assault offense. With respect to this assault charge, the trial court deferred adjudication of guilt and sentenced the respondent to 5 years' community supervision with the condition that he "serve an indeterminate term of confinement . . . of not more than one (1) year or less than 180 days in a substance abuse treatment facility." After being found removable under sections 212(a)(2)(A)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) and (II), the respondent sought cancellation of removal under section 240A(a) of the Act, 8 U.S.C. §1229b(a). The Immigration Judge denied the application, concluding that the respondent had been convicted of an aggravated felony crime of violence with a "term of imprisonment" (as defined in section 101(a)(48)(B) of the Act) of at least 1 year.

The Board affirmed the Immigration Judge's determination. The Board noted that an indeterminate sentence—1 year in the respondent's case—is considered to be a sentence for the maximum term imposed under controlling Fifth Circuit and Board precedent. Further, under section 101(a)(48)(B) of the Act, a "term of imprisonment" is deemed to include any sentence of incarceration or confinement, irrespective of any suspension of the imposition or execution of the term of imprisonment or sentence. The Board noted persuasive authority concluding that the disjunctive phrase "period of incarceration or confinement" in section 101(a)(48)(B) encompasses more than just time spent in jail. Because the respondent was not free to leave the substance abuse treatment facility, the Board concluded that his sentence was a "period of confinement" under the Act. Accordingly, the appeal was dismissed.

a collateral attack on a criminal conviction)." *Id.* at 696. Mental competency issues, however, may be qualitatively different from a situation where administrative closure is sought to await the outcome of proceedings in another forum.

In the Asylum Context: Accepting a Respondent's Fear as Subjectively Genuine

In *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), the Board articulated an additional safeguard for aliens with competency issues that affect the reliability of their testimony. The respondent, a native and citizen of Honduras, had "difficulty meaningfully answering basic questions," provided "confusing and disjointed" and "nonresponsive" testimony, and also "laughed inappropriately during the hearing." *Id.* at 609–10. He further insisted that he had arrived "last year," which according to his testimony was in 2006, yet the hearing was conducted in 2013, and it was "not in dispute" that he arrived in the United States in 2012. *Id.* The respondent's attorney explained to the Immigration Judge that he believed that his client had a "cognitive disability that affected his ability to testify." *Id.* Although the Immigration Judge noted the respondent's unusual behavior and testimony, he did not evaluate competency under the framework discussed in *Matter of M-A-M-*. *Id.* The Immigration Judge denied all forms of protection-based relief, finding that the respondent did not testify credibly and therefore could not satisfy his burden of proof. *Id.*

In its decision to remand, the Board first found that the facts above constituted "indicia of incompetence," and that the Immigration Judge erred in not conducting a competency assessment. *Id.* The Board then recognized that an alien suffering mental illness or cognitive disability "may exhibit symptoms that affect his ability to provide testimony in a coherent linear manner." *Id.* at 611 (citing *Matter of M-A-M-,* 25 I&N Dec. at 480). Therefore, the Board reasoned, inconsistencies, inaccurate details, or inappropriate demeanor during testimony "may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge." *Id.* Accordingly, it was held that "where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim." *Id.* at 612.

In the Asylum Context: Changed or Extraordinary Circumstances

Generally, an asylum application must be filed within "1 year after the date of the alien's arrival in the United States." Section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B). However, an Immigration Judge may accept a late filing if the alien can demonstrate "changed circumstances which materially affect the applicant's eligibility for asylum" or "extraordinary circumstances relating to the delay in filing." 8 U.S.C. § 1158(a)(2)(D). "Extraordinary circumstances" may include "[l]egal disability (e.g., the applicant was an unaccompanied minor *or suffered from a mental impairment*) during the 1-year period after arrival." 8 C.F.R. § 1208.4(a)(5)(ii) (emphasis added).

The Board conducts an "individualized analysis" to "determin[e] whether extraordinary circumstances exist to excuse an alien's failure to meet the deadline for filing an asylum application." *Matter of Y-C-,* 23 I&N Dec. 286, 287–88 (BIA 2002) (en banc). In *Matter of Y-C-,* the respondent entered the United States without inspection as a 15-year-old unaccompanied minor. He was served with a Notice to Appear upon arrival and detained. Almost 1 year later, the respondent was paroled from the custody of the former Immigration and Naturalization Service to the custody of his uncle. *Id.* at 286. The respondent attempted to file an asylum application about 5 months later, but the Immigration Judge refused to accept it. *Id.* at 288. The respondent subsequently filed an asylum application, but the Immigration Judge concluded that the respondent was not eligible for this form of relief because he had not filed his application within 1 year of his arrival or shown extraordinary circumstances to excuse this delay. *Id.* at 287. In considering the respondent's appeal, the Board stated that the respondent's unaccompanied minor status did not necessarily by itself constitute an extraordinary circumstance. *Id.* at 288. Rather, "the respondent must establish the existence or occurrence of the extraordinary circumstances, must show that those circumstances *directly relate* to his failure to file the application within the 1-year period, and must demonstrate that the delay in filing was *reasonable* under the circumstances." *Id.* (emphasis added). After considering the factors presented,

including the respondent's legal disability (i.e., minority) during his custody in the juvenile detention facility, the Board concluded that the respondent demonstrated extraordinary circumstances, as contemplated in 8 C.F.R. § 1208.4(a)(5)(ii), that excused his delay in filing and that the application was filed within a reasonable period considering these circumstances.

In contrast, in an unpublished decision addressing "extraordinary circumstances" as discussed in 8 C.F.R. § 1208.4(a)(5), the United States Court of Appeals for the Ninth Circuit concluded that substantial evidence supported the Board's determination that an alien's mental illness had not directly related to his failure to file within the 1-year time frame. *Saqib v. Holder*, 312 F. App'x 900, 902 (9th Cir. 2009). The Ninth Circuit noted that "[the respondent's] mental illness did not prevent him from filing a number of other petitions in an attempt to remain in the United States, and he admitted that he consciously chose to pursue those other methods rather than seek asylum." *Id.* at 902. The panel therefore determined that the Board correctly concluded that the alien's mental illness did not directly relate to his failure to file the application within the 1-year period. *Id.*

Conclusion

The legal landscape surrounding mental competency in immigration proceedings has developed significantly since 2009. Perhaps most notably, in *Matter of M-A-M-* and *Matter of J-S-S-*, the Board has provided Immigration Judges with guidance for determining whether a respondent is competent to proceed. The initial consideration is whether indicia of incompetency are present. Since there is a presumption of competency, if no indicia of incompetency are observed, then the Immigration Judge has no duty to evaluate a respondent's competency. If indicia of incompetency are observed, however, the Immigration Judge must determine if a preponderance of the evidence establishes that the respondent is competent. In holding that neither party bears the burden to establish a respondent's competency, the Board has indicated that the process should be a "collaborative approach enabl[ing] both parties to work with the Immigration Judge to fully develop the record." *Matter of J-S-S-*, 26 I&N Dec. at 681–82. The Immigration Judge should articulate this factual finding on the record, and if competency is not established by a preponderance of the evidence, the Immigration Judge must prescribe "safeguards" to protect the rights and privileges of the alien. These safeguards may include those required by statute and regulation, as well as other safeguards that an Immigration Judge may conclude are appropriate to protect a respondent's rights in proceedings. Ultimately, in discharging his or her duty to ensure that the safeguards implemented are sufficient to afford the alien a fair hearing, the Immigration Judge should consider the totality of the facts and circumstances.

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1. Detained, unrepresented respondents in the Ninth Circuit may be entitled to additional specialized procedures beyond those described in *Matter of M-A-M-*. Pursuant to the *Franco-Gonzalez* permanent injunction, all detained aliens who are members of the plaintiff class (aliens "having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings") who have been detained for longer than 180 days must be provided with a custody redetermination hearing. *Franco-Gonzalez v. Holder,* No. CV 10-02211, 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction order), *as amended by Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (order further implementing permanent injunction). All plaintiff class members who, after a judicial competency inquiry by an Immigration Judge, are determined to be incompetent to represent themselves must then be provided with a qualified representative as a reasonable accommodation under section 504 of the Rehabilitation Act, 29 U.S.C. § 794. *Id.*

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