



NQRP Practice Advisory: Procedural Safeguards and Section 504 of the Rehabilitation Act

Last updated October 2023

Purpose and Scope¹

This practice advisory is for legal representatives of immigrants whose disability or mental health condition affects competence in removal proceedings. It is comprised of lessons learned, arguments constructed, and practice tools meant to enhance skills and spark ideas for future advocacy. This practice advisory is limited to two primary practice areas: (1) application of **procedural safeguards** afforded pursuant to Immigration Nationality Act (INA) § 240(b)(3), 8 United States Code (U.S.C.) § 1229a(b)(3), and *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011); and (2) seeking **reasonable accommodations** afforded by Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794 and its implementing regulations that are binding on the Executive Office of Immigration Review (EOIR), 28 C.F.R. § 39.130, *et seq.* and the Department of Homeland Security (DHS), 6 C.F.R. § 15.30, *et seq.* While this practice advisory focuses on strategies for representing clients appointed counsel through the *Franco-Gonzalez v. Holder* injunction and National Qualified Representative Program (NQRP) Nationwide Policy, it also has broader application to individuals in removal proceedings who may need safeguards and reasonable accommodations due to disability.

This practice advisory has three components. **Section I** provides legal background and framing of *Franco* and the NQRP Nationwide Policy stemming from *Franco*, and distinctions between the two programs. **Section II** examines the legal sources for the

¹ Other practice advisories exist that speak more generally about representing clients with mental illness and cognitive impairments. Catholic Legal Immigration Network (CLINIC), *Representing Noncitizens with Mental Illness* (May 2020), <https://www.cliniclegal.org/file-download/download/public/3756>; Immigrant Legal Resource Center (ILRC), *Advocating for and Representing Clients with Mental Illness in Detained Immigration Removal Proceedings* (June 2022), https://www.ilrc.org/sites/default/files/resources/removal_proceedings_clients_mental_illness_advisory_june_2022.pdf.

“safeguards” afforded to people with disabilities or mental health conditions that impact their competence in immigration proceedings, and engages with the application of Section 504 in the immigration context. Finally, **Section III** provides examples of ways to use the legal framework and sources discussed in Sections I and II when advocating before EOIR and DHS.

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I. INTRODUCTION

Unlike individuals prosecuted in the criminal legal system, noncitizens in civil immigration proceedings are not guaranteed legal representation.² There is, however, one exception. In 2013, the District Court for the Central District of California issued a landmark injunction in *Franco-Gonzalez v. Holder* (hereinafter, “*Franco*”) that shifted this paradigm for a discrete group of noncitizens.³

Franco is the first instance where a right to court-appointed counsel was recognized in immigration removal proceedings. It changed the legal landscape and served as the catalyst for the EOIR’s creation of the NQRP Nationwide Policy. Ten years after the creation of the Nationwide Policy, a robust network of legal advocates, paralegals, social workers, attorneys, and BIA accredited representatives has formed a community specializing in zealous legal representation for noncitizens whose disabilities and mental health conditions affect their competence in immigration proceedings.

This section will first discuss the circumstances that led to the permanent injunction in *Franco* and the creation of the NQRP Nationwide Policy. Next, it will highlight fundamental differences between the protections afforded for *Franco* class members and individuals covered by the NQRP Nationwide Policy and how the differences impact legal strategies.

A. *Franco* Litigation

In *Franco*, a group of individuals with mental disabilities incarcerated by ICE filed a class action complaint alleging that because of their disabilities they were not competent to defend their rights in immigration removal proceedings. Despite their limitations, immigration courts were forcing plaintiffs to proceed without legal representation even when they failed to comprehend the nature of the removal proceedings and lacked the ability to meaningfully represent themselves.⁴ José Antonio Franco-Gonzalez, a Mexican immigrant with a cognitive disability who was detained in federal immigration facilities for nearly five years without a hearing or a lawyer, served as the lead plaintiff.

After more than three years of litigation, on April 23, 2013, the district court entered a permanent injunction in *Franco*, making certain reforms mandatory for immigrants

² See Immigration and Nationality Act (INA) § 240(b)(4)(A), 8 United States Code (U.S.C.) § 1229a(b)(4)(A) (permitting counsel to represent a person in removal proceedings “at no expense to the Government”); INA § 292, 8 U.S.C. § 1362 (same).

³ *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492 at *2 (C.D. Cal. Apr. 23, 2013).

⁴ *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1037 (C.D. Cal. 2010).

detained in states within the Ninth Circuit (Washington, Arizona, and California).⁵ In 2014, the federal district court judge, Hon. Dolly Gee, issued an “Order Further Implementing This Court’s Permanent Injunction” that provided a detailed framework for screening possible class members, sharing information between EOIR and ICE, evaluating competency, and other matters.⁶

The District Court for the Central District of California certified the *Franco* class and delineated two subclasses. The Main Class is defined as:

All individuals who are or will be in DHS custody for removal proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as 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.⁷

The Court went on to create Sub-Class One, comprised of “[i]ndividuals in the above-named Plaintiff Class who have a serious mental disorder or defect that renders them incompetent to represent themselves in detention or removal proceedings.”⁸ The Court found it appropriate to afford Qualified Representatives to this Sub-Class as a reasonable accommodation.⁹ Sub-Class Two is composed of “[i]ndividuals in the above-named Plaintiff Class who have been detained for more than six months.”¹⁰ The Court found members of Sub-Class Two were entitled to a bond hearing after 180 days in detention where DHS “bears the burden of establishing by clear and convincing evidence that [class members’] continued detention is necessary.”¹¹

Franco afforded significant legal protections that are enforceable under the court’s permanent injunction. Class members are:

- appointed counsel—identified as a Qualified Representative (“QR”)—paid for by the federal government after a determination of incompetency (Sub-Class One);
- allowed to maintain access to a QR until the ultimate resolution of their immigration proceedings, even if released from ICE custody;
- provided a bond hearing after 180 days of detention—this is true both for individuals appointed counsel (Sub-Class One) as well as persons who underwent a competency hearing that ultimately found them able to proceed pro se (Sub-Class Two);
- afforded bond hearings where DHS bears the burden of proof by clear and convincing evidence justifying continued detention.¹²

⁵ *Franco-Gonzalez*, 2013 WL 3674492 at *2.

⁶ *Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

⁷ *Franco-Gonzalez*, 2013 WL 3674492 at *2.

⁸ *Id.*

⁹ *Id.* at *8–9.

¹⁰ *Id.*

¹¹ *Id.* at 10.

¹² *Id.* at *3–13.

B. NQRP Nationwide Policy

The day before the *Franco* court granted the permanent injunction, EOIR and ICE issued policy memorandums creating a new national program that—for the first time—afforded government-appointed legal representation for noncitizens deemed mentally incompetent in immigration proceedings.¹³ Its purpose was “to provide enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”¹⁴ Just like in *Franco* jurisdictions, the procedural protections afforded by this policy provide for the provision of a QR “to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.”¹⁵

NQRP Nationwide Policy members are afforded legal protections modeled after *Franco*, yet not as robust. The policy ensures that individuals deemed mentally incompetent are:

appointed counsel in the form of a QR paid for by the federal government after a determination of incompetency, though the funding expires 30 days after a final administrative order of removal in the immigration case or 90 days after an individual’s release from ICE custody.¹⁶

The NQRP Nationwide Policy also directs IJs to conduct a bond hearing after six months of detention for respondents identified as having a serious mental disorder or condition.¹⁷ DHS policy provides guidance to ICE for such bond hearings under the Nationwide Policy.¹⁸ Although the NQRP Nationwide Policy affords a bond hearing to members after six months of confinement, this provision of the policy is largely not followed by

¹³ U.S. Dep’t of Justice Executive Office for Immigration Review, *Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained [Noncitizens] with Serious Mental Disorders or Conditions* (Apr. 22, 2013), available at <https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/2013-OLeary-Memo.pdf> (hereinafter, “EOIR Nationwide Policy Memo”); U.S. Dep’t of Homeland Security, ICE Directive 11063.1: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented [Detained Persons] With Serious Mental Disorders or Conditions* (April 22, 2013), available at: https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf (hereinafter, ICE Directive 11063.1); see also Amelia Wilson, *Franco I Loved: Reconciling the Two Halves of the Nation’s Only Government-Funded Public Defender Program for Immigrants*, 97 Wash. Law Rev. 2, 23 (2022) (providing a description of the NQRP Nationwide Policy and recognizing it as the “first (and to this day, only) appointed counsel mechanism for any noncitizen group in removal proceedings”).

¹⁴ U.S. Dep’t of Justice, National Qualified Representative Program (NQRP) (Updated Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

¹⁵ *Id.*

¹⁶ See EOIR Nationwide Policy Memo, *supra* note 13.

¹⁷ *Id.*

¹⁸ ICE Directive 11063.1, *supra* note 13, at fn 2 (“EOIR’s new policy also provides custody hearings to unrepresented detained [noncitizens] who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer.”).

immigration courts.¹⁹ To provide further guidance, EOIR issued a plan for how to implement heightened procedural protections to noncitizens who qualified for a QR under the policy.²⁰

While gaps exist between the protections afforded by *Franco* and the NQRPN Nationwide Policy, *Franco* is a helpful tool because it provides a systemic framework of heightened protections that QRs practicing under the Nationwide Policy can seek on for clients through requests for safeguards and reasonable accommodations, discussed more in Section II.

II. SAFEGUARDS UNDER THE INA AND REASONABLE ACCOMMODATIONS UNDER SECTION 504

A lawyer's primary role is to protect the interests of their client. This relationship is particularly critical for individuals who have a mental disability that impacts their ability to meaningfully participate in their removal proceedings. In those instances, the attorney must often rely heavily on social workers, medical and mental health records, mental health experts' opinions, and personal experience with client interactions to assess how best to advocate for heightened protections in immigration court.

A. Information-Gathering to Guide Which Safeguards and Accommodations to Seek

It is critical to begin gathering records immediately after the QR appointment to assist in the process of assessing which safeguards and/or accommodations to seek. Each person's mental health symptoms, affect, presentation, and cognitive abilities differ, and the safeguards or accommodations sought should align with the nature of the disabilities and symptoms specific to each individual client. Records could include medical records filed by ICE in a Motion for Consideration of Medical/Mental Health Records or Notice of Potential *Franco-Gonzalez* Class Membership; an IJ-ordered Forensic Competency Evaluation (FCE); a psychological evaluation from an independent medical professional; prior medical records (hospital, prison, etc.); school records that provide background and context about the client, including information about any Individualized Education Program ("IEP"); or other sources of information that can assist counsel with assessing what protections would be most beneficial to seek on the client's behalf.

Equally important is gathering records related to the procedural posture of the case, which can provide guidance about how to best represent the client's interests. The EOIR Record of Proceeding ("ROP") provides information about the current pending case, but may not contain records from prior proceedings before the immigration court.

¹⁹ See Wilson, *supra* note 13, at 23 ("The fact that Nationwide Policy respondents are not entitled to a custody review with a QR present after an incompetence determination is utterly illogical and violates EOIR's own stated policy.").

²⁰ U.S. Dep't of Justice Executive Office for Immigration Review, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders* (August 15, 2013), available at <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf> (hereinafter, "EOIR Phase I Plan").

Evidence from earlier immigration proceedings can allow the QR to understand whether the client’s competency was implicated earlier on, reveal pertinent criminal and medical records, and provide a point of reference for the client’s past behavior to better understand whether a change in mental illness or impairment has taken place that provides helpful framing for current conduct. To obtain such records, QRs should file Freedom of Information Act (“FOIA”) requests to EOIR and various sub-agencies of DHS as soon as possible after being appointed in an NQRP case.²¹

However, obtaining records of prior immigration history can sometimes be challenging—particularly on a tight timeline—and utilizing the safeguards and accommodations framework can assist counsel in obtaining records more expeditiously.

Example: A QR may wish to obtain a copy of the Department of State’s (DOS) records for a client who entered the United States as a refugee, as such records contain critical information about the basis for the client’s refugee status. Because DOS records could take many months to obtain, the QR could simultaneously request from opposing counsel a copy of the client’s DOS records, which ICE should have in ICE’s case file (also referred to as the “A-file” by ICE). To do this, the QR should first file the FOIA request and provide proof of filing, and any information about long case processing times that are at the QR’s disposal, to the ICE Office of the Principal Legal Advisor (OPLA). This request could be framed as a safeguard or reasonable accommodation necessary to uphold the client’s due process rights and ensure access to a full and fair hearing that serves to prevent protracted proceedings that prolong the client’s detention (if detained). If ICE pushes back on this request, counsel has at least laid a foundation for filing a motion with the immigration court requesting that the IJ order ICE to comply with the requested safeguard or reasonable accommodation.

Practice Tip: Ninth Circuit practitioners also benefit from the decision in *Dent v. Holder*, which requires ICE to provide copies of the immigration case file in contested proceedings.²² NQRP providers can bootstrap arguments from *Dent* and rely on the legal framework pertinent to competency cases laid out in the INA, caselaw, and under Section 504 to advocate for ICE to release records.²³

Locating criminal legal records is also essential to preparing any client’s legal defense, particularly when clients are appointed counsel due to competency limitations

²¹ For more information about how to file FOIA requests for clients in removal proceedings, the following practice advisories may be helpful: American Immigration Council (AIC), *Practice Advisory: Freedom of Information Act and Immigration Agencies* (May 2021), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_foia_f_or_immigration_lawyers.pdf; ILRC, *A Step-by-Step Guide to Completing FOIA Requests With DHS* (December 2021), available at https://www.ilrc.org/sites/default/files/resources/new_foia_dhs_practice_advisory_-_2021_0.pdf.

²² 627 F.3d 365 (9th Cir. 2010).

²³ See American Immigration Council, *Practice Advisory: Dent v. Holder and Strategies for Obtaining Documents from the Government During Removal Proceedings* (Jun. 2012), available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/dent_practice_advisory_6-8-12.pdf.

because such records may reveal facts that are critical to shaping the immigration legal claim(s). Criminal records may contain medical records related to competency concerns raised during the criminal proceedings, evidence of erratic behavior fueled by the client's mental state at the time, mental health evaluations conducted within the scope of the criminal proceedings, findings regarding the client's competency in criminal proceedings, any court-ordered mental health treatment, and other information. Such information can assist the QR further in understanding the client's mental health and thus potential safeguards and reasonable accommodations needed.

Finally, if the client has family or friends and authorizes communication between the QR and their network, it is often helpful to speak with them to better understand the client's history, personality, triggers, and goals. They might be able to provide critical evidence about the client's past harm as well as information about their medical history and places to contact in search of records. In addition to supporting the preparation of the legal claim(s), a client's community can assist the QR with an assessment of what safeguards might be beneficial throughout the litigation process.

Speaking with clients on a regular basis will also give the QR an understanding of the client's needs. Repeated interactions and observations over time will likely give the QR the most insight into the nature of their disabilities and what the client needs in court. The more information the QR gathers, the more prepared the QR will be to request appropriate safeguards and accommodations.

B. Safeguards

Under *Franco* and the NQRP Nationwide Policy, the primary safeguard is the appointment of counsel after a finding of a respondent's mental incompetence.²⁴ The agencies then leave it up to the appointed QRs to seek out safeguards and reasonable accommodations that would enhance a client's ability to meaningfully participate in their immigration proceedings. However, the agencies are not always willing to grant any and all requests for safeguards or reasonable accommodations. QRs must be prepared to object to any agency denials of requested protections to create a strong record for appeal. More about preserving the record is discussed in Section III.

i. Safeguards Under the Immigration & Nationality Act and Regulations

Congress included a framework for applying "safeguards" in immigration proceedings in the INA at section 240(b)(3). It is somewhat unclear where the "safeguards" language originated, but the term is now widely adopted in the context of EOIR litigants with limited competence. The statute recognizes that in certain instances

²⁴ *Franco-Gonzalez*, 2013 WL 3674492 at *8 ("the appointment of a Qualified Representative for Sub-Class One members serves only to level the playing field by allowing them to meaningfully access the hearing process"); EOIR Nationwide Policy Memo, *supra* note 13, at 2 (affording the provision of a QR after an IJ's finding that an "unrepresented detained [noncitizen] is not mentally competent to represent him- or herself"); *Matter of M-J-K-*, 26 I&N Dec. 773, 777 (BIA 2016) (recognizing legal representation in the form of a QR as a safeguard).

it may be “impracticable” for a noncitizen to be present at the removal proceeding due to “mental incompetency” and states that the Attorney General (AG) (who directs the agencies) “shall prescribe safeguards to protect the rights and privileges of the [noncitizen].”²⁵ Thus, once an IJ makes a finding of incompetence, the agencies must implement safeguards. INA § 240(b)(3) is the cornerstone of the legal framework that protects the rights of noncitizens with mental disabilities in immigration proceedings.

In the INA’s corresponding regulations, DHS and EOIR identify certain accommodations that protect people’s rights when they are not competent to represent themselves before the immigration court. These include:

- Discussing proper notice and NTA service requirements for people deemed mentally incompetent (8 C.F.R. § 103.8(2));
- Waiving presence when competency is at issue “provided that the [noncitizen] is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend”) (8 C.F.R. § 1003.25(a));
- Discussing notice, proper service, and waiver of appearance (8 C.F.R. § 1240.4);
- Prohibiting IJs from accepting “an admission of removability from an unrepresented respondent who is incompetent...and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend” (8 C.F.R. § 1240.10);
- Waiving presence when “mental incompetency” at issue and directing “the guardian, near relative, or friend” who was served with the charging document “be permitted to appear on behalf of the respondent” (8 C.F.R. § 1240.43).

The Board of Immigration Appeals (hereinafter, “the Board”) highlighted these regulations in one of its seminal published cases that discuss the issue of competency, *Matter of E-S-I*,²⁶ discussed in more depth *infra*.

ii. Foundational BIA Caselaw on Safeguards

Prior to 2011, the Board rarely engaged with issues relating to noncitizens with mental disabilities. Aside from *Matter of Sinclitico*,²⁷ in which the BIA decided that a respondent who attempted to relinquish his U.S. citizenship had not done so voluntarily as a result of his schizophrenia, there was a dearth of guidance from the BIA on how immigration courts should assess competency. In 2011, however, the BIA published *Matter of M-A-M*.²⁸ The decision in *Matter of M-A-M* was the Board’s attempt to correct this void and in it, the Board defined the test for competency in immigration court. Specifically, the Board held that:

²⁵ INA § 240(b)(3).

²⁶ 26 I&N Dec. 136 (BIA 2013).

²⁷ 15 I&N Dec. 320 (BIA 1975).

²⁸ 25 I&N Dec. 474 (BIA 2011).

The test for determining whether [a noncitizen] is competent to participate in immigration proceedings 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.²⁹

The Board went on to explain how an immigration court should conduct proceedings when there is an “indicia of incompetency.”³⁰ When any party observes indicia of a noncitizen’s incompetency, the BIA held that the immigration court must determine whether the respondent is competent to participate in proceedings and, should the noncitizen be found incompetent under the aforementioned test, the IJ then has “discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.”³¹ The Board next provided a non-exhaustive list of safeguards:

1. Refusal to accept an admission of removability from an unrepresented respondent;
2. Identification and appearance of a family member or close friend who can assist respondent and provide information to the court;
3. Docketing or managing the case to facilitate the respondent’s ability to obtain legal representation and/or medical treatment;
4. Participation of a guardian;
5. Continuance for good cause shown;
6. Closing hearings to the public;
7. Waiving respondent’s appearance;
8. Actively aiding in development of the record, including the examination and cross-examination of witnesses; and
9. Reserving appeal rights for the respondent.³²

Notably, the Board recognized that “[i]n some cases, even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns may remain. In these cases, the IJ may pursue alternatives with the parties, such as administrative closure, while other options are explored, such as seeking treatment for the respondent.”³³

Two other critical premises were included in *M-A-M-* that are helpful when requesting safeguards on a detained individual’s behalf. First, when an indicia of incompetence is raised by or on behalf of the respondent, “DHS has an obligation to provide the court with relevant materials in its possession that would inform the court

²⁹ *Id.* (emphasis added).

³⁰ *Id.* at 479.

³¹ *Id.* at 482.

³² *Id.* at 483.

³³ *Id.*

about the respondent's mental competency."³⁴ DHS, as the custodian of the detained individual, has broad access to documentation of the health status of people in its custody.

Practice Tip: Practitioners can use *M-A-M-* language as a tool in ensuring that DHS submits evidence related to the competency inquiry, and in seeking documents to aid in the preparation of the client's defense against deportation.

Second, "[m]ental competency is not a static condition."³⁵ It is critical for practitioners to be attuned to the state of the client's mental health throughout the proceedings and to adjust requests for safeguards accordingly. *M-A-M-* recognized that even when a noncitizen is found competent, an immigration judge may still have "good cause for concern about [their] ability to proceed such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed."³⁶

Practice Tip: Practitioners may rely on *M-A-M-* to argue that immigration judges should apply appropriate safeguards even where an IJ has found the individual competent.

M-A-M- finally gave immigration courts a basic structure to apply when a noncitizen with competency concerns appeared before the court. Below in Section III, there is a more fulsome discussion of how to apply *M-A-M-*.

After the issuance of *M-A-M-*, the Board decided four other foundational cases related to competency. First, in *Matter of E-S-I-*, DHS appealed the immigration court's decision to terminate proceedings after DHS had failed to properly serve the Notice to Appear (NTA) on an incompetent noncitizen.³⁷ The Board remanded the case to the immigration court after issuing guidance on how to properly serve the NTA when issues of competency are "manifest" either before the onset of removal proceedings or during the course of the proceeding.³⁸ The court held that where a respondent is found incompetent, the DHS must properly serve the respondent's NTA on a person with whom the respondent resides; someone in a position of authority or his or her delegate if the respondent is detained in a penal or mental institution; or wherever possible, a relative, guardian, or person similarly close to the respondent; and, in most cases, the respondent themselves.³⁹

Next, the Board issued *Matter of J-R-R-A-*, in which the Court 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

³⁴ *Id.* at 480 (citation omitted).

³⁵ *Id.*

³⁶ *Id.* at 480.

³⁷ *Matter of E-S-I-*, 26 I&N at 137.

³⁸ *Id.* at 146.

³⁹ *Id.* at 138-40.

otherwise sufficient to support the claim.”⁴⁰ Significantly, the Court also concluded that this “safeguard” should be implemented even if a noncitizen is “deemed competent for purposes of his hearing” seemingly settling any doubt that the implementation of safeguards can occur with or without a finding of incompetency.⁴¹

The same year, in *Matter of J-S-S*, the Board held that “[n]either party bears the burden of establishing competency” and that the IJ must determine competency by a preponderance of the evidence standard.⁴² Additionally, the Court held that a competency finding is reviewed under a clearly erroneous standard by the Board.⁴³

Finally, in *Matter of M-J-K*, the Board confirmed that the IJ has the discretion to implement appropriate safeguards which the Board reviews *de novo*.⁴⁴ The guiding principle on review for the BIA is whether the IJ implemented safeguards that were “adequate to ensure the fairness of proceedings.”⁴⁵ While there is some unhelpful language in *M-J-K* that is arguably discriminatory against persons with disabilities and no longer good law in light of the Attorney General’s (A.G.) decision in *Matter of B-Z-R*, *infra*, it suggests that IJs have broad discretion to explore what safeguards are appropriate and recognizes termination as a possibility when no other safeguards are adequate.⁴⁶

Additionally, though not necessarily a foundational case, the AG’s decision in *Matter of B-Z-R* further advances the plight of noncitizens with mental disabilities in their litigation efforts, and its legal premise can be applied in various settings.⁴⁷ In 2022, the AG held that when assessing whether an applicant for asylum or withholding had a conviction for a particularly serious crime, an adjudicator “may consider mental health evidence” as a possible mitigating factor as it relates to the dangerousness of the offense.⁴⁸

Practice Tip: Practitioners may argue that the IJ or DHS should, as a safeguard, contextualize an individual’s conduct in light of mental health symptoms at the time of the commission of a criminal act. This framing can be helpful when seeking release from detention on bond or parole, where the DHS or the respondent must prove dangerousness or lack thereof. Similarly, this framing can be helpful in other legal analyses that involve the circumstance-specific approach, where courts have distinguished between generic criminal offenses where the categorical approach

⁴⁰ 26 I&N Dec. 609, 612 (BIA 2015).

⁴¹ *Id.* at 611.

⁴² 26 I&N Dec. 679, 683 (BIA 2015).

⁴³ *Id.* at 684.

⁴⁴ 26 I&N Dec. at 776.

⁴⁵ *Id.*

⁴⁶ See *id.* at 777, fn.4 (describing when an IJ should be reluctant to terminate proceedings but seemingly endorsing it as a possible safeguard under the right circumstances).

⁴⁷ 28 I&N Dec. 563 (BIA 2022).

⁴⁸ *Id.*

applies and offenses where courts must look at the circumstances specific to the conduct.⁴⁹

iii. Circuit Court Caselaw

Various circuit courts have examined the provision of safeguards in the context of immigration proceedings. Below is a noncomprehensive list of cases examining the Board's approach in *Matter of M-A-M*.

- *Birhanu v. Wilkinson*, 990 F.3d 1242, 1253 (10th Cir. 2021), cert. granted, judgment vacated sub nom. *Wolie Birhanu v. Garland*, 213 L. Ed. 2d 1086, 142 S. Ct. 2862 (2022) (examining what an IJ must do to determine whether a respondent is competent to represent themselves, deferring to the Board's framework that requires the IJ to "weigh the results from the measures taken and determine ... whether the [noncitizen] is sufficiently competent to proceed with the hearing without safeguards.") (citing *Matter of M-A-M*, 25 I&N Dec. at 481).
- *Pierre-Paul v. Barr*, 930 F.3d 684, 694–95 (5th Cir. 2019), cert. denied, 140 S. Ct. 2718 (2020) ("If an Immigration Judge determines that [an individual] lacks sufficient competency to proceed with the hearing, ... [then the immigration judge] ha[s] discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.").
- *Calderon–Rodriguez v. Sessions*, 878 F.3d 1179 (9th Cir. 2018) (finding that based on the agency's own interpretation, the Board abused its discretion when it affirmed the IJ's competency determination because: (1) it contained inaccurate factual findings about the mental health evidence in the record; and (2) the IJ failed to adhere to the *M-A-M* standards and did not require DHS—as the petitioner's custodian—to meet its obligation to provide current medical records in its possession).
- *Mejia v. Sessions*, 868 F.3d 1118, 1121–22 (9th Cir. 2017) (discussing the factors that demonstrated "clear indicia" of incompetence that required the IJ "to explain whether Petitioner was competent and whether procedural safeguards were needed").
- *Diop v. Lynch*, 807 F.3d 70, 75 (4th Cir. 2015) ("The BIA does not tie the fact-finder to a list where one unchecked item could invalidate an otherwise fair removal proceeding. The Board has avoided requiring [IJs] to ask any particular question, request any particular evaluation, or adopt any particular safeguard. It opts instead for an adaptable case-by-case approach.").

The above cases demonstrate that circuit courts are incredibly deferential to the Board when it comes to interpreting statutes and regulations related to competency in

⁴⁹ See, e.g., *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

immigration proceedings. Yet none have directly discussed which standard of deference the circuit courts should give to the Board’s construction of INA § 240(b)(3).

C. Section 504

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of a disability in programs, services, or activities conducted by U.S. federal agencies, including DHS and EOIR.⁵⁰ The Rehabilitation Act defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of [the] individual.”⁵¹ Although “the same substantive standards apply under the Rehabilitation Act and the [Americans with Disabilities Act],” Section 504 applies to federal agencies and does not require exhaustion of administrative remedies.⁵²

i. Defining Who is Protected Under Section 504

Under Section 504, “[n]o qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ... conducted by any Executive agency.”⁵³ Section 504 forbids facial discrimination against individuals with disabilities and requires that executive agencies such as DHS and EOIR alter their policies and practices to prevent discrimination on account of disability. The terms “benefit, programs, and services” are construed broadly.⁵⁴

ii. Section 504 Requires “Meaningful Access” to the Program, Benefit, or Service

The U.S. Supreme Court has created the “meaningful access” standard, whereby the government must grant reasonable modifications to “otherwise qualified” persons with disabilities (i.e., the person’s disability creates an impediment to fully benefiting from a program for which they qualify) to ensure they are “provided with meaningful access” to the program at issue.⁵⁵ Namely, under Section 504, covered entities must afford persons with disabilities “equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.”⁵⁶ Thus, meaningful access means equal access.

⁵⁰ 6 C.F.R. § 15.30(a) (applying to DHS); accord 28 C.F.R. § 39.130 (same); see also 29 U.S.C. § 794 (applying to EOIR).

⁵¹ 42 U.S.C. § 12102(1).

⁵² *Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 986 (10th Cir. 2021) (citation omitted).

⁵³ 29 U.S.C. § 794.

⁵⁴ *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (“Modern prisons provide [people who are incarcerated] with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the people imprisoned).

⁵⁵ *Alexander v. Choate*, 469 U.S. 287, 300–02 n. 21 (1985) (“The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access.”).

⁵⁶ *Id.* at 305 (citing 45 C.F.R. § 84.4(b)(2)).

iii. Reasonable Accommodations are Required Unless an Exception Applies

Federal agencies have an affirmative obligation under Section 504 to ensure that their benefits, programs, and services are accessible to persons with disabilities, including by providing reasonable modifications.⁵⁷ “[B]ecause Congress was concerned that ‘[d]iscrimination against [people with disabilities] was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,]’ the express prohibitions against disability-based discrimination in Section 504 and Title II include an *affirmative obligation* to make benefits, services, and programs accessible to disabled people.”⁵⁸ “[N]othing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.”⁵⁹ Thus, failure to implement a reasonable accommodation amounts to disability discrimination.⁶⁰

a. Fundamental Alterations

Reasonable accommodations necessary to prevent disability discrimination are required unless such modifications would create a “fundamental alteration” of the relevant program, service, or activity, or would impose an undue hardship.⁶¹

Example: In *PGA Tour v. Martin*, the U.S. Supreme Court considered the fundamental alteration defense under Title III of the ADA, in the context of a golfer who had physical limitations and sought to use a golf cart during a tournament, despite competition rules prohibiting such assistance. The Court reasoned that the requested modification might be a fundamental alteration if it changed an “essential aspect” of the game, or if it gave the player with a disability an advantage that would “fundamentally alter the character of the competition” and ultimately found that waiving the rule did not constitute a fundamental alteration.⁶² Thus, when examining whether something constitutes an “essential” requirement for purposes of Section 504, one must look to the specific circumstances at issue.

a. Undue hardship.

A reasonable modification may not be required if the covered entity can establish that it would impose an undue financial or administrative burden.⁶³ However, an agency

⁵⁷ *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015).

⁵⁸ *Id.* (quoting *Choate*, 469 U.S. at 295) (emphasis added).

⁵⁹ *Id.* at 269.

⁶⁰ *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (“The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.”).

⁶¹ See *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 n.17 (1987) (modification not required if it would require “a fundamental alteration in the nature of [the] program”) (citation omitted); *Choate*, 469 U.S. at 300.

⁶² 532 U.S. 661 (2001) at 662-63, 690; *accord Franco-Gonzales*, 797 F. Supp.2d at 1053 (considering the “unique circumstances” and “Plaintiffs’ individual characteristics and the procedural posture of their cases pending before the BIA” in assessing the reasonableness of the accommodation requested).

⁶³ *Choate*, 469 U.S. at 298.

covered by Section 504 cannot justifiably defend denying a requested modification based on undue hardship if there is a feasible mechanism to ensure the person with a disability is protected from discrimination.⁶⁴

b. Applying Section 504 in the Immigration Context

NQRP providers and other advocates should push for the application of Section 504 in the immigration context as it affords greater protections for noncitizens with disabilities than the *M-A-M*- framework. Doing so may require persistent advocacy and education to adjudicators who may resist or not understand Section 504's relevance in immigration proceedings. However, the requirements of Section 504 plainly apply to the immigration benefits and proceedings that noncitizens may seek under the INA.⁶⁵

Example: *Franco-Gonzalez v. Holder* directly applies Section 504 to immigration proceedings. Plaintiffs, people with mental disabilities incarcerated by ICE, alleged that Section 504 required “(a) the appointment of counsel as an accommodation for non-citizens who are not competent to represent themselves and (b) a custody hearing in light of Plaintiffs’ prolonged detention.”⁶⁶ The District Court found Plaintiffs “were not provided with even the most minimal of existing safeguards under [8 C.F.R. §] 1240.4, let alone more robust accommodations required under the Rehabilitation Act,” and ordered the appointment of a “qualified representative” for persons in immigration detention with serious mental illness.⁶⁷ The Court later granted a permanent injunction, finding the safeguards afforded by *Matter of M-A-M*- insufficient and determining that the INA did not forbid the provision of counsel as a reasonable accommodation.⁶⁸ In so doing, it found that appointment of a QR was an appropriate modification to ensure “individuals who otherwise lack meaningful access to their rights in immigration proceedings as a result of mental incompetency” can participate in the federal program for which they otherwise qualify.⁶⁹

⁶⁴ See e.g., *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1303 (D.C. Cir. 1998) (*en banc*) (determining that an interpretation of the hospital’s collective bargaining agreement that enabled it to implement its ADA obligations was “distinctly preferred.”); see also 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

⁶⁵ *Fraihat v. U.S. Immigr. & Customs Enft*, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020), rev’d, 16 F.4th 613 (9th Cir. 2021) (“the programmatic ‘benefit’ in this context is shared by all class members and is best understood as participation in the removal process.”). Though the Ninth Circuit later “rejected the district court’s liability finding in *Fraihat*,” that finding was “based on evidentiary insufficiency” and “the Ninth Circuit neither affirmed nor reversed” the court’s determination that “‘participation in the removal process’ could fit within the statutory term ‘benefit.’” *Id.* See also *Matter of M-A-M*-, 26 I&N Dec at 480 (citation omitted); Margo Schlanger, Elizabeth Jordan, Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 Harv. Law & Pol. Rev. 1, 263 (2022).

⁶⁶ 767 F.Supp.2d at 1053, 1056.

⁶⁷ *Id.* at 1058.

⁶⁸ *Franco-Gonzalez*, 2013 WL 3674492 at *6.

⁶⁹ *Id.*

Franco was not the first case to raise a Section 504 claim in the immigration context. *Galvez-Letona v. Kirkpatrick* established framework for when a waiver of a statutory requirement is an appropriate accommodation when such waiver does not fundamentally alter the program.⁷⁰ In *Galvez-Letona*, a person with an intellectual and developmental disability sought U.S. citizenship and at issue was whether an exception to the oath of allegiance requirements found in the naturalization statute constituted a “fundamental alteration.”⁷¹ Comparing the situation with other contexts where the government agency made exceptions to statutory requirements, the Court found that a waiver of the oath of allegiance did not constitute a fundamental alteration and was appropriate to comply with Section 504 to ensure Mr. Galvez-Letona gained meaningful access to the benefit sought.⁷²

In sum, when seeking protections pursuant to Section 504, an individualized analysis is required to evaluate how a person’s disability impacts their meaningful access to the program, benefit, or services provided by a covered agency. Here, EOIR and DHS have the affirmative obligation to ensure that their benefits, programs, and services are accessible to people with disabilities, including by providing reasonable modifications to prevent disability discrimination, even if such an accommodation may conflict with statutory language.

III. SEEKING SAFEGUARDS AND REASONABLE ACCOMMODATIONS IN FRONT OF THE AGENCIES

Safeguards and Section 504 are essential tools when representing NQRP clients. While federal agencies have the affirmative obligation to afford reasonable accommodations to persons with disabilities, it often goes unmet.⁷³ NQRP providers can help fill any existing gaps between traditional immigration proceedings and modified proceedings that provide meaningful access for clients with disabilities. Advocates should do so by evaluating what would best serve clients’ needs; creating a strong foundation for why the safeguard or accommodation sought is essential; and objecting to any denials to ensure the record is clear for any appeals. This section provides examples of how to apply these protections in various contexts before EOIR and DHS.

A. Executive Office for Immigration Review (EOIR)

The legal framework articulated *supra* applies in proceedings before the immigration courts and should be readily utilized to uphold a client’s rights.⁷⁴ Though

⁷⁰ 54 F.Supp.2d 1218, 1224–25 (D. Utah 1999), *aff’d* on other grounds, 3 F. App’x 829 (10th Cir. 2001).

⁷¹ *Id.* at 1224–25.

⁷² *Id.*

⁷³ See *e.g.*, *Choate*, 469 U.S. at 295 (recognizing agencies’ affirmative obligation to make government programs accessible to persons with disabilities); *Pierce*, 128 F. Supp. 3d at 266 (same).

⁷⁴ INA § 240(b)(c) (safeguards); 29 U.S.C. § 794 (Section 504); 28 C.F.R. § 39.130, *et seq.* (applying Section 504 to EOIR). See also *Franco-Gonzalez*, 2013 WL 3674492 at *3 (holding that litigants in immigration proceedings who are deemed mentally incompetent are entitled a QR as a reasonable accommodation pursuant to Section 504). See also Schlanger et.al., *supra* note 65 (providing a comprehensive discussion on sources of law related to the application of Section 504 in the immigration context).

submission of Third Party Notifications (TPNs) and the provision of Judicial Competency Inquiries (JCIs) and *M-A-M-* hearings are an important aspect of advocacy related to securing the safeguard and accommodation of a QR, this section focuses on bond and removal proceedings after a QR has been appointed.

i. Practical Considerations

This section provides framework for when and how to request safeguards and reasonable accommodations before the immigration court.

a. When to Request Safeguards and Accommodations

QRs are typically assigned to represent a noncitizen after the IJ has found a person not competent to represent themselves. That does not mean, however, that the IJ assessed safeguards beyond the need for legal representation. In cases where practitioners believe that further safeguards are necessary, the advocate should request such safeguards at any point in the proceeding where the client may need a modification. In some courts, the IJ will hear arguments about safeguards at a master calendar hearing, or in the beginning of an individual calendar hearing.

However, depending on the jurisdiction's practice, it may be prudent to request a separate hearing pursuant to *Matter of M-A-M-* to discuss accommodations with the Court ("*M-A-M-* hearing"). If the QR is requesting any testimonial safeguards, a separate *M-A-M-* hearing well in advance of the merits hearing is advisable so that the QR has proper notice of what safeguards the IJ will implement prior to preparing the client to testify. At an *M-A-M-* hearing, the practitioner can have a full hearing devoted solely to discussing which accommodations the client might require to protect their rights. Some IJs may want this hearing to take place right before the commencement of the merits hearing, and some IJs will allow the *M-A-M-* hearing to occur in a separate time slot prior to even the scheduling of any individual hearing.

Practitioners may also wish to request the *M-A-M-* hearing in advance of filing any applications should the client require accommodations with respect to completing forms or even entering pleadings, for example if the client is unable to answer basic biographical questions. As competency can be fluid, practitioners may want to request more than one *M-A-M-* hearing if the proceedings last for many years.

b. How to Request Safeguards and Accommodations

1) Motions for Safeguards

There are various mechanisms for requesting safeguards and accommodations, each of which has different benefits. Written motions for safeguards are helpful because they provide a vehicle for framing the client's disabilities and tying the requested safeguards and accommodations to the ways in which the symptoms of those diagnoses manifest. Written motions create a clear record of how the agency can facilitate the client's meaningful access to the immigration proceedings. In some instances, a QR may orally seek a safeguard or accommodation, particularly when it would benefit the client in that moment. Practitioners should remember that safeguards and accommodations can be

sought at any time in the removal process—from the date proceedings are initiated to the conclusion of administrative proceedings. Thus, QRs should not shy away from seeking safeguards or accommodations as procedural protections in any way that enhances the client’s ability to meaningfully participate in the removal proceedings.

2) Include Relevant Evidence with the Motion for Safeguards

The best evidence to present attached to a motion for safeguards is typically a psychological evaluation of the client. Such an evaluation may already be in the record, such as in the case of an IJ who has ordered an FCE during the competency hearings, or the QR may wish to have one conducted closer in time to the request for safeguards. A qualified psychological expert can include in their report any accommodations they believe would be necessary and any opinions as to competency and the likelihood of restoration of competency. The NQRP provides funding for practitioners to obtain expert evaluations, and securing a psychological report is an immensely helpful tool in identifying which safeguards or accommodations might be most beneficial in any given case. However, if lacking in time and resources, practitioners can certainly make safeguards requests without a formal mental health evaluation and rely on information already in the record. However, such an evaluation can serve as critical evidence when challenging denials of requests for safeguards or accommodations on appeal.

During an *M-A-M-* hearing, QRs can also present testimony of the psychological expert and may consider proffering testimony from the client if appropriate. Deciding whether to present a client for testimony can be difficult for numerous reasons including the fact that asking a client to put their limitations (or manifestations of a mental health condition) on display may be painful for them. Because the evaluating psychological expert is the person best equipped to explain the client’s diagnoses and symptoms, QRs may choose to advocate only for the presentation of the expert testimony during an *M-A-M-* hearing.

Further, as with any other area of trial advocacy, when seeking a safeguard, QRs must focus on creating a clear and strong record in case appeal becomes necessary. Thus, if an IJ denies a request for a continuance to obtain a psychological evaluation, practitioners should object on the basis that the denial is a violation of the client's right to due process. Due process requires a full, fundamentally fair, and individualized hearing and vitiates their right to seek accommodations on the basis of their disability.

If it is not possible to obtain a mental health evaluation before requesting safeguards, QRs should consider submitting other evidence that they feel is relevant to showing the client’s needs, such as medical records that show diagnoses, symptoms, and treatment; and declarations from family and community members who know the client well. QRs may also consider finding any public information about the client; or, alternatively, any general background information about mental health that the QR can provide to the judge that may be helpful in understanding what type of mental health issues the client has. Another option if it is not possible to obtain a full mental health evaluation before the safeguards request is to ask a psychologist or other mental health

professional to review records, listen to any DAR recordings, or even observe a hearing and testimony from the client and provide a limited scope opinion about the client's mental health and potential needs.

As a very last resort, QRs may consider filing proffers or statements based on the QR's own observations and interactions with the client. QRs should keep in mind, however, that lawyers are not permitted to act as a witness in a case in which the lawyer is also an advocate (with some exceptions), so the QR may consider having a colleague such as a paralegal, social worker, or other support staff provide declarations regarding their observations and interactions of the client instead.⁷⁵ This is not a best practice but may be a last resort option if no other evidence is available. Each QR should follow their own state's ethical rules regarding lawyer as a witness, and should only use this method where no other possible evidence is available and not doing so would be a substantial hardship on the client.

3) Clearly Identify Each Individual Safeguard in the Motion

When requesting safeguards, it is prudent to identify each one sought by numbering them in the motion or providing a letter designation for each one. Identifying each individual safeguard will allow an IJ to clearly delineate which safeguards are granted and which are not. An IJ may also summarily grant or deny all safeguards requested or may grant some safeguards while denying others. For example, an IJ could state, "With respect to the requested safeguards, I will grant A–C, deny D, hold in abeyance E & F and reassess should it become necessary, and grant G–J." Counsel must ensure that the record is clear on the outcome of each request for a particular safeguard. Should an IJ deny a safeguard request, counsel should object to ensure the issue is preserved for appeal.

ii. Removal Proceedings

Removal proceedings must be fundamentally fair.⁷⁶ Additionally, as discussed above, they must comport with Section 504 of the Rehabilitation Act. A representative for a person with limited capacity must advocate for safeguards that will level the playing field so that the noncitizen with disabilities is on equal footing with and has equal access to the court as would a similarly situated noncitizen without limitations.

a. Safeguards and Section 504

When contemplating which safeguards or accommodations to seek, the inquiry hinges on what would position the person with a disability similarly to someone in the same situation who does not have a disability. In other words, the person would be incompetent in the removal proceedings but for the safeguard or accommodation.

⁷⁵ See ABA Model Rules of Professional Conduct, R. 3.7.

⁷⁶ See *Matter of R-C-R-*, 28 I&N Dec. 74, 77 (BIA 2020); *Matter of M-A-M-*, 25 I&N Dec. at 479.

First, it is best practice to treat the assessment of competency and the discussion of safeguards as a threshold issue at the start of proceedings or as soon as practicable.⁷⁷ A client's participation in removal proceedings requires active participation and understanding of arcane court systems. Without analyzing how to make the proceeding fundamentally fair at the outset, practitioners risk, for example, waiving forms of relief that would have gone undiscovered absent a thorough psychological examination; or conceding charges of removability that might have otherwise been contested had the noncitizen been given the opportunity to explain information on their terms.

Second, practitioners can be creative in requests for safeguards based on the specific needs of the client. Though the BIA's binding caselaw on competency is scant, the safeguards suggested by the Board in *M-A-M-* are not exhaustive.⁷⁸ There are, however, a wide swath of unpublished decisions addressing the issue of diminished competency in removal proceedings.⁷⁹ Thus, if counsel or the evaluating mental health expert believe special safeguards are necessary to maintain the fairness of the proceedings, the QR should seek them.

Example: If a client is paranoid and only trusts one person, a safeguard could be allowing the trusted person to sit next to the client when they testify. Perhaps the client cannot read or write but wants to file for asylum. An appropriate safeguard could be foregoing the signing of the asylum application at the individual hearing, despite the Form I-589's requirement to the contrary. Once the QR has gathered sufficient information about the client's mental health, the QR should request any protections they deem necessary for the proceedings to be fair given their client's disabilities.

Third, QRs may need to request safeguards with respect to aspects of the proceedings that occurred before the QR appointment. For example, IJs are prohibited from accepting a *pro se* litigant's admissions related to citizenship, admissibility, or removability if the person has a disability or mental health condition that affects competence.⁸⁰ If the court accepted pleadings prior to a finding of incompetence and appointment of a QR, the court should revisit that inquiry once the QR appears on the respondent's behalf. Prior admissions may have damaging implications for an assessment of removability and eligibility for relief from removal. Further, if DHS served the NTA prior to the appointment of counsel, then DHS must re-serve the NTA to adhere to DHS's obligations under the regulations and caselaw.⁸¹ If DHS did not properly serve the NTA under *Matter of E-S-I-*, the QR may move to terminate proceedings.⁸²

⁷⁷ See Section III(A)(i)(a), *supra*.

⁷⁸ See *Matter of M-A-M-*, 25 I&N Dec. at 483.

⁷⁹ See Immigrant & Refugee Appellate Center, LLC (IRAC), *Index of Unpublished Decisions from the Board of Immigration Appeals* (2023), <https://www.irac.net/unpublished/index-2/> (cataloguing unpublished Board decisions).

⁸⁰ 8 C.F.R. § 1240.10(c); see *Matter of E-S-I-*, 26 I&N Dec. at 143 ("where a respondent lacks competency" the attorney can provide information about citizenship, inadmissibility and removability, and relief from removal).

⁸¹ 8 C.F.R. § 103.8(c)(2); *Matter of E-S-I-*, 26 I&N Dec. at 145 (identifying re-service of the NTA "would be among the safeguards needed for the case to proceed.").

⁸² *Matter of E-S-I-*, 26 I&N Dec. at 145.

However, QRs should be strategic about requesting termination under *Matter of E-S-I-*. One possible benefit of termination would be that ICE could release the client if proceedings are terminated. But ICE can, and usually does, remedy improper service of the NTA by issuing a new NTA and serving it on the required individuals. If the client is released after termination of proceedings without prejudice but before the issuance of a new NTA, the client would no longer qualify for the provision of a QR because they would not be detained.

Finally, practitioners should recall that adjudicators can apply safeguards even if the noncitizen is found competent under the standard articulated in *M-A-M-*. In *M-A-M-*, the BIA stated that:

[e]ven if [a noncitizen] has been deemed to be medically competent, there may be cases in which an Immigration Judge has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed. In such cases, Immigration Judges should apply appropriate safeguards.⁸³

Further, the BIA explained in *Matter of J-R-R-A-* that its suggested safeguard relating to subjective fear and credibility should be implemented even if “the individual could be deemed competent for purposes of his hearing.”⁸⁴ Therefore, the safeguard determination is connected with, but not dependent upon, a finding of incompetence. The structure developed by the BIA in some ways requires a “competency hearing” to have a discussion on safeguards, but just because the outcome of that hearing may result in a finding of competence, that does not mean it is inappropriate to pursue necessary safeguards.

b. Administrative Closure and Termination

As the BIA noted in *M-A-M-*, “[t]he [INA’s] invocation of safeguards presumes that proceedings can go forward, even where the [noncitizen] is incompetent, *provided the proceeding is conducted fairly*.”⁸⁵ In some cases, there may be no safeguards sufficient to serve as an equalizer and ensure the proceedings are fundamentally fair, short of administrative closure or termination.⁸⁶

Administrative closure is akin to pausing proceedings and removing a client’s case from the active removal docket. Administrative closure may be appropriate if the client is acutely unwell at the moment but undergoing treatment and the prognosis for recovery is positive.⁸⁷ However, per *Matter of Avetisyan*, administrative closure is inappropriate when

⁸³ *Matter of M-A-M-*, 25 I&N Dec. at 480.

⁸⁴ 26 I&N Dec. at 611.

⁸⁵ 25 I&N Dec. at 477 (emphasis added).

⁸⁶ See *id.* at 483 (explaining that “concerns may remain” even if safeguards are implemented).

⁸⁷ See, e.g., *M-G-H-*, AXXX XXX 638 (BIA Nov. 6, 2015) (unpublished) (remanding for IJ to further consider request for administrative closure for respondent found mentally incompetent) (O’Herron, Neal, Holmes); *D-P-*, AXXX XXX 016 (BIA May 21, 2015) (remands for further consideration of motion for

based on a “purely speculative” event, and recovery from a disability rendering a client not competent could be “purely speculative.”⁸⁸ Therefore, in cases where the record clearly demonstrates that a client will never become competent under the standard in *M-A-M-*, the QR can alternatively seek termination of proceedings with prejudice.

EOIR’s Immigration Judge Benchbook—on which courts and the BIA routinely rely—supports requests for termination.⁸⁹ The Benchbook provides that IJs should “consider[] administratively closing or terminating cases where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards[.]”⁹⁰ Moreover, IJs are granted broad authority to “take *any action* consistent with their authorities under the Act and regulations *that is appropriate and necessary* for the disposition of such cases.”⁹¹

IJs have terminated removal cases that could not fairly proceed on account of the noncitizen’s serious mental condition.⁹² For example, in *Franco*, the IJ terminated removal proceedings against a class action representative “after recognizing that he could not go forward with the proceeding given [his] mental condition.”⁹³ In at least one unpublished decision from the Board, the IJ properly terminated proceedings where DHS failed to reserve NTA on other individuals after respondent was deemed incompetent.⁹⁴

However, in *Matter of M-J-K-*, the Board reversed termination of proceedings on competency for the lower court to assess and implement appropriate safeguards.⁹⁵ The Board in *M-J-K-* demonstrated its discomfort with termination when it stated that “Immigration Judges should be particularly reluctant to terminate proceedings where, as here, the [noncitizen] has a history of serious criminal conduct and may pose a danger to himself or others upon his release into the community.”⁹⁶

administrative closure as a safeguard for respondent found to be mentally incompetent) (unpublished) (O’Herron, Holmes, Greer (dissenting)).

⁸⁸ 25 I&N Dec. 688, 696 (BIA 2012).

⁸⁹ See, e.g., *Gjeci v. Gonzales*, 451 F.3d 416, 421 & n.1 (7th Cir. 2006) (citing IJ Benchbook for procedure to evaluate motions to withdraw); *Matter of M-A-M-*, 25 I&N Dec. at 476 (indicating that the Board’s analysis regarding competency issues is “largely consistent with agency practice as reflected in the Immigration Judge Benchbook.”).

⁹⁰ U.S. Dept. Of Justice Executive Office Of Immigration Review, *Immigration Judge Benchbook* § II.B.1 (2016).

⁹¹ 8 C.F.R. § 1003.10 (emphasis added).

⁹² See, e.g., *Franco-Gonzales*, 767 F. Supp. 2d at 1048; C-C-H-C-, AXXX XXX 686 (BIA Nov. 27, 2020) (unpublished) (Liebowitz). See also Sherman-Stokes, Sarah, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1057 & n.191 (May 2016) (noting that, based on interviews with immigration judges and attorneys, “immigration judges in [some] jurisdictions are routinely ordering termination for incompetent respondents that appear before them.”).

⁹³ *Franco-Gonzales*, 767 F. Supp. 2d at 1048.

⁹⁴ C-C-H-C-, AXXX XXX 686 (BIA Nov. 27, 2020) (unpublished) (Liebowitz).

⁹⁵ 26 I&N Dec. at 777 n.4 (emphasis added). *But see Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (civil immigration detention is constitutional only in “narrow” nonpunitive “circumstances” and the government cannot subject a person with a disability or mental health condition to confinement unless it demonstrates by clear and convincing evidence that the person poses a danger).

⁹⁶ *Id.*

Yet, the court in *Franco* has determined that implementing safeguards may not be adequate to protect the fundamental rights of noncitizens suffering from serious mental incompetency.⁹⁷ “The majority of these ‘safeguards’ ... however, are left to the Immigration Judge’s discretion, and none guarantee that the incompetent [noncitizen] may participate in his proceedings as fully as an individual who is not disabled.”⁹⁸

Academic commentators have also endorsed the view that termination of proceedings may in some cases be the only adequate form of protection for certain incompetent noncitizens.⁹⁹

Example: Termination may be appropriate in cases where the client is unable to cooperate or communicate with their QR due to their disability, and the QR is unable to apply for relief or otherwise pursue a defense in court because of the client’s disability. IJs will sometimes request that QRs try other safeguards first before granting termination.

c. Preserving the Record

Advocates must be strategic by raising issues at the IJ level that they wish to preserve for appeal to the BIA and beyond, whether that be in writing such as in a motion for safeguards or orally during any master or individual hearing. Preserving the record is important both when a client loses before the IJ as well as in instances where they prevail and ICE wishes to challenge the IJ’s decision. Raising objections to denials of safeguards and accommodations is critical to clearly preserve any argument that the IJ erred in their decision. The same is true if an IJ rules against a client’s motion for termination or administrative closure. During individual hearings, QRs may also preserve the record by objecting to any disregard of safeguards the IJ has granted during examination of the client. Creating a strong record for appeal is particularly critical in NQRP cases, which tend to be procedurally, factually, and legally complicated. Further, NQRP attorneys are practicing at the intersection of immigration, criminal, and disability rights law. Pursuing appeals of IJ decisions in these areas can serve to provide helpful guidance from the Board and circuit courts interpreting the nuanced claims raised by NQRP clients.¹⁰⁰

⁹⁷ *Franco-Gonzalez v. Holder*, 2013 WL 3674492 at *8.

⁹⁸ *Id.*

⁹⁹ See Sherman-Stokes, Sarah, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 791 (2017) (“Termination of proceedings and release to mental health care may be the ‘only reasonable accommodations’ available to this subset of incompetent respondents.”). See also Marouf, Fatma, *Incompetent But Deportable: The Case For a Right To Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929 (May 2014) (proposing that immigration judges “decide on a case-by-case basis whether to terminate a case based on the respondent’s incompetence.”); Bowen, Molly, *Avoiding an “Unavoidably Imperfect Situation”: Searching For Strategies To Divert Mentally Ill People Out of Immigration Removal Proceedings*, 90 WASH U. L. REV. 492 (2012) (“[a] basis for terminating proceedings is that continuing proceedings against a mentally ill individual would violate his or her due process rights.”).

¹⁰⁰ The NQRP does *not* fund federal court litigation. QRs may file petitions for review appealing Board decisions negatively impacting NQRP clients, but legal fees are not covered under the NQRP, though prevailing parties may be able to collect attorney’s fees through the Equal Access to Justice Act (“EAJA”). For more guidance on filing petitions for review, see AIC, *Practice Advisory: How to File a Petition for*

iii. Custody Redetermination (Bond) Proceedings

The goal of custody redetermination proceedings, also known as bond proceedings, is to secure the client's release from ICE detention. When assessing whether to grant release on bond, the primary inquiry involves whether the individual is a danger to the community or a flight risk.¹⁰¹ IJs enjoy broad discretion in this assessment.¹⁰² The legal framework meant to protect persons with limited competency or mental disabilities can bolster requests for release.

a. Safeguards

Certainly, a broad variety of safeguards can and should be requested in bond proceedings, just like in removal proceedings, to ensure disability discrimination does not prevent clients from being granted release from ICE custody. In addition to seeking the protections articulated in *Matter of M-A-M*, counsel can bootstrap the legal framework from cases such as *Matter of J-R-R-A-* and *Matter of B-Z-R-* to argue that courts should adopt similar reasoning in the context of bond.

Example 1: Consistent with *Matter of J-R-R-A- supra*, it would be prejudicial for an adjudicator to draw a negative inference in a bond proceeding when the respondent's competency impacts their ability to testify in support of a request for release. The Board directed that in circumstances where "mental illness or serious cognitive disability" are implicated, "the factors that would otherwise point to a lack of honesty in a witness—including inconsistencies, implausibility, inaccuracy of details, inappropriate demeanor, and non-responsiveness—may be reflective of mental illness or disability, rather than an attempt to deceive the Immigration Judge."¹⁰³ Although different in scope, this same framing should apply in bond proceedings before the immigration courts. When assessing dangerousness or flight risk, IJs must consider respondent's mental disabilities when making factual findings related to eligibility for release.

Example 2: The concept carries over to safeguard requests related to remote court appearances conducted via video conferencing (VTC). QRs can seek in-person bond proceedings as a safeguard to ensure a full and fair proceeding. Or, if in-person proceedings are not possible, the QR could request that the IJ make a positive credibility determination given the difficulty of closely observing a respondent during remote proceedings.¹⁰⁴

Review (Nov. 2015), available at

https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_f_or_review_2015_update.pdf. If you wish to learn more about collecting EAJA fees, read National Immigration Litigation Alliance (NILA), *Practice Advisory: Requesting Attorneys' Fees Under the Equal Access to Justice Act* (Aug. 2020), available at <https://immigrationlitigation.org/wp-content/uploads/2021/03/2021.03.23-EAJA-PA-FINAL.pdf>.

¹⁰¹ *Matter of Guerra*, 24 I&N Dec. 37 (2006).

¹⁰² *Id.*

¹⁰³ *Matter of J-R-R-A-*, 26 I&N Dec. at 611.

¹⁰⁴ See, e.g., Bradley, Liz and Farber, Hillary, *Virtually Incredible: Rethinking Deference to Demeanor When Assessing Credibility in Asylum Cases Conducted by Video Teleconference* 568–70 (2022), available at

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3835&context=faculty_scholarship.

Example 3: Similarly, the guidance provided by the AG in *Matter of B-Z-R-* can be analogized to bond proceedings. The respondent in *Matter of B-Z-R-*, had a conviction for burglary that an IJ determined to be a particularly serious crime barring him from asylum and withholding relief from removal.¹⁰⁵ In so doing, the IJ followed prior Board precedent directing adjudicators to ignore evidence of mental health as a mitigating factor when assessing dangerousness in a particularly serious crime analysis.¹⁰⁶ The AG intervened to clarify that adjudicators may consider evidence of mental health to assess dangerousness, and the same should be true in the bond context.

b. Section 504

The legal framing provided by Section 504 can be applied in bond proceedings before EOIR, either in conjunction with other arguments (i.e., pursuit of bond under the NQRP Nationwide Policy, Section III(A)(iii)(c), *infra*) or as a standalone claim. Even if the court does not rule on the Section 504 claim, it is an effective tool to raise the IJ's awareness of the client's disability and the legal protections they deserve to prevent discrimination.

The appointment of a QR is only the first step in affording a safeguard or accommodation, and the QR should advocate against any assertions by the court that the mere appointment of counsel is sufficient to uphold the client's constitutional and statutory rights. Courts consistently apply Section 504 to individuals in immigration proceedings and QRs can use that existing framework to seek reasonable accommodations.¹⁰⁷ Thus, Section 504 applies in the immigration context and IJs are required to afford reasonable accommodations to avoid disability discrimination.¹⁰⁸

When building a Section 504 claim, the first step is establishing the client has a disability that is covered under 29 U.S.C. § 705(2)(B); 42 U.S.C. §§ 12102(1)–(3); and 28 C.F.R. § 35.108. The requirement for meeting this burden is relatively low, requiring that the person have “a physical or mental impairment that substantially limits one or more major life activities.”¹⁰⁹ Next, the respondent must demonstrate they are unable to meaningfully access the benefit sought—access to the immigration proceedings—due to the disability.

Example: In the context of custody redetermination, someone might seek release from detention as a reasonable accommodation. Release may be the appropriate accommodation if a client is unable to meaningfully assist in the preparation of the immigration case and a medical expert has found that if the individual were no longer in a carceral setting, their competency could be restored such that they would be able

¹⁰⁵ 28 I&N Dec. at 565.

¹⁰⁶ *Id.* (overruling *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014)).

¹⁰⁷ *Id.*; *Fraihat*, 445 F. Supp. 3d at 748; *Galvez-Letona*, 54 F. Supp. 2d at 1225.

¹⁰⁸ 29 U.S.C. § 794; 28 C.F.R. § 39.130, *et seq.*; see also 8 C.F.R. § 1003.10 (IJs are granted broad authority to “take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases.”).

¹⁰⁹ 42 U.S.C. § 12102(1).

to cooperate with counsel. This could take shape in many ways—the client could be experiencing suicidal ideation, they could have symptoms of psychosis or paranoia that are uncontrolled in detention, etc.—and it is up to the QR to identify both the disability and the reason release is the best accommodation to prevent disability discrimination.¹¹⁰

Further, counsel must consider why the agency does not qualify for an exception to the reasonable accommodation sought. Namely, the modification (in the above example, release) does not constitute either a fundamental alteration of the benefit or program (immigration proceedings) or an undue hardship.

When arguing that an accommodation is not an undue hardship, QRs may argue that the EOIR’s non-detained docket far exceeds the number of cases on its detained docket, and therefore transferring a detained case to the non-detained docket would not constitute either a fundamental alteration or an administrative or financial hardship. At the conclusion of the first quarter of FY2022, over 1.5 million cases were pending before U.S. immigration courts.¹¹¹ As of March 12, 2023, ICE held 27,723 people in custody and monitored 287,299 people on the non-detained docket through its alternative to detention programs.¹¹² Even if we erroneously assume that every person in ICE custody has a case pending before EOIR, these statistics establish that only about 1.8 percent of EOIR cases are on a detained docket. Further, in fiscal year 2024, DHS’s projected average daily cost of detention is \$157.20 per day whereas the cost of providing case management through a nonprofit is \$14.05 per day or it costs ICE \$8.00 per day to monitor an individual on its Intensive Supervision Appearance Program (“ISAP”).¹¹³ Thus, release from detention would not be a fundamental alteration of the immigration proceedings. Similarly, it would not constitute an undue administrative burden because the agencies regularly process cases from the detained to non-detained dockets. Finally, there is no undue financial burden given the cost of detention is significantly higher than the cost of processing an individual’s case on the non-detained docket.

If the client is detained under INA § 236(c), QRs may also argue that the mandatory detention statute does not prevent DHS from granting release as a reasonable accommodation. DHS has wide discretion, despite INA § 236(c), to avoid detention or release persons from its custody for humanitarian reasons.¹¹⁴ Moreover, courts have

¹¹⁰ Schlanger et.al., *supra* note 65, at 283 (describing release as a reasonable accommodation, even when pertaining to individuals subject to the mandatory detention statute, INA § 236(c); 8 U.S.C. § 1226(c)). “Indeed, it would constitute disability discrimination to allow flexibility for policy reasons but bar similar flexibility when required by the Rehabilitation Act theory.” *Supra*.

¹¹¹ Congressional Research Service, *U.S. Immigration Courts and the Pending Cases Backlog* (April 25, 2022), <https://crsreports.congress.gov/product/pdf/R/R47077>.

¹¹² TRAC Immigration, *Immigration Detention Quick Facts*, <https://trac.syr.edu/immigration/quickfacts/> (last updated Sept. 24, 2023).

¹¹³ American Immigration Lawyers Association (AILA), *Featured Issue: Immigration Detention and Alternatives to Detention*, AILA Doc. No. 21031937 (Mar. 2023), available at <https://www.aila.org/advocacy/media/issues/featured-issue-immigration-detention>.

¹¹⁴ 8 C.F.R. § 212.5; U.S. Dep’t of Homeland Security: ICE Directive 11071.1: *Assessment and Accommodations for [Detained Persons] with Disabilities* 9 (Dec. 15, 2016), available at <https://perma.cc/M4S4-274Y> (hereinafter, “ICE Directive 11071.1”) (providing for release as an option for

found that waivers or exceptions to statutory language are appropriate to prevent disability discrimination.¹¹⁵ Release from DHS custody is therefore widely available to people in immigration proceedings before EOIR.¹¹⁶ Accordingly, release is reasonable and does not constitute a fundamental alteration.¹¹⁷

c. NQRP Nationwide Policy Provides for Bond Proceedings After Six Months of Detention

As discussed in Section I, in 2013, EOIR and DHS published an agency memorandum enacting the NQRP Nationwide Policy. The EOIR Nationwide Policy Memo provided a list of enhanced procedural protections for unrepresented individuals “with serious mental disorders or conditions.”¹¹⁸ The agency began “implementation of a system” that provides: “Competency Hearings,” “Mental Competency Examinations,” “Availability of Qualified Representatives,” and “Bond Hearings.”¹¹⁹ In the section devoted to bond hearings, EOIR states, “any unrepresented detained [noncitizens] who were initially identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and who have been held in detention by DHS for six months or longer will be afforded a bond hearing.”¹²⁰

Notably, the EOIR Nationwide Policy Memo did not create any carve-outs delineating which NQRP Nationwide Policy members would *not* qualify for an individualized bond hearing as a safeguard. In many ways, the EOIR Policy mirrored the court’s permanent injunction in *Franco*, which similarly provides bond hearings to all class members after 180 days of detention, regardless of what statute served as the basis for detention (i.e., INA §§ 235(b), 236(a), (c), or 241(a)). Further, EOIR created a checklist for IJs considering NQRP cases and specifically created a section for the “Nationwide Policy Bond Hearing,” directing judges to conduct a bond hearing between 180 and 195 days of detention if the person is identified before the 180th day, otherwise “as soon as practicable.”¹²¹ Thus, there is a strong argument based on the plain language of the NQRP Nationwide Policy that people covered by the Nationwide Policy should qualify for a bond hearing after six months of ICE detention.

NQRP providers may argue that the bond provision in the Nationwide Policy applies to anyone appointed a QR as a procedural safeguard. The bond proceeding is one of many other safeguards that EOIR has fully endorsed under the Nationwide Policy and declining to exercise jurisdiction over NQRP cases after six months of confinement

persons with disabilities); see Brief for American Immigration Council as Amici Curiae Supporting Petitioners-Appellees, *Hope v. Warden York Cty. Prison*, No. 20-1784 (3d Cir. 2020), available at https://www.americanimmigrationcouncil.org/sites/default/files/amicus_briefs/hope_et_al_v_doll_et_al_amicus_brief.pdf (describing such cases).

¹¹⁵ *Franco-Gonzalez*, 2013 WL 3674492 at *10; *Galvez-Letona*, 54 F. Supp. 2d at 1225.

¹¹⁶ *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010) (finding an accommodation reasonable where it was “available”).

¹¹⁷ See *PGA Tour, Inc.*, 532 U.S. at 683; *Galvez-Letona*, 54 F.Supp.2d at 1226.

¹¹⁸ See EOIR Nationwide Policy Memo, *supra* note 13.

¹¹⁹ *Id.* at 1–2.

¹²⁰ *Id.*

¹²¹ *Id.*

violates the agency's own policy.¹²² It would be arbitrary for EOIR to follow all other elements of the policy except for the bond provision. QRs must raise the issue before EOIR to ensure it is followed as a procedural safeguard afforded by the NQRP Nationwide Policy.¹²³

Practice Tip: Because the NQRP Nationwide Policy mimics the legal framework established in *Franco*, practitioners may wish to argue that during NQRP Nationwide Policy bond hearings, the government bears the burden of proof by clear and convincing evidence to establish continued confinement is necessary.

d. Preserving the Record

Part of the purpose of raising numerous different claims for release is to ensure the client has various colorable issues preserved for appeal. That said, while custody status is reviewable by the Board, the Board's decisions are not appealable outside of EOIR. Therefore, if a client wishes to challenge the lawfulness of their confinement, the sole mechanism is via a petition for writ of habeas corpus before the appropriate federal district court.¹²⁴

Practitioners must look to the law in the district court where a petition would be filed to assess whether issues must be exhausted before the agency prior to the filing of a petition. If it is unclear whether exhaustion is required, it may be prudent to raise any issues before EOIR that a practitioner intends to challenge in a habeas filing.¹²⁵ For example, NQRP Nationwide Policy members may seek to challenge the constitutionality of their prolonged detention if they are subject to mandatory detention pursuant to INA § 236(c)(8) U.S.C. § 1226(c); the agency's arbitrary and capricious application of the NQRP

¹²² Wilson, *supra* note 13, at 23 (The fact that Nationwide Policy respondents are not entitled to a custody review with a QR present after an incompetence determination is utterly illogical and violates EOIR's own stated policy."). See also *Viruel Arias v. Choate*, No. 22-CV-02238-CNS, 2022 WL 4467245, ECF No. 1 (D. Colo. Sept. 26, 2022) (habeas petition challenging EOIR and DHS's refusal to follow the terms of the agencies' NQRP Nationwide Policy directives and alleging the agencies' actions are arbitrary, capricious, and contrary to law in violation of the Administrative Procedures Act, 5 U.S.C. § 706); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (agencies must follow their own internal regulations and policies).

¹²³ *Franco-Gonzalez*, 2013 WL 3674492 at *10.

¹²⁴ See, e.g., Schlanger et. al., *supra* note 65 (providing a roadmap for how to seek release from immigration detention as a reasonable accommodation pursuant to Section 504 via a habeas petition). Please note that the NQRP Nationwide Policy does *not* fund federal court litigation and would not cover the filing of habeas petitions, even if they are on behalf of clients appointed through *Franco* or the NQRP Nationwide Policy.

¹²⁵ How to file habeas petitions is outside the scope of this practice advisory. For more guidance on this area of litigation, check out NILA & American Bar Association (ABA), *Practice Advisory: Nuts and Bolts of Habeas Corpus Petitions Challenging Immigration Detention* (July 2021), available at <https://immigrationlitigation.org/wp-content/uploads/2021/08/Practice-Advisory-Nuts-and-Bolts-Imm-Detention-Habeas.pdf>.

Nationwide Policy under the Administrative Procedure Act (“APA”)¹²⁶; or other aspects of immigration detention.¹²⁷

B. Department of Homeland Security (DHS)

DHS is also bound by its own agency policy, statutory and regulatory rights, and constitutional protections that can be the basis for legal advocacy. This can take shape with requests before the Office of the Principal Legal Advisor (OPLA) as well as with Enforcement and Removal Operations (ERO). This section will discuss requests for prosecutorial discretion, release from ICE custody, and advocating for and preserving of the record requests for improved conditions of confinement for clients with disabilities. As with advocacy before the Court, preservation of the record before DHS is critical to ensure that the client’s rights are protected.

i. Prosecutorial Discretion

As a prosecutorial agency, DHS has the authority to decide when (and when not) to initiate immigration proceedings, pursue appeals, and authorize detention, among other determinations.¹²⁸ Prosecutorial discretion can take many forms, and this section discusses some ways to request prosecutorial discretion as a safeguard or accommodation.

a. Dismissal

Applying the aforementioned legal framing, QRs may seek dismissal of a case due to the client’s limited competency as a safeguard or reasonable accommodation. Because ICE is an enforcement and prosecutorial agency, it can decide whether to pursue removal proceedings against an individual on a case-by-case basis. Dismissal means that the DHS no longer wishes to seek a person’s deportation.

There is no time limitation on seeking dismissal. ICE could agree to dismiss a case at the outset, during the pendency of proceedings before the immigration court, or dismissal could also occur after ICE files an appeal to the Board. Every ICE office

¹²⁶ For a more robust discussion of APA claims, see NILA, et al, *Practice Advisory: Immigration Lawsuits and the APA*, Basics of a District Court Action (September 2021), available at <https://immigrationlitigation.org/wp-content/uploads/2021/09/2021.09.22-APA-FINAL.pdf>.

¹²⁷ While it may be possible to raise Section 504 claims via habeas, akin to the *Franco* litigation, some courts have construed this claim to constitute a conditions of confinement challenge that is not appropriately raised via a habeas petition. Rather, a civil complaint, potentially filed in conjunction with the habeas petition, may be the more appropriate vehicle depending on the law in the applicable jurisdiction. See, e.g., *Viruel Arias v. Choate*, No. 22-CV-02238 (CNS), 2022 WL 4467245 at *4–5 (D. Colo. Sept. 26, 2022) (finding that because petitioner’s “medical conditions and treatment did not impact the *duration* of her detention...the Court cannot consider the Rehabilitation Act claim in her petition” and explicitly stating that she could “file a separate civil action asserting her Rehabilitation Act claim”).

¹²⁸ See generally, Shoba Sivaprasad Wadhia, *Understanding Prosecutorial Discretion in Immigration Policy and Recommendations for Moving Forward* (April 19, 2021), <https://www.acslaw.org/expertforum/understanding-prosecutorial-discretion-in-immigration-policy-and-recommendations-for-moving-forward/>.

practices differently, and it is best practice to reach out to local practitioners to understand what evidence OPLA finds most compelling in exercising favorable discretion.

However, when considering whether to seek dismissal, the QR should first understand the client's goals. Dismissal is particularly beneficial when the client already has lawful status (e.g. lawful permanent residency) or a pathway to seek lasting immigration relief (i.e. eligible for adjustment of stative or affirmative asylum applications) because the dismissal will result in them maintaining or applying for such status. For clients who may not have another mechanism to a lawful immigration status, it may not be the best legal path forward because it leaves them without any option for legal status where they may otherwise be able to apply for relief in court. However, dismissal could bring the client peace of mind because they do not want to worry about litigating their case before the immigration court, even if it would leave them without lawful status. Strategy determinations like this require keen communication and guidance from the client. In some instances, it may be difficult to obtain a client's consent to a particular outcome, owing to their mental health condition. This requires careful consideration on a case-by-case basis but QRs should endeavor to seek alignment with a client's goals to the extent possible.

b. Seeking to be Placed in INA § 240 Proceedings

Where ICE will not entertain dismissal in its entirety, QRs may consider other procedural postures that could benefit the client. For example, it is not uncommon for *Franco* class members and individuals covered by the NQRP Nationwide Policy to have prior orders of removal, which would place them in reinstated removal proceedings and prevent them from being eligible to apply for asylum. In cases where clients were placed in such reinstated removal proceedings pursuant to INA § 241, counsel can seek placement in INA § 240 proceedings as a safeguard and/or reasonable accommodation. This could allow a client seeking fear-based relief to qualify for asylum in addition to withholding of removal and protection under the Convention Against Torture (CAT). Asylum is clearly more desirable because it entails a considerably lower standard of proof and more robust benefits should it be granted. Or, if the client is eligible for relief outside of fear-based proceedings, placement in full removal proceedings could open pathways for remaining in the United States that otherwise would be foreclosed, such as cancellation of removal.

Before engaging in this type of advocacy, QRs must consider a client's legal eligibility for expanded relief available pursuant to INA § 240. If a client was convicted of an aggravated felony that precludes asylum eligibility, placement in INA § 240 proceedings would not enhance their litigation position. Another consideration is how any maneuver between the two types of proceedings may impact the QR order. If the client is no longer detained, it may strip them of NQRP eligibility because the client would restart their proceedings and would need re-appointment of a QR. Thus, QRs should weigh the consequences of requesting that the client be placed in INA § 240 proceedings against the benefit of being able to apply for asylum and possibly other relief.

c. Stipulations

Finally, the issues to which ICE can stipulate vary widely and should be contemplated when assessing which safeguards may be appropriate in any given case. ICE might stipulate to a grant of relief from removal based on the strength of the evidence compiled in support of a client's legal claim, which is always advantageous because it typically means the client does not have to endure the stress of testifying. Though rare, stipulations to relief occur and might be pursued in particularly compelling cases.

Stipulations narrower in scope are also helpful in the pursuit of a favorable client outcome. OPLA may be willing to agree that certain elements of the client's legal claim have been met prior to the merits hearing such that those topics will not be at issue when presenting testimony (e.g., OPLA stipulating that respondent met heightened *Matter of Jean* standard when seeking refugee adjustment; agreeing that respondent established past persecution; etc.). OPLA commonly is willing to stipulate to the fact that a proffered expert is an expert in a specific subject matter (e.g., OPLA stipulating to country conditions expert as it pertains to "disability rights and the treatment of people with disabilities in Mexico"). Thus, QRs should be creative in requesting that DHS stipulate to certain matters, and use the safeguards and reasonable accommodation framework in so doing.

d. Release

ICE has broad discretion when deciding who it detains. Policies exist that reflect this flexibility and serve as useful resources when seeking release on behalf of a client with mental disabilities.¹²⁹ Applying the safeguards and reasonable accommodation legal framework to release requests with ICE can highlight vulnerabilities particular to the client and ensures the agency is on notice of the heightened medical or mental health needs related to the individual. QRs can seek release through a formal parole request, but such requests can also just be framed as a general release request or as an exercise of prosecutorial discretion.

ICE is most comfortable applying its humanitarian parole authority that exists in INA § 212(d)(5) based on urgent humanitarian reasons and significant public benefit.¹³⁰ That said, there is a legal basis to seek release as a procedural safeguard. And, as outlined above as applied to bond proceedings, Section 504 lends itself to seeking

¹²⁹ U.S. Dep't of Homeland Security Immigration And Customs Enforcement, *Detention Reform*, <https://www.ice.gov/detention-reform#tabl> (last updated July 24, 2018) (referencing use of risk classification assessment tools that "require[]ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations"); ICE Directive 11071.1, *supra* note 114 (providing for release as an option for persons with disabilities who are detained); U.S. Dep't of Justice, *Exercising Prosecutorial Discretion* 11 (Nov. 17, 2000), *available at* <https://perma.cc/VE54-2DNH> (citing noncitizens "with a serious health concern" as a trigger for the favorable exercise of discretion).

¹³⁰ People with special vulnerabilities include those with mental illness, serious medical illness, or disabilities; those who are elderly, pregnant, or nursing; those who would be susceptible to harm due in part to gender or sexual identity; and those who have been survivors of torture, abuse, sexual assault, or trafficking. U.S. Dep't of Homeland Security, ICE Directive 11065.1: *Review of the Use of Segregation for ICE § 5.2* (2013), *available at* https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf (hereinafter, "ICE Directive 11065.1").

release as a reasonable accommodation. The sole difference is the need to cite to the regulation that applies Section 504 to DHS, 6 C.F.R. § 15.30, *et seq.*

ii. Improving conditions of confinement

NQRP providers are well aware that a large component of representing clients with severe mental health and medical needs involves advocating on their behalf with ICE. This section focuses how to best utilize ICE's own detention standards in conjunction with the safeguards and reasonable accommodations framework delineated throughout this practice advisory.

a. Utilizing ICE Detention Standards

The ICE detention standards set out a rubric of conduct for officials charged with administering immigration detention and release. There are two sets of standards. The Performance Based National Detention Standards (PBNDS)¹³¹ apply to an ICE dedicated facility and the National Detention Standards (NDS)¹³² apply to state or local facilities that have contracted with ICE to house people who are detained in immigration detention or non-dedicated facilities. Therefore, depending upon where a person is detained, either the PBNDS or the NDS will apply.

Both the PBNDS and the NDS set out a standard of conduct, policies and practices for officials charged with administering immigration detention and therefore can be used on behalf of people who are detained in immigration detention including, but not limited to, those detained, released within the interior of the United States, or released for the purposes of removal or deportation. For people who have either a mental or physical disability, the PBNDS and the NDS can provide a basis to advocate for a variety of accommodations that are necessary to ensure a person's rights. Because the PBNDS and NDS govern the conduct of officials that necessarily requires final agency action to be taken, the standards can and should be relied upon by practitioners.¹³³ The PBNDS

¹³¹ U.S. Dep't of Homeland Security, ICE Detention Standards (Feb. 24, 2023), <https://www.ice.gov/factsheets/facilities-pbnbs> (listing the various versions of the PBNDS). A practitioner must know which version applies to the facility where the client is detained in order to know which PBNDS to cite. For purposes of this practice advisory, the citations to the PBNDS refer to the 2011 version, which most commonly applies. U.S. Dep't of Homeland Security, *Performance-Based National Detention Standards 2011* (Rev. Dec. 2016), available at <https://www.ice.gov/doclib/detention-standards/2011/pbnbs2011r2016.pdf> (hereinafter, "PBNDS").

¹³² U.S. Dep't of Homeland Security, *2019 National Detention Standards for Non-Dedicated Facilities*, available at <https://www.ice.gov/detain/detention-management/2019> (hereinafter, "NDS").

¹³³ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). See also, *Accardi*, 347 U.S. at 266 (The Supreme Court found that when the government has promulgated "[r]egulations with the force and effect of law," those regulations "supplement the bare bones" of federal statutes and in areas of the law, such that agencies must follow their own "existing valid regulations," even where government officers have broad discretion, such as in the area of immigration.); *Damus v. Nielsen*, 313 F.Supp.3d 317, 337–38 (D.C.C. 2018) (applying the *Accardi* doctrine and rejecting the government's argument it lacked jurisdiction over petitioners' claim regarding the failure of ICE to follow a parole directive and found that "[t]he Directive therefore falls squarely within the ambit of those agency actions to which the doctrine may attach.") Breaches of *Accardi's* rule constitute violations of both the APA and the Fifth Amendment's Due Process Clause. See *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545, 546 (6th Cir. 2004) (noting that an *Accardi* violation may be a due process violation, and the government's action may be set aside pursuant

and NDS cover numerous types of conduct, but this practice advisory focuses on provisions of the standards that may be useful in the representation of people who qualify for representation pursuant to *Franco* or the NQRP Nationwide Policy.

b. Access to Counsel

The nucleus of the NQRP Nationwide Policy is that any person who meets the criteria necessary to qualify has court-appointed legal counsel in the form of a QR. Therefore, meaningful access to counsel is imperative.

Both the PBNDS and the NDS underscore what it means for attorneys to have meaningful access to clients. Under the PBNDS¹³⁴ the relevant section is Section 6.4.I., where legal visitation is required to be available seven (7) days a week including holding and for a minimum of eight (8) hours per day on a regular business days and a minimum of four (4) hours per day on weekends and holidays. Section 5.5.G. contains a similar provision to the PBNDS regarding legal visitation. Therefore, pursuant to their own standards, polices, and procedures, access to counsel must be ensured for any person who is detained in immigration detention and practitioners can rely on the PBNDS and NDS to argue as such.¹³⁵

c. Medical Care

Both the PBNDS and the NDS contain provisions that govern medical care and medical release planning for people while they are in the custody of ICE, which includes the period of physical confinement in immigration detention and during the “release” process whether that means release to the community or deportation.

In general, both the PBNDS and the NDS provide that people who are in immigration detention receive appropriate and necessary medical care while they are detained and that there is a consideration and accommodation of a disability or disabilities. For example, Section 4.3 of the PBNDS, Medical Care, contains a myriad of standards, practices, policies, rules, and procedures that must be met by ICE to ensure access to adequate medical care. This includes, but is not limited to, providing continuity of care during the transfer of people and upon release-release includes both release in the United States and removal and deportation.

Below are some excerpts from the PBNDS can be relied upon by practitioners. The NDS¹³⁶ should also be consulted for applicable relevant provisions. Section 4.3(BB)(4)(c)(2) of the PBNDS sets forth that “[u]pon removal or release from ICE

to the APA); *Sameena, Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (“An agency’s failure to follow its own regulations . . . may result in a violation of an individual’s constitutional right to due process.”); *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (“*Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process”).

¹³⁴ PBNDS, *supra* note 131.

¹³⁵ See generally, *Innovation L. Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018) (failure to abide by PBNDS for access to counsel); *Torres v. DHS*, 411 F. Supp. 3d 1036, 1068-69 (C.D. Cal. 2019) (failure to abide by PBNDS in access to counsel challenge).

¹³⁶ NDS, *supra* note 132, at Section 4.3(Q).

custody, the [person detained] shall be provided medication, referrals to community-based providers as medically appropriate, and a detained medical care summary. This summary should include instructions that the [individual] can understand and health history that would be meaningful to future medical providers.” It should further, at a minimum, include information such as the noncitizen’s “current mental, dental, and physical health status, including all significant health issues, and highlighting any potential unstable issues or conditions which require urgent follow-up”; “current medications, with instructions for dose, frequency, etc.”; “any pending medical or mental health evaluations, tests, procedures, or treatments for a serious medical condition scheduled for the [detained person] at the sending facility[.]”¹³⁷

Section 4.3(V)(Z) of the PBNDS, meanwhile, requires that ICE

must ensure that a plan is developed that provides for continuity of care in the event of a change in detention placement or status. . . Upon removal or release from ICE custody, the [individual] shall receive up to a 30 day supply of medication . . . and a detailed medical care summary[.]

Under the provision, ICE is required to “ensure that a continuity of treatment care plan is developed and a written copy provided to the [person detained] prior to removal.” Finally, Section 4.3(II)(8) notes that individuals who “require[] close, chronic or convalescent medical supervision shall be treated in accordance with a written treatment plan conforming to accepted medical practices for the condition in question, approved by a licensed physician[.]”

These excerpts are not exhaustive and are only meant to introduce relevant detention standards that advocates can rely upon.

d. Detention Standards and ICE Directives

Practitioners should also cite the PBNDS and the NDS in combination with the ICE directives intended—pursuant to the language in ICE directives—to “compliment” the requirements of the detention standards. For example, ICE’s Directive 11065.1: Review of the Use of Segregation for ICE [Detained Persons] provides: “ICE shall take additional steps to ensure appropriate review and oversight of... placement in segregation for any length of time in the case of [individuals] for whom heightened concerns existed based on known special vulnerabilities and other factors related to the [person’s] health.” In the purpose/background section, it states that “[t]his directive is intended to complement the requirements of the 2011 Performance Based National Detention Standards (PBNDS 2011), the 2008 Performance-Based National Detention Standards (PBNDS 2008), the

¹³⁷ *Id.* See also, e.g., *Charles v. Orange County*, 925 F.3d 73 (2d Cir. 2019) (holding that discharge planning is an essential part of in-custody care for people imprisoned with serious mental illnesses and detained noncitizens plausibly alleged that ICE and county officials were deliberately indifferent to their medical needs when officials failed to provide them with discharge plans, despite ICE and county policies requiring discharge planning.).

2000 National Detention Standards (NDS), and other applicable ICE policies.”¹³⁸ Therefore, an advocate can and should cite to both the relevant ICE directive and the standards in advocating for their client not to be placed in segregation.

Practitioners should review all ICE directives to determine whether they can be relied upon in combination with the detention standards. Other relevant ICE directives that should be reviewed include, but are not limited to, ICE Directive 11063.2 (serious mental disorders and conditions),¹³⁹ ICE Directive 11071.1 (assessment and accommodations for [persons detained] with disabilities)¹⁴⁰ and ICE Directive 11022.1 (transfers).¹⁴¹

e. Seeking reasonable accommodations

In addition to relying on ICE detention standards and directives, practitioners can seek reasonable accommodations to ensure the rights of clients are protected and adhered to in detention, though certainly the goal is securing their release. This could look like seeking a bottom bunk assignment for a client with a bad back. It could also involve requesting that the client, who has previously exhibited suicidal ideation when placed in a solitary setting, not be detained in the restricted housing unit.¹⁴² If a client is having a challenging time getting along with someone else in their dorm such that being in close proximity to the other person is triggering or exacerbating the symptoms of their mental illness, the attorney could seek a dorm reassignment as a reasonable accommodation if ICE will not entertain release. These are just a few examples of circumstances where counsel may wish to lean on the Section 504 legal framework articulated above.

f. How to Elevate Violations of the PBNDS and Section 504

There is no one-size fits all to elevating violations of ICE detention standards or Section 504, and the strategy largely depends on the type of facility that is responsible for the client’s incarceration. In privately-owned ICE processing centers, like the one in Aurora, Colorado owned and operated by GEO Group, Inc., ICE officers are embedded within the facility and each person in detention is assigned an ERO officer (called deportation officers or “DO”). Any complaints about violations of the detention standards or reasonable accommodations under Section 504 are typically first directed toward the DO (depending on the severity of the violation) and escalated appropriately within the

¹³⁸ ICE Directive 11065.1, *supra* note 130.

¹³⁹ Dep’t of Homeland Security, ICE Directive 11063.2, *Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions and/or Who are Determined to Be Incompetent by an Immigration Judge* (April 5, 2022), available at <https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf>.

¹⁴⁰ ICE Directive 11071.1, *supra* note 114.

¹⁴¹ Dep’t of Homeland Security, ICE Directive 11022.1: *Detainee Transfers* (Jan. 4, 2012), available at <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>.

¹⁴² See Kayla James & Elena Vanko, Vera Institute for Justice, *The Impacts of Solitary Confinement* (Apr. 2021), available at <https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf> (providing evidence that solitary confinement is associated with an increased risk of self-harm and suicide).

field office, typically ending with the Assistant Field Office Director (“AFOD”) in charge of detention issues, or the Field Office Director (“FOD”).

When local complaints or requests for reasonable accommodations fail to generate traction, they may be escalated to ICE headquarters and/or to one of the oversight bodies within DHS. These include:

- Office of the Immigration Detention Ombudsman (“OIDO”)¹⁴³
- Office of Civil Rights and Civil Liberties (“CRCL”)¹⁴⁴
- Office of the Inspector General (“OIG”)¹⁴⁵

Each sub-agency has differing authority and in circumstances where egregious violations are taking place, and advocates may wish to elevate complaints to all three. Notably, CRCL has a Section 504 division and all complaints raised pursuant to the Rehabilitation Act should indicate as such at the top of the cover page to ensure it is channeled to the appropriate personnel within CRCL. Complaints to CRCL can also result in the issuance of a “Z hold” that prevents an individual’s immediate removal.¹⁴⁶ OIDO aggregates information from individual complaints filed and issues reports about specific detention facilities, quarterly newsletters, and annual reports to Congress.¹⁴⁷ Consistent with its obligations under the Inspector General Act of 1978, OIG makes formal recommendations to DHS in response to the agency’s findings when it conducts audits, inspections, and evaluations. It oversees corrective action plans meant to ensure the agency heeds its recommendations, including compliance with its own detention standards.

IV. CONCLUSION

Cases litigated pursuant to the *Franco* injunction and under the NQRP Nationwide Policy will be the most rewarding, challenging, joyful, perplexing, and heartbreaking cases an immigration attorney can face. Expanding legal arguments in support of clients who otherwise may face disability discrimination is an essential component of lifting up clients’ experiences and focusing the immigration agencies’ attention on ways in which the system can be more accessible to our clients and that their rights are protected.

¹⁴³ U.S. Dep’t of Homeland Security Office of the Immigration Detention Ombudsman, *Requesting Assistance from the Office of Immigration Detention Ombudsman*, <https://www.dhs.gov/requesting-assistance-oido> (last updated 7/27/2023).

¹⁴⁴ U.S. Dep’t of Homeland Security, Office of Civil Rights and Civil Liberties, *Make a Civil Rights Complaint*, <https://www.dhs.gov/file-civil-rights-complaint> (last updated 4/25/2023).

¹⁴⁵ U.S. Dep’t of Homeland Security, Office of Inspector General, <https://www.oig.dhs.gov> (last visited Oct. 27, 2023).

¹⁴⁶ See e.g., National Immigration Project of the National Lawyers Guild (NIPNLG), et al., *Practice Advisory: Advocating for Immigrant Survivors of Medical Abuse at the Irwin County Detention Center* 15 (May 2021), available at https://nipnlg.org/sites/default/files/2023-03/2021_05May_irwin-survivors.pdf (providing information about DHS CRCL and its authority to issue a “z hold” to stay a complainant’s deportation).

¹⁴⁷ U.S. Dep’t of Homeland Security, *Office of the Immigration Detention Ombudsman (OIDO) Publications*, <https://www.dhs.gov/oido-publications> (last updated 8/14/2023).

V. APPENDIX

- A. EOIR Policy Memo
- B. DHS Policy Memo
- C. EOIR Phase I Guidance
- D. IJ Checklist
- E. Safeguards Cheat Sheet
- F. Sample Motions for Safeguards
- G. Sample Motion for Bond/Release Based on NQRP Nationwide Policy & Section 504
- H. Redacted IJ Order Granting Administrative Closure
- I. Sample Materials Related to Motions to Terminate Based on Violation of Matter of E-S-I-
- J. Sample Motion to Withdraw/Terminate

A



U.S. Department of Justice


Executive Office for Immigration Review

Office of the Chief Immigration Judge

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

April 22, 2013

MEMORANDUM TO: All Immigration Judges

FROM: Brian M. O'Leary 
Chief Immigration Judge

SUBJECT: Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions

For those of you who have had unrepresented detained aliens with serious mental disorders or conditions appear in your courtrooms, you are more than aware of the many unique challenges encountered in conducting removal proceedings involving such individuals. Accordingly, in order to enable Immigration Judges to more efficiently and effectively carry out their adjudicatory duties when confronted with such cases and to enhance procedural protections for mentally incompetent individuals appearing in our courts, today we are announcing, together with the Department of Homeland Security (DHS), a number of enhancements throughout the immigration removal and detention system.

Specifically, we will today begin implementation of a system that will accomplish the following:

- **Competency Hearings.** When it comes to your attention through documentation, medical records, or other evidence that an unrepresented detained alien appearing before you may have a serious mental disorder or condition that may render him or her incompetent to represent him- or herself in removal proceedings, you will conduct a competency hearing.
- **Mental Competency Examinations.** If, at the conclusion of competency hearing(s), you are unable to make a determination of whether the alien is competent to represent him- or herself in removal proceedings based on the evidence presented, you will now be able to order an independent mental competency examination and the production of a psychiatric or psychological report. EOIR will be administering a system that works with DHS to

procure such independent examinations and reports. While Immigration Judges shall retain their discretion to determine whether or not a detained alien is competent to represent him- or herself, the independent competency evaluation will serve as a useful tool in assisting with that determination.

- **Availability of Qualified Representatives.** If, at the conclusion of competency hearing(s), you find that the unrepresented detained alien is not mentally competent to represent him- or herself, and the alien does not at that point otherwise have legal representation, EOIR will make available a qualified legal representative to represent the alien in all future detained removal and/or bond proceedings.
- **Bond Hearings.** In addition, any unrepresented detained aliens who were initially identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and who have been held in detention by DHS for six months or longer will be afforded a bond hearing.

More detailed information will be provided as it becomes available. We expect these new procedures will be fully operational by the end of 2013.

Due to the lapse in appropriations, Department of Justice websites will not be regularly updated. The Department's essential law enforcement and national security functions will continue. Please refer to the Department of Justice's [contingency plan](#) for more information.

JUSTICE NEWS

Department of Justice

Executive Office for Immigration Review

FOR IMMEDIATE RELEASE

Monday, April 22, 2013

Department Of Justice And The Department Of Homeland Security Announce Safeguards For Unrepresented Immigration Detainees With Serious Mental Disorders Or Conditions

WASHINGTON -- The Department of Justice (DOJ) and the Department of Homeland Security (DHS) will issue today a new nationwide policy for unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings.

The policy entails implementation of new procedural protections, including: conducting screening for serious mental disorders or conditions when individuals held for removal proceedings enter a U.S. Immigration and Customs Enforcement Health Service Corps (IHSC)-staffed immigration detention facility; working with non-IHSC-staffed immigration detention facilities to identify detainees with serious mental disorders or conditions in those facilities; the availability of competency hearings and independent psychiatric or psychological examinations; procedures that will make available qualified representatives to detainees who are deemed mentally incompetent to represent themselves in immigration proceedings; and bond hearings for detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and have been held in immigration detention for at least six months.

If verifiable documentation, medical records or other forms of evidence provide indication of mental incompetency, Immigration Judges will convene a competency hearing to determine whether the detainee is competent to represent himself or herself in immigration proceedings. When an Immigration Judge is unable to make a determination of mental competency based upon evidence already presented, the Immigration Judge will be authorized to order an independent examination and psychiatric or psychological report. The competency examinations will be administered through a program run by the DOJ Executive Office for Immigration Review (EOIR) and performed by an independent medical professional.

EOIR will make available a qualified representative to unrepresented detainees who are deemed mentally incompetent to represent themselves in immigration proceedings. Additionally, detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and who have been held in immigration detention for at least six months will also be afforded a bond hearing.

DOJ and DHS believe these new procedures will provide enhanced protections to unrepresented immigration detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings, and will facilitate the conduct of those proceedings. The Government expects these new procedures to be fully operational on a national basis by the end of 2013.

Component(s):

Executive Office for Immigration Review

Updated July 15, 2015

B




U.S. Immigration
and Customs
Enforcement

April 22, 2013

MEMORANDUM FOR: Thomas D. Homan
Acting Executive Associate Director
Enforcement & Removal Operations

Peter S. Vincent
Principal Legal Advisor

Kevin Landy
Assistant Director
Office of Detention Policy and Planning

FROM: John Morton
Director 

SUBJECT: Civil Immigration Detention: Guidance for New
Identification and Information-Sharing Procedures Related
to Unrepresented Detainees With Serious Mental Disorders
or Conditions

Purpose

This memorandum directs that procedures be in place to ensure that U.S. Immigration and Customs Enforcement (ICE) detainees who may be mentally incompetent to represent themselves in removal proceedings before the Department of Justice's Executive Office for Immigration Review (EOIR) are identified, that relevant information about them is provided to the immigration court so that an immigration judge (IJ) can rule on their competency and, where appropriate, that such aliens are provided with access to new procedures for unrepresented mentally incompetent detainees being implemented by EOIR.¹ In order to assist EOIR in identifying unrepresented individuals detained in ICE custody for removal proceedings who have serious mental disorders or conditions that may render them mentally incompetent to represent themselves in those proceedings, ICE personnel should immediately begin taking the following steps.²

¹ This policy directive supplements all previous guidance distributed by ICE pursuant to the Board of Immigration Appeals' decision in *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).

² On this same date, EOIR issued a nationwide policy authorizing IJs to order competency exams for detained aliens where there are indicia of mental incompetency and the immigration judge believes that he or she cannot render a competency determination in the absence of an exam. When an IJ orders a

Identification and Assessment Procedures

For facilities that are staffed by the ICE Health Service Corps (IHSC) where screening procedures have not yet begun being implemented, Enforcement and Removal Operations (ERO) and IHSC personnel should immediately begin developing procedures to ensure that, absent emergency circumstances related to facility security or the health and safety of staff or detainees, all immigration detainees will be initially screened when they enter the facility and will receive a more thorough medical and mental health assessment within 14 days of their admission. For all other facilities, ERO and IHSC personnel should immediately begin working with the detention facilities' medical staff to develop procedures to identify detainees with serious mental disorders or conditions that may impact their ability to participate in their removal proceedings, including through use of a national telephone hotline for detainees and family members to report and provide information regarding detainees.

These procedures should provide that if a detainee is identified as having serious mental disorders or conditions, ICE will request that either a qualified mental health provider complete a mental health review report or the facility provide the detainee's medical records within the facility's possession to ICE for further review.

Information-Sharing Procedures

ERO and IHSC personnel should also immediately begin developing procedures to ensure that documents related to an unrepresented detainee's mental competency, including a mental health review report and mental health records in ICE's possession, are provided to the applicable Office of Chief Counsel (OCC). OCCs should begin developing procedures to ensure that relevant information in its possession that would inform the immigration court about the detainee's mental competency is made available to the IJ.

Timeline

Where these procedures have not yet begun being implemented, ICE personnel are directed to begin developing these procedures immediately and have the relevant procedures in place at all immigration detention facilities by December 31, 2013.

competency exam for a detained alien, ICE will ensure that the independent examiner has the necessary access to the detained alien to conduct the competency exam. EOIR's new policy also provides custody hearings to unrepresented detained aliens who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer. ICE trial counsel shall participate in these custody hearings. EOIR's new nationwide policy also provides qualified representatives to detainees who are found to be mentally incompetent to represent themselves. ICE trial counsel will work with such qualified representatives, consistent with treatment afforded any respondent's representative-of-record, in removal proceedings before EOIR.

C

Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders¹

I. Foundational Principles

Commitment to Screen and Provide Protections

The Executive Office for Immigration Review (“EOIR”) is committed to identifying detained unrepresented respondents in immigration custody who are not competent to represent themselves in removal and custody redetermination proceedings.

EOIR will not proceed in the case of any detained unrepresented respondent determined to be incompetent to represent him- or herself in a removal or custody redetermination proceeding until appropriate procedural protections and safeguards are in place.

II. Determinations to Be Made by Immigration Judges²

A. Background

In *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals held that for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by law. *Id.* at 479.

On April 22, 2013, the Office of the Chief Immigration Judge announced a “Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions.” This policy makes a qualified legal representative available in removal and custody redetermination proceedings if it is determined that a respondent with a serious mental disorder or condition is detained, unrepresented, and incompetent to represent him- or herself.

Accordingly, for a detained, unrepresented respondent with a serious mental disorder or condition to be considered competent to represent him- or herself in a removal or custody redetermination proceeding, he or she must be able to meaningfully

¹ EOIR announced its nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents on April 22, 2013. On August 15, 2013, EOIR began Phase I of its nationwide plan, in order to test aspects of the plan. This document constitutes EOIR’s final guidance for Phase I of its nationwide plan. Based on observations made during Phase I, EOIR may issue revised guidance in conjunction with further roll-out of the plan.

² This guidance sets forth principles by which Immigration Judges should assess competency within the context of EOIR’s nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders. As part of its ongoing commitment to provide such protections, EOIR also intends to issue a Notice of Proposed Rulemaking on this subject and, upon receipt and review of public comment, a Final Rule.

participate in the proceeding and perform the functions necessary for self-representation.

B. Competence to Represent Oneself

Immigration Judges should utilize the following guidance to determine if a respondent is competent to represent him- or herself:

A respondent is competent to represent him- or herself in a removal or custody redetermination proceeding if he or she has a:

1. rational and factual understanding of:
 - a. the nature and object of the proceeding;
 - b. the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
 - c. the right to present, examine, and object to evidence;
 - d. the right to cross-examine witnesses; and
 - e. the right to appeal.
2. reasonable ability to:
 - a. make decisions about asserting and waiving rights;
 - b. respond to the allegations and charges in the proceeding; and
 - c. present information and respond to questions relevant to eligibility for relief.

A respondent is incompetent to represent him- or herself in a removal or custody redetermination proceeding if he or she is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself. “Mental disorder” (including Intellectual Disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person that substantially interferes with the ability to meet the ordinary demands of living.

C. Presumption of Competence

A respondent is presumed to be competent to represent him- or herself in a removal and custody redetermination proceeding. *See, e.g., M-A-M-*, 25 I&N Dec. at 479.

The presumption of competence to represent oneself is rebutted if an Immigration Judge finds, by a preponderance of the evidence, that the respondent is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself.

D. Provision of a Qualified Legal Representative

EOIR will provide a qualified legal representative to any detained, unrepresented alien in a removal or custody redetermination proceeding found to be incompetent to represent him- or herself.

III. Process to Identify & Determine Issues of Competence

There are three stages to screen for and decide issues of competence:

1. Detecting indicia – The judge remains attentive to any behaviors or other indicators that the respondent may have a mental disorder limiting his or her ability to represent him- or herself. Where there is a “bona fide doubt” about respondent’s competence to represent him- or herself, the judge should move to stage 2 and conduct a judicial inquiry.
2. Conducting a judicial inquiry – The judge asks a series of questions to determine whether there is “reasonable cause” to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find that the respondent is competent or incompetent to represent him- or herself. Alternatively, if there is reasonable cause to believe the respondent may be incompetent to represent him- or herself, but the evidence is not sufficient to rebut the presumption of competence, the judge should move to stage 3 and conduct a more in-depth hearing on the issue of competence.
3. Conducting a competency review – The judge conducts an evidentiary hearing to determine whether the presumption of competence has been rebutted.

IV. Detection of Indicia

Competence is the ability to perform a function demanded in a particular situation at the defined level. Competence is neither a status nor a state. Competence cannot be observed. Rather, one may observe behavioral signs or indicia that a person may lack the ability to perform a task or function required in a particular situation.

Immigration Judges must be vigilant at all times for indicia of a mental disorder that significantly impairs the respondent’s ability to perform the functions listed in the definition of competence.

A. Examples of Indicia

Indicia of a mental disorder that can impair competence or reflect impaired competence include, but are not limited to:

Past or current evidence of interventions related to mental disorder—for example:

- Outpatient mental health treatment
- Psychiatric hospitalization
- Interventions for self-injurious behavior or suicide attempts
- Limited academic achievement
- Currently receiving mental health treatment

Current manifestations of behavior suggesting mental disorder—for example:

- Poor memory
- Poor attention/concentration
- Confused or disorganized thinking
- Paranoid thinking (unreasonable fears)
- Grandiose thinking (overestimating own ability)
- Seeing or hearing things not present
- Serious depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court

B. Sources of Indicia

Indicia of the respondent's cognitive, emotional, or behavioral functioning may come from any reliable source including, but not limited to: family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral informants or third parties knowledgeable about the respondent.

C. Form of Indicia

Indicia of incompetence may appear in any form including, but not limited to, observed behaviors; letters; government, legal, educational, employment, or health care records; or other verbal or written accounts.

D. Timing of Indicia

Because competence is fluid and may change over time, indicia of incompetence may appear and must be considered throughout all stages of the proceeding.

E. Communication by the Department of Homeland Security (DHS) of Indicia to the Court

Role of DHS v. EOIR Examinations

DHS serves a custodial and prosecutorial role in immigration proceedings. EOIR serves as an impartial adjudicator in immigration proceedings.

In its custodial role, the Department of Homeland Security may, upon taking an individual into custody, perform a physical and mental health examination of the individual. The purpose of this examination is, in part, to ensure that the detained individual does not pose a danger to self or others and to address appropriate treatment during detention. The purpose of this examination is not to determine whether the detained individual is competent to represent him- or herself in an immigration proceeding. In fact, not all individuals detained by DHS are detained for the purpose of instituting an immigration proceeding.

The DHS intake examination may nonetheless reveal information relevant to understanding the respondent's cognitive, emotional, and behavioral functioning. DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency. *M-A-M-*, 25 I&N Dec. at 480.

The examination to inform the court's determination of the competence of the respondent will be prepared at the request of the court rather than during the custodial intake by DHS. This is because the judge is in a better position to inform the mental health professional in the referral for examination about the nature and object of the proceeding and the reasons why the court questions the competence of the respondent. Additionally, a competence examination prepared by an agent of the court is likely to have greater evidentiary weight and avoid potential conflicts of interest than a report prepared by an agent of the prosecuting component of the government. The process for an Immigration Judge to refer the respondent for a competency examination is set forth below.

V. Judicial Inquiry

A. When to Conduct a Judicial Inquiry

Where the evidence of record results in a "bona fide doubt" about the respondent's competency to represent him- or herself, the judge should conduct a judicial inquiry. A "bona fide doubt" exists if there is "substantial evidence of incompetence." Evidence suggestive of a "bona fide doubt" includes, but is not limited to, respondent's demeanor before the court, irrational behavior, and available health evaluations. *See, e.g., Amaya-Ruiz v. Stewart*, 121 F.3d 486 (9th Cir. 1997) (internal citations omitted).

B. Purpose of the Judicial Inquiry

The purpose of the judicial inquiry is to gather information so the judge can make an informed decision whether the respondent's competency is at issue and a more in-depth competency review is necessary.

C. Process for Conducting a Judicial Inquiry

The judge begins the judicial inquiry by explaining to the respondent the purpose and process for conducting the judicial inquiry. The judge then proceeds to ask the respondent questions designed to shed light on the respondent's ability to represent him- or herself and his or her cognitive, emotional, and behavioral functioning. An explanation of the process for conducting a judicial inquiry with a sample advisal and suggested questions is contained in Appendix A. When performing the judicial inquiry, it is important that the judge note for the record any relevant non-verbal as well as verbal response to the questions.

D. Possible Outcomes of the Judicial Inquiry

There are three possible outcomes of the judicial inquiry:

- Respondent is competent - There is no reasonable cause to believe that the respondent is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent him- or herself. In such case, the presumption that the respondent is competent is not rebutted and the court can proceed without any additional safeguards or protections.
- Respondent is incompetent - A preponderance of the evidence establishes that the respondent is not competent to represent him- or herself in the proceeding. In such case, the judge will find the presumption of competence has been rebutted, request provision of a qualified representative, and ensure appropriate safeguards and protections are put in place.
- Insufficient evidence to decide if respondent is competent - The evidence is not sufficient to rebut the presumption of competence but the judge has "reasonable cause" to believe that the respondent is suffering from a mental disorder that impairs his or her ability to represent him- or herself. In such cases, the judge should conduct a hearing to gather additional evidence needed to determine whether the respondent is competent.

VI. Competency Review

A. When to Conduct a More In-Depth Competency Review

Where, at the conclusion of the judicial inquiry, the judge has “reasonable cause” to believe that the respondent is suffering from a mental disorder but needs additional evidence to determine whether the presumption of competence is rebutted, the judge will schedule a hearing to collect and review evidence of competency. It is at this stage that the judge will consider whether to refer the respondent for a mental health examination to inform the court’s decision on competency.

B. Procedural Rules

A determination of competence to represent oneself encompasses issues of law and fact that are addressed, along with all other issues of law and fact, in the context of the immigration proceeding. No additional hearing type or separate record of proceeding will be generated.

VII. System of Referral for a Mental Health Examination

A. When to Refer a Respondent for a Mental Health Examination

The Immigration Judge is not required to refer the respondent for a mental health examination. However, the judge is required to consider whether a referral is necessary.

A referral for a mental health examination is appropriate where the judge is unable to determine, based upon existing evidence of record, whether the respondent is competent to represent him- or herself.

B. Process to Refer Respondent for a Mental Health Examination

To refer the respondent for a mental health examination, the judge should complete the mental health examination referral found in Appendix B.

The referral provides the mental health professional with information, if available, about the nature and object of the proceeding, including the type of proceeding, the projected length of the hearings, the anticipated complexity of issues, the allegations and charges against the respondent, and potential forms of relief. The referral provides the mental health professional with information relating to respondent’s current cognitive, emotional, and behavioral functioning such as the behavioral observations, statements, or other information that caused the judge to question the ability of the respondent to perform as required in the proceeding.

The referral also provides background and administrative information to the mental health professional, including the name of the respondent, alien registration number, language spoken, apparent country of origin, place of detention, next court date or other deadline for the examination or report, and the name of the judge.

The referral should also include the name of a contact the mental health professional can speak with, if any, who may be knowledgeable about the respondent's past or current cognitive, emotional, and behavioral functioning.

The referral should also be accompanied by other documents, records, or information relevant to the competence of the respondent.

C. Use of an Interpreter in the Mental Health Examination

Where it is indicated in the mental health examination referral that the language the respondent speaks and understands best is a language other than English and the mental health professional is not fluent in the respondent's language, the Language Services Unit of the Office of the Chief Immigration Judge should be notified so that arrangements can be made to secure the services of a qualified interpreter for the mental health examination.

D. Qualifications of Examining Professionals

Upon receipt of the mental health examination referral, EOIR will procure the services of a qualified mental health professional.

At a minimum, mental health professionals assigned to serve as examiners for purposes of immigration proceedings must:

- be licensed to practice psychology or medicine in the jurisdiction where the examination will be conducted;
- have specialty training in psychiatry, clinical psychology, or counseling psychology;
- have completed an EOIR-approved training in conducting mental health examinations of respondents in immigration proceedings; and
- be able to document successful completion of a minimum of 100 hours of approved continuing education in conducting forensic examinations.

Whenever feasible, psychologists and psychiatrists appointed to conduct mental health examinations shall:

- be certified by the American Board of Psychiatry and Neurology (with added qualifications in forensic psychiatry) or the American Board of Forensic Psychology or other comparable organization; or

- have experience and completed training on conducting competence examinations.

Other relevant considerations when assigning a mental health professional in immigration proceedings include the quantity and level of training completed by the mental health professional, experience conducting competency examinations (especially experience conducting examinations of respondents in immigration proceedings), the complexity of examination required, the mental health professional's familiarity with and knowledge of the respondent's language, culture and possible disorder(s), and other factors relevant to the case at hand.

Mental health professionals should use structured and standardized assessment tools and methods whenever possible. Any tools or methods used must be reliable and valid, taking into consideration the respondent's background and culture.

Mental health professionals meeting the above qualifications presumptively qualify as having expertise in conducting an examination of a respondent's competence to represent him- or herself in an immigration proceeding.

E. EOIR-Approved Training of Mental Health Professionals

The EOIR-approved training program required to be qualified to conduct mental health examinations in immigration proceedings will cover:

- introduction to immigration law and procedure;
- determinations of competence in immigration proceedings;
- conducting mental health evaluations for immigration proceedings;
- report writing for the immigration court;
- ethics and professionalism;
- working with a foreign language interpreter; and
- cultural competence in forensic examinations.

Any mental health professional conducting an examination by tele-health or other electronic technology shall also have completed training in conducting an examination via that modality.

F. Role of the Mental Health Professional v. Role of the Judge

The role of the mental health professional is to identify and describe for the court any cognitive, emotional, or behavioral impairments the respondent has and their effects, if any, on the respondent's ability to perform the functions required to be competent to represent him- or herself in an immigration proceeding.

The role of the Immigration Judge is to determine whether any limitations on the respondent to perform the functions as reported by the mental health professional and established by any other relevant evidence of record fall with the defined range of ability (*i.e.*, rationally able to... , factually able to... , or reasonably able to...) necessary to represent him- or herself.

G. Fiduciary Duty and Notification of the Mental Health Professional

The purpose of the mental health examination ordered by the immigration court is to provide information to the court about the mental health of the respondent so the court can make an informed decision about the respondent's competence to represent him- or herself. The purpose of the mental health professional is not to treat or assist the respondent. Although the examining mental health professional may owe the respondent some legal duties, the fiduciary duty of the mental health professional is owed to the court. No relationship or privilege exists or is created between the respondent and the examining mental health professional assigned to conduct the examination by the immigration court.

There is no requirement that the examining mental health professional obtain informed consent from the respondent when the examination has been ordered by the court. The mental health professional, however, must notify the respondent of the purpose of the mental health examination, the examination procedure to be utilized, the lack of privilege and confidentiality between the mental health professional and the respondent, possible uses of the examination report, how information obtained during the examination and the report may be shared, and any other matter required by professional or ethical rules of behavior.

Any record, report, or work product prepared by the examining mental health professional belongs to the immigration court. There is no right or privilege of privacy or confidentiality between the examining mental health professional and the respondent. A mental health professional assigned by the court shall be deemed a court witness whether called by the court or either party, and may be examined as such by either party.

H. Refusal of the Respondent to Cooperate in the Mental Health Examination

Where the respondent refuses to cooperate in or attend the mental health examination ordered by the court, the examining mental health professional shall use any available data or information to assess the competency of the respondent to represent him- or herself and, to the extent possible, prepare the report ordered by the court. The examining mental health professional can rely on information such as personal observation of the respondent, health care records, information provided by family, friends, or others familiar with the respondent, information from detention personnel, educational records, court records, records of law enforcement agencies, or any other information relevant to the respondent's ability to represent him- or herself and assist a qualified representative if one is provided.

I. Format of the Examination

The mental health examination should be conducted in person in the facility where the respondent is detained unless there is a medical, administrative, or security justification for not doing so.

Subject to reasonable security and administrative considerations, the mental health examination must be conducted in a location such as a pro bono room or room designated for detainees to meet with legal counsel that provides, as determined by the mental health professional, a sufficient degree of uninterrupted quiet and privacy to conduct the examination. The examining mental health professional and respondent should have access to a table and two chairs. Where possible, common visitation and consultation areas and areas with glass or other dividers separating the respondent from the mental health professional should be avoided.

In rare circumstances, for instance where no qualified mental health professional can be located near the place of respondent's detention, an immediate examination is needed, or a distant examining mental health professional with special skill or knowledge is required, the examination may be conducted using tele-health technology. In the event that tele-health technologies are employed, the resolution of electronic images must be medically appropriate as determined by the mental health professional performing the examination.

Examining mental health professionals must comply with the laws regulating his or her profession in the jurisdiction in which the examination is performed and any other professional or ethical obligations that apply.

J. Scope of the Examination

Upon assignment by the court, the mental health professional shall examine the respondent's cognitive, emotional, and behavioral functioning and competence to represent him- or herself, as specified by the court in its order appointing the mental health professional to evaluate the respondent.

1. Assessment of Respondent's Cognitive, Emotional, and Behavioral Functioning

When conducting the evaluation the mental health professional shall assess:

- a. relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other histories if necessary; and
- b. the respondent's presentation and behavior during the evaluation, including reported or observed signs or symptoms of a mental disorder and the respondent's response style (*i.e.*, approach to the evaluation).

2. Assessment of Respondent's Competence

When conducting the evaluation, the mental health professional shall consider factors related to the issue of whether the respondent meets the criteria for competence in an immigration proceeding (*i.e.*, whether the respondent has present ability to represent him- or herself).

In considering the issue of competence, the mental health professional shall assess all of the following:

a. Respondent's rational and factual understanding of:

- 1) the nature and object of the proceeding, including its adversarial nature;
- 2) the allegations and charge(s);
- 3) possible outcomes of the proceeding; and
- 4) the roles of participants in the proceeding.

b. Respondent's rational and factual understanding of:

- 1) the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
- 2) the right to present, examine, and object to evidence;
- 3) the right to cross-examine witnesses; and
- 4) the right to appeal.

c. Respondent's ability to:

- 1) make decisions about asserting and waiving rights;
- 2) respond to the allegations and charges in the proceeding; and
- 3) present information and respond to questions relevant to eligibility for relief.

d. Any other factors the mental health professional deems relevant to the respondent's competence to represent him- or herself.

If the mental health professional will recommend that the respondent be adjudicated incompetent to represent him- or herself, the mental health professional shall:

- 1) identify the impairments and mental disorder that are the cause of the incompetence; and
- 2) assess the respondent's ability to:
 - a) make a rational decision about being represented by counsel; and
 - b) assist counsel.

K. Payment for Services Rendered

The examining mental health professional will receive a flat rate to conduct the mental health examination and prepare a report of the examination for submission to the immigration court.

No other fees, costs or expenses will be reimbursed, including but not limited to: costs incurred for travel, parking, or testimony; fees associated with administration of tests; or costs of instruments.

L. Report Standards

The examining mental health professional must file with the court a written report summarizing the evaluation with copies for the respondent and the attorney for the Government.

In the written report, the mental health professional must:

1. identify the specific matters referred for evaluation;
2. list any evaluation procedures, techniques, and tests used in the examination;
3. list all sources of information considered by the mental health professional;
4. describe relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other factors as necessary;
5. describe the respondent's presentation and behavior during the evaluation (including reports or exhibition of signs or symptoms of mental disorder) and response style;
6. provide opinions on each issue referred for evaluation and identify any issues about which the mental health professional could not give an opinion;
7. provide a factual basis for any opinions offered in the report; and

8. identify the mental disorder that is the cause of the incompetence (if indicated).

M. Quality Control of Reports

The first time that a mental health professional is assigned by EOIR to conduct a competency evaluation, he or she must submit a copy of his or her report of examination to the point of contact designated by EOIR. The report will be reviewed to ensure that the examination and report comply with the directives of the agency.

Payment for services rendered by a mental health professional will not be released until the report of the mental health professional is received by the immigration court and deemed acceptable by the Immigration Judge.

Where the report of the examination fails to address matters required by the order of the court, payment for services rendered by the mental health professional may be withheld and the mental health professional may be ordered to supplement the report as necessary or appear in court without additional remuneration to provide information missing from the report.

N. Use of the Report of the Mental Health Examination

Upon receipt of the mental health examination report, the Immigration Judge will schedule a hearing to address the contents of the report, resolve the issue of competency, and determine whether additional safeguards or protections are necessary.

The Immigration Judge shall weigh the totality of the evidence including, but not limited to, the report summarizing the mental health evaluation, and the Immigration Judge shall determine whether the presumption that the respondent is competent to represent him- or herself has been rebutted by a preponderance of the evidence.

O. Protection of Mental Health Information

“Mental Health Information” includes any information expressly contained in or directly obtained from a request for a mental competence review, an Immigration Court’s administrative inquiry into mental competence, a portion of a hearing in which mental competence is addressed, a mental health examination of an alien, and a report of such examination.

Except as otherwise noted below, Mental Health Information shall only be used to determine an alien’s mental competency to participate or represent oneself in an immigration proceeding, and may not be used to establish the truth of allegations or charges against the alien, or to establish ineligibility for relief.

The paragraph above shall not apply to DHS' use of Mental Health Information if such information is independently submitted by, obtained by, or in the possession of DHS. If a respondent uses Mental Health Information in any proceeding for any purpose other than to inform his or her mental competency to participate in an immigration proceeding, the paragraph above shall not apply, and disclosure and use of the Mental Health Information shall be governed by rules of evidence and procedures applicable in immigration proceedings. If the alien uses a part of a document or report, DHS may request the production of any other portion of that document or report. Such request shall be granted at the Immigration Judge's discretion upon consideration of all relevant factors.

VIII. Procedural Protections & Safeguards

A. Obligation to Prescribe Appropriate Safeguards and Protections

Where the Immigration Judge finds the respondent is not competent to represent him- or herself in an immigration proceeding, the Immigration Judge shall consider the totality of the facts and circumstances and prescribe appropriate safeguards and protections to ensure the fundamental fairness of the immigration proceeding.

B. Provision of a Qualified Representative

EOIR will provide a qualified representative to an unrepresented, detained respondent where the judge has found the respondent incompetent to represent him- or herself.

The court should consider the examining mental health professional's assessment of the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case.

C. Waiver of Counsel

As the provision of a qualified representative is a safeguard or protection deemed necessary by the court to guarantee the fairness of the proceeding rather than pursuant to a legal right owed to the respondent, the respondent does not have the right to waive the presence of the qualified representative.

D. Refusal to Cooperate with the Qualified Representative

The refusal of a respondent who has been determined by the mental health professional to be able to consult with and assist counsel, to cooperate with the qualified representative provided by the court, does not negate the efforts of the government to provide an appropriate safeguard or protection.

IX. Format of IJ Decision

A. On the Record

All portions of an immigration proceeding addressing the issue of competence must be on the record.

B. Decision of the Judge

The Immigration Judge must articulate the rationale for his or her decision regarding the competency of the respondent to represent him- or herself. The decision should set forth all findings of fact and conclusions of law, and give the reasoning and analyses therefor. Specifically, the decision should discuss the presence of indicia of incompetence, the results of the judicial inquiry and the basis for any finding that there was or was not reasonable cause to believe competence was in issue, and the evidence offered in the competency review hearing, and ultimately whether the evidence was or was not sufficient to rebut the presumption of competence.

Where the Immigration Judge determines that the respondent is not competent to represent him- or herself, the decision should discuss the function required in the definition of competence that the respondent was found unable to perform, the safeguards and protections considered, the appropriateness and adequacy of any safeguards provided, and articulate the reasoning.

X. Tracking Cases

Data Entry

As soon as is reasonably practicable, the database used to track cases pending before the immigration court shall be amended to track the following events and dates:

- Indicia – whether the judge found indicia resulting in a “bona fide doubt” that respondent has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
- Judicial inquiry – the date the judicial inquiry was conducted and whether the judge found “reasonable cause” to believe the respondent has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.
- Mental Health Examination – whether the respondent was referred for a mental health examination and, if so, the date of the referral.
- Competence Determination – whether the judge found the respondent competent or incompetent to represent him- or herself and the date of such finding.
- Qualified Representative – whether a qualified representative was provided and, if so, the date of the assignment.

XI. Impact on Franco v. Holder

Nothing in this document is intended to negate or alter the obligations of EOIR under the orders of the Court in *Franco v. Holder*.

D

Process for Conducting a Judicial Inquiry

- I. Purpose of the Judicial Inquiry** - The purpose of the judicial inquiry is to determine whether respondent's competence is in issue and a more in-depth competency review is warranted.
- II. Mandatory Advisals** – The judicial inquiry should generally occur after explaining to the respondent the nature and purpose of the proceeding and providing the advisals required in 8 C.F.R. § 1240.10(a).
- III. Suggested Advisal** - The judicial inquiry should begin by explaining to the respondent the purpose and process for conducting the judicial inquiry. A sample advisal follows:

I am an Immigration Judge. My job is to decide whether you will be allowed to stay in the United States. I am going to hold a hearing to gather information from you and the representative of the Government to help me decide whether you will be allowed to stay in the United States.

It is important that you understand what is happening in court. It is important that you understand what is being said about you. It is also important that you are able to tell your side of the story.

To make sure that you are able to understand and tell your story, I am going to ask some questions about you and your case. I will use this information to decide whether you will need any special help in the hearing.

Can you explain to me what I just said in your own words?

Do you have any questions before we begin today?

IV. Suggested Questions

- A. **Areas of Inquiry** - When conducting the judicial inquiry, the Immigration Judge must ask questions to assess respondent's:
1. understanding of the nature and object of the proceeding,
 2. understanding of and ability to exercise core rights and privileges,
 3. ability to respond to the allegations and charges,
 4. ability to present information and respond to questions relevant to eligibility for relief, and
 5. cognitive, emotional, and behavioral functioning.

- B. **Suggested Questions** – The following list of questions is designed to shed light on the respondent's: 1) cognitive, emotional, and behavioral functioning; and 2) ability to represent him- or herself. This list is not exhaustive. The judge may ask other questions relevant to the respondent's mental health and ability to function as required in the hearing (*e.g.*, ability to communicate, subjective reality, memory, and interest in self). It is important for a judge to observe respondent's non-verbal as well as verbal responses to questions posed.

1. Cognitive, Emotional, and Behavioral Functioning

- a. How are you today?
- b. What is your name?
- c. What is today's date (including year)?
- d. What state and country are we in today?
- e. How did you get to the United States?
- f. When did you come to the United States? About how long have you been in the United States?
- g. Do you want to stay in the United States?
- h. Where do you live?
- i. What is the highest level of school that you completed?
- j. Are you seeing a doctor or taking any medications?
 - 1) If yes, what condition or problems are you being treated for?
 - 2) If yes, what medications are you taking?
- k. Are you currently being treated for a mental health (psychological/psychiatric) or emotional problem?
 - 1) If yes, what is the problem for which you are being treated?
 - 2) If yes, how often do you see the doctor?
 - 3) If yes, what medications, if any, are you receiving for this problem?
- l. Have you been treated for a mental health (psychological/psychiatric) or emotional problem in the past?
 - 1) If yes, when and for what problem?

2. Ability to Respond to the Allegations and Charges

- a. Why were you arrested? (Why did the immigration officers pick you up?)
- b. Where were you arrested?
- c. When were you arrested? (What was the date and time of your arrest?)
- d. Can you explain to me the immigration charges against you? (Can you explain to me what the government says you did wrong?)
- e. Is there anything important that you think I should know about what they say you did wrong? (Do you agree with what the government is saying about you?)

- f. What does _____ (e.g., alien smuggling, controlled substance, conviction, firearm) mean?
- g. How do you plan to proceed in court? (What do you plan to do next?)
- h. What do you want me to know about you and/or why you are here?
- i. What do you hope happens in court?

3. Understanding and Ability to Exercise Rights and Privileges

- a. What are your rights in immigration proceedings?
- b. What is a legal representative? What does a legal representative do in court?
- c. How do you find an attorney or legal representative?
- d. Is there anyone who can help you with your case?
- e. What is “evidence”?
- f. Can you give me an example of “evidence” that may be offered in your proceeding?
- g. What is an “appeal”?
- h. Why and how would you file an appeal?

4. Ability to Present Information and Respond to Questions Relevant to Relief

- a. What does “relief from removal” mean?
- b. What forms of relief from removal may be available in these proceedings?
- c. How long have you been in the United States?
- d. Do you have any family in the United States?
- e. Have you or your family ever had papers or permission to be in the United States?
- f. Has someone hurt you or tried to hurt you in your country?
- g. Are you afraid to go back to your country? Why?
- h. What does _____ (e.g., asylum, cancellation of removal, withholding of removal) mean?
- i. I am going to show you a relief application. Please take a moment to review the application. Can you explain to me how you would fill the application out or bring it back to me completed?
- j. Who do you know who might be able to help you with your case?

5. Other appropriate questions

- a. Is there anything else you would like to tell me?
- b. Are there any other questions you would like to ask?

Respondent: _____ Date: _____

Case No.: _____ Best Language: _____

Apparent Country of Origin: _____ Ethnicity (if known): _____

Judge: _____ Hearing Location: _____

Place of Detention: _____

Next Scheduled Hearing Date or Requested Due Date: _____

Type of Proceeding: _____ Estimated Length of Hearing: _____

Likely Forms of Relief:

- | | | |
|---|--|---|
| <input type="checkbox"/> Asylum | <input type="checkbox"/> Adjustment of status | <input type="checkbox"/> Temporary Protected Status |
| <input type="checkbox"/> Withholding of removal | <input type="checkbox"/> Cancellation of removal (LPR) | <input type="checkbox"/> Waiver(s) |
| <input type="checkbox"/> Convention Against Torture | <input type="checkbox"/> Cancellation of removal (non-LPR) | <input type="checkbox"/> Voluntary Departure |
| <input type="checkbox"/> Other: _____ | | |

Estimated Complexity of Issues (Circle one: 1 is least and 10 is most complex): 1 2 3 4 5 6 7 8 9 10

Indicia of a mental disorder:

- | | | |
|--|---|---|
| <input type="checkbox"/> History of outpatient mental health treatment | <input type="checkbox"/> Poor memory | <input type="checkbox"/> Severe depression or anxiety |
| <input type="checkbox"/> History of psychiatric hospitalization | <input type="checkbox"/> Poor attention/concentration | <input type="checkbox"/> Poor intellectual functioning |
| <input type="checkbox"/> History of self-injurious behavior | <input type="checkbox"/> Confused or disorganized thinking | <input type="checkbox"/> Irrational behavior or speech in court |
| <input type="checkbox"/> History of suicide attempts | <input type="checkbox"/> Paranoid thinking | <input type="checkbox"/> Lack of responsiveness in court |
| <input type="checkbox"/> History of limited academic achievement | <input type="checkbox"/> Grandiose thinking | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Currently receiving mental health treatment | <input type="checkbox"/> Seeing or hearing things not present | |

Other Relevant Documents or Health Information: _____

Other Relevant Information: _____

Contact with Information about Respondent's Health: _____

Attachments:

- | | |
|---|---|
| <input type="checkbox"/> Notice to Appear (Form I-862) or other charging document | <input type="checkbox"/> Record of Deportable/Inadmissible Alien (Form I-213) |
| <input type="checkbox"/> Additional Charges of Deportability/Inadmissibility (Form I-261) | <input type="checkbox"/> Other: _____ |

Application of the Nationwide Policy established by:

- 1) Notification by DHS of concern regarding competence, or
 DHS screening documents and information filed

2) IJ finding of *bona fide* doubt (BFD)

Date of notification or BFD: 4/25/19

- Basis for application of the policy stated on the record

Judicial Competency Inquiry (JCI) conducted: (Goal: 21 days from notification or BFD)

- JCI Advisal given based upon the form "Process for Conducting a Judicial Inquiry"

Respondent questioned regarding:

- Nature and object of the proceeding
 Understanding and ability to exercise rights
 Ability to respond to allegations and charges
 Ability to present information and respond to questions relevant to relief
 Cognitive, emotional, and behavioral functioning

JCI finding:

- Competent (Proceedings resume)
▪ Use no "reasonable cause to believe is incompetent"/competence is established by a "preponderance of the evidence" standard
 Incompetent (IJ orders QR)
▪ Use incompetent by a "preponderance of the evidence" standard
 "Order for Provision of a Qualified Representative" submitted within 24 hours
 Insufficient evidence (IJ promptly orders Forensic Competency Evaluation)

Date of JCI finding: 5/1/19

- JCI finding stated on the record

Forensic Competency Evaluation (FCE) ordered: (Goal: promptly after JCI)

Date FCE ordered: _____

- FCE referral submitted with supporting documentation within 3 business days

Date FCE report received: _____

- FCE served on parties

Report "accepted" by IJ

Competency Review (CR) conducted: (Goal: 30 days of receipt of FCE report)

Used "preponderance of the evidence" standard to determine competence.

CR finding:

Competent (Proceedings resume)

Incompetent (IJ orders QR)

"Order for Provision of a Qualified Representative" submitted within 24 hours

Date of CR finding: _____

CR finding stated on the record

Qualified Representative (QR) provided: (Goal: 60 days of JCI or 21 days of CR)

Date E-28 filed by QR: _____

Stated on record that QR has been provided

Other safeguards and protections considered:

Additional safeguards or protections considered and, if required, provided.

List additional safeguards or protections: _____

If safeguards insufficient to ensure fundamental fairness, proceedings stopped.

NATIONWIDE POLICY BOND HEARING if:

Respondent is eligible for bond under INA 236(a) or subject to mandatory custody under 236(c) **AND**

Respondent identified as covered by the Nationwide Policy due notification by DHS or IJ BFD finding

● *If identified before 180th day of detention*, bond hearing should be conducted between 180–195th day of detention

● *If identified after 180th day of detention*, bond hearing should be conducted as soon as practicable with a goal of conducting the bond hearing within 15 days of identification

Date Nationwide Policy bond hearing held: _____

Burden of proof placed on respondent to establish not a flight risk, danger to others or national security

Respondent found incompetent represented by a QR at the bond hearing

Outcome of bond hearing: _____

E

SAFEGUARDS “CHEAT SHEET”

CASE INITIATION AND PLEADINGS STAGE

- Ask ICE / DHS to facilitate communication as necessary
 - Use EOIR’s VTC system
 - Ask ICE to provide a private room for phone calls
 - Extended time for calls/visits
 - Access to in-person visitation rooms otherwise closed during pandemic
 - Ask ICE officer to visit client
- Ask DHS to produce A-file and/or criminal records
- Ask DHS to file updated medical records
- Issuance of NTA in lieu of reinstatement
- Re-service of NTA on warden (if detained) or person with whom client resides
- Continuance before entering pleading
- Redo pleadings if previously taken *pro se*
- For arriving aliens: Withdraw request for admission instead of getting removal order

APPLICATION PREPARATION STAGE

- Continuances for application preparation
- Accept filing of skeletal applications
- Allow client to not sign application
- Motions to Extend Filing Deadlines and/or Accept Untimely Filings

COLLATERAL APPLICATIONS WITH USCIS

- Continuances for collateral applications to be approved
- Extensions of time to respond to Requests for Evidence / Notices of Intent to Deny
- Protections at interviews
 - Allowing family/friend/attorney to assist in providing or clarifying information
 - Repeating questions or slowing down questioning
 - Taking breaks during interview
 - Taking mental health into consideration

RESOLUTIONS PRIOR TO ICH

- Motion to Terminate
- Motion to Administratively Close Proceedings
- Motion to Continue

BOND / CUSTODY DETERMINATIONS

- Franco bond hearing after 6 months of detention
- Take mental health into consideration when assessing flight risk and danger
- Consider effects on mental health of continued detention

DURING THE ICH

- *Physical layout:*
 - In-person appearance instead of VTC or WebEx

- All parties at table instead of bench and witness stand
- IJ removing robe
- Respondent testifies at Counsel table instead of on witness stand
- Social worker at Counsel table next to Respondent
- *Witness logistics:*
 - Mental health expert as first witness to “set the scene” / establish expectations
 - Respondent’s presence waived during certain testimony and/or wear headphones
- Waive Respondent’s testimony
- Proffer declaration in lieu of testimony
- Formally incorporate declaration into record and give it full weight of oral testimony
- Family or close friend testifies in lieu of Respondent
- *Assistance during testimony:*
 - Use notes
 - Allow leading questions
 - Refresh memory with documents in record
 - Take frequent breaks / drink water
 - Give additional time to answer and/or time to speak with attorney to seek clarification if necessary
- Limit direct and/or cross examination
- Allow Respondent’s counsel to actively aid in the development of the record
- *Cross examination:*
 - Non-adversarial questioning
 - Conduct cross examination in a manner sensitive to the history of X condition
 - Refrain from hostile or aggressive questioning
 - Pose questions in a slow and careful manner
 - Limit use of compound questions and questions with complex terms and concepts

IJ DECISION

- Assess credibility in the context of Respondent’s mental illness
- Consider mental illness, including effects of trauma, with regard to ability to recall information and details
- Consider mental illness when assessing manner of testimony (flat affect, pauses, incongruent laughter, smiling, tangential/confused/contradictory responses) that might otherwise indicate evasiveness or untruthfulness
- Take mental health into consideration when considering discretionary factors (weighing criminal history, likelihood to reoffend, etc.)
- Subjective fear be established on documentary record if necessary

AFTER THE ICH

- Keep the record open for additional evidence / arguments
- Reset the case to an MCH for a decision to allow for release coordination
- Move to reopen to reserve appeal (if initially waived)
- Move to reopen and reissue decision (if appeal deadline missed)

F

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DETAINED
****NQRP****

Qualified Representative for Respondent

**U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
AURORA IMMIGRATION COURT
AURORA, COLORADO**

_____)
In the Matter of:)
)
)
XXX XXX)
)
)
In Removal Proceedings)
_____)

File No.: XXX XXX XXX

**RESPONDENT'S MOTION FOR PROCEDURAL SAFEGUARDS
AND REASONABLE ACCOMMODATIONS**

Immigration Judge: [Name]

Next Master Calendar Hearing: [Date]

Respondent, Ms. Client, by and through undersigned counsel, hereby submits her Motion for Procedural Safeguards and Reasonable Accommodations. Ms. Client files this motion in conjunction with her Form I-589, Application for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture.

I. Procedural & Factual History

On April 30, 2020, this Court found Respondent incompetent to represent herself in removal proceedings and ordered the appointment of a qualified representative through the National Qualified Representative Program (“NQRP”). Thereafter, the Rocky Mountain Immigrant Advocacy Network received notification of its appointment as the Qualified Representative in this case. Undersigned counsel entered Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court on May 26, 2020.

Because an Immigration Judge deemed Respondent incompetent to represent herself in removal proceedings, she should be afforded appropriate safeguards. *Matter of M-A-M-*, 25 I&N Dec. 474, 484 (BIA 2011). Immigration Judges have broad discretion to determine which safeguards are appropriate, given the particular circumstances in any given case before them. *Id.* at 481–82; *Matter of M-J-K-*, 26 I&N Dec. 773, 775 (BIA 2016).

In this case, Respondent has various diagnoses, including: Mild Intellectual Disability; “high symptom burden” of Post-Traumatic Stress Disorder (PTSD); Bipolar Disorder; Attention Deficit/Hyperactivity Disorder (ADHD); Multiple Personality Disorder (now known as Dissociative Identity Disorder); Alcohol Use Disorder; Stimulant Use Disorder; and Schizophrenia. *See* Tab A, Court Ordered Competency Evaluation Completed by [Name], M.D (Mar. 10, 2021). Her mental health symptoms include, auditory hallucinations, confused and disorganized thinking, dissociative episodes, psychogenic non-epileptic seizures (PNES),

paranoia, mood dysregulation, insomnia, and lapses in attentiveness and responsiveness. Tab A at 4–5. In total, she has been hospitalized in a psychiatric institution on approximately ten different occasions. *Id.*

Throughout her life, Ms. Client has received various forms of treatment attempting to control the symptoms of her mental illness. Namely, physicians have prescribed Lithium (mood stabilizer), Seroquel (anti-psychotic medication), Wellbutrin (anti-depressant), diazepam (anxiolytic), Neurontin (mood stabilizer), Buspar (anxiolytic), Prozac (anti-depressant), Klonopin (anxiolytic), and Adderall (ADHD medication). *Id.* Ms. Client has a history of suicidality and self-injurious behavior. *Id.* “In addition to psychotropic medication management, Ms. Client reported receiving trauma therapy including eye movement desensitization and reprocessing (EMDR).” *Id.*

Ms. Client has reported diagnoses for amnesia, or “blacking out.” *Id.* at 5. Ms. Client’s medical history includes prescriptions for Keppra (anti-convulsant) for seizures, Albuterol (for asthma, wheezing), and Synthroid (thyroid hormone). Tab A at 5.

II. The Court Should Grant the Procedural Safeguards Sought.

Respondent requests that the Court prescribe the necessary safeguards to ensure a fair hearing. *Matter of M-A-M-*, 25 I&N Dec. at 481–83 (describing the legal right to procedural safeguards and offering a non-exhaustive list of possibilities); *Matter of M-J-K*, 26 I&N Dec. at 775 (determining that the Immigration Judge has the discretion to select and implement appropriate safeguards). She respectfully requests that the Court consider as safeguards the following measures:

- (A) Ensure the same IJ who presided over Respondent’s master calendar hearings adjudicate her case at the merits hearing.
- (B) Close the courtroom to the public. *Matter of M-A-M-*, 25 I&N Dec. at 483.

- (C) Limit Respondent's testimony in the event that it becomes difficult or unfruitful for her to continue.
- (D) Due to her cognitive impairments, Respondent, through counsel, requests that the Court afford additional weight to the testimony of third parties and objective evidence in the record in determining her potential relief. *See Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015) (stating 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. The Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues").
- (E) Assess the credibility and reliability of Respondent's testimony in light of her mental health disabilities. *See Matter of J-R-R-A-*, 26 I&N Dec. 609.
- (F) Conduct any questioning by the Court and any cross-examination by DHS in a manner sensitive to Respondent's mental health disabilities.
- (G) Permit counsel to conduct direct examination in a manner appropriate to Respondent's abilities and potential reluctance to participate in proceedings, including asking leading questions on direct exam, to ensure the record is adequately developed. *Matter of M-A-M-*, 25 I&N Dec. at 483.
- (H) If necessary, the Court should allow for recesses when appropriate to permit Respondent to consult with counsel, should her disability impact her ability to testify or otherwise participate in the proceedings as described above.
- (I) Continue the case, as needed, depending on the state of Respondent's mental health on the date and time of her merits hearing. *Matter of M-A-M-*, 25 I&N Dec. at 483 (offering a continuance as a possible safeguard).
- (J) Reassess the necessary safeguards needed to proceed with Respondent's removal proceedings at the time of her individual merits hearing given a Colorado criminal court found, as recently as April 6, 2021, that Ms. Client "will not attain competency in the reasonably foreseeable future due to her ongoing mental and/or developmental disabilities and that even if restored to competency she would not maintain competency through the adjudication of the case." Tab B, Order of District Court Judge, [Name] (Apr. 6, 2021). In the event Ms. Client is unable to meaningfully participate in her removal proceedings, the Court should consider administrative closure or termination as an appropriate safeguard. *Matter of M-A-M-*, 25 I&N Dec. at 479, 483 (listing administrative closure as a possible safeguard and describing the right to "fundamental fairness" in immigration proceedings, which is not met if a respondent is unable to

meaningfully participate in their own legal defense, warranting termination); Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 Vill. L. Rev. 787, 819–22 (2017).

Based on the foregoing, Respondent respectfully requests that the Court prescribe the above-named safeguards to ensure a fair hearing. INA § 240(b)(3); *Matter of M-A-M-*, 25 I&N Dec. at 476 (stating that the Board’s “goal is to ensure that proceedings are as fair as possible in an unavoidably imperfect situation”).

III. The Court Should Grant Procedural Protections as a Reasonable Accommodation Pursuant to Section 504 of the Rehabilitation Act.

Concurrently, the Executive Office for Immigration Review (“EOIR”) is governed by Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794, which prohibits disability discrimination by any program or activity conducted by an executive agency. The regulations implementing Section 504 for EOIR define a person with disabilities as “any person who has a physical or mental impairment that substantially limits one or more major life activities . . .” 28 C.F.R. § 39.103. Regulations implementing Section 504 require that EOIR not discriminate or deny a benefit to an individual on account of a disability. 28 C.F.R. § 39.130 (DOJ Section 504 regulations, applicable to EOIR). Individuals with known disabilities can request accommodations to remedy any discrimination they may experience on account of their disabilities.

A. Section 504 Endorses for Reasonable Accommodations or Modifications for Persons with Disabilities.

The Rehabilitation Act defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of [the] individual.” 42 U.S.C. § 12102(1). Although “the same substantive standards apply under the Rehabilitation Act and the [Americans with Disabilities Act],” Section 504 applies to federal agencies and does not require exhaustion

of administrative remedies. *Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 986 (10th Cir. 2021) (citation omitted).

Under Section 504, “[n]o qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ... conducted by any Executive agency.” 29 U.S.C. § 794. Section 504 forbids not only facial discrimination against individuals with disabilities, but also requires that executive agencies such as DHS and EOIR alter their policies and practices to prevent discrimination on account of disability.

The terms “benefit, programs, and services” are construed broadly. *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (“Modern prisons provide [people who are incarcerated] with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’” the people imprisoned).

In *Choate* the Supreme Court created the “meaningful access” standard: that “otherwise qualified” people with disabilities must be granted reasonable modifications to ensure they are “provided with meaningful access” to the program at issue. *Alexander v. Choate*, 469 U.S. 287, 300–02 n. 21 (1985). Namely, under Section 504 covered entities must afford persons with disabilities ““equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement.”” *Id.* at 305 (citing 45 C.F.R. § 84.4(b)(2)). Meaningful access means equal access.

Covered entities have an affirmative obligation under Section 504 to ensure that their benefits, programs, and services are accessible to people with disabilities, including by providing reasonable modifications. *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (“[B]ecause Congress was concerned that ‘[d]iscrimination against [people with

disabilities] was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,]’ the express prohibitions against disability-based discrimination in Section 504 and Title II include an affirmative obligation to make benefits, services, and programs accessible to disabled people.”) (quoting *Choate*, 469 U.S. at 295); *id.* at 269 (“[N]othing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.”). Failure to implement a reasonable accommodation amounts to disability discrimination. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (“The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination.”).

The Tenth Circuit summarized the applicable analysis for seeking a reasonable accommodation from a covered entity in *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1200 (10th Cir. 2007). The individual must: (1) have a qualifying disability; (2) the public entity must be on notice of the fact that the person has a disability covered by the ADA or Section 504; and (3) the entity must be aware that the individual requires an accommodation. *Id.* Thus, covered federal agencies violate Section 504 if they fail to “provide ‘*meaningful access*’ to their programs and services” that otherwise exclude participation due to disability. *Robertson*, 500 F.3d at 1195 (citation omitted).

Reasonable accommodations necessary to prevent disability discrimination are required unless such modifications would create a “fundamental alteration” of the relevant program, service, or activity, or would impose an undue hardship. *See Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 n.17 (1987) (modification not required if it would require “a fundamental alteration in the nature of [the] program”) (citation omitted); *Alexander*, 469 U.S. at

300; *see also* 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the Supreme Court considered the fundamental alteration defense under Title III of the ADA, in the context of a golfer who had physical limitations and sought to use a golf cart during a tournament, despite competition rules prohibiting such assistance. The Court reasoned that the requested modification might be a fundamental alteration if it changed an “essential aspect” of the game, or if it gave the player with a disability an advantage that would “fundamentally alter the character of the competition” and ultimately found that waiving the rule did not constitute a fundamental alteration. *Id.* at 662–63, 690; *accord Franco-Gonzales*, 767 F. Supp. 2d at 1053 (considering the “unique circumstances” and “Plaintiffs’ individual characteristics and the procedural posture of their cases pending before the BIA” in assessing the reasonableness of the accommodation requested). Thus, when examining whether something constitutes an “essential” requirement for purposes of Section 504, one must look to the specific circumstances at issue.

The requirements of Section 504 apply to the immigration benefits and proceedings that noncitizens may seek under the INA. *See Galvez-Letona*, 54 F.Supp.2d 1218, 1224–25 (D. Utah 1999), *aff’d on other grounds*, 3 F. App’x 829 (10th Cir. 2001); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1053, 1056 (C.D. Cal. 2010) (finding that plaintiffs with disabilities in immigration detention “were not provided with even the most minimal of existing safeguards under [8 C.F.R. §] 1240.4, let alone more robust accommodations required under the

Rehabilitation Act,” and ordering the appointment of a “qualified representative” for persons in detention with serious mental illness).

Waiver of statutory requirements is an appropriate accommodation when an exception does not fundamentally alter the program. *Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1225 (D. Utah 1999), *aff'd on other grounds*, 3 F. App'x 829 (10th Cir. 2001). In *Galvez-Letona* a person with an intellectual and developmental disability sought U.S. citizenship and at issue was whether an exception to the oath requirements found in the naturalization statute constituted a “fundamental alteration.” 54 F.Supp.2d at 1224–25 (D. Utah 1999). Finding other contexts where the government agency made an exception to the requirement, the court found that a waiver was appropriate to comply with Section 504 and ensure Mr. Galvez-Letona gained meaningful access to the benefit sought. *Id.*

B. Ms. Client Necessitates the Accommodations Requested.

Here, Ms. Client requests the aforementioned safeguards pursuant to INA § 240(b)(3) and also requests the same as accommodations pursuant to Section 504. Ms. Client seeks to meaningfully participate in the adjudication of her immigration case, a benefit covered by Section 504. *See* Margo Schlanger, Elizabeth Jordan, Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 Harv. Law & Pol. Rev. 1, 254–64 (2022).

It is undisputed that Ms. Client has a “disability” for purposes of Section 504. 29 U.S.C. § 705(2)(B); 42 U.S.C. §§ 12102(1)–(2); 28 C.F.R. § 35.108(d)(2)(iii)(I), (K). She suffers from serious mental illness such that a judge deemed her incompetent to represent herself in removal proceedings. Given that EOIR assessed Ms. Client’s competency and determined that she is not capable of representing herself, the agency is on notice of her mental disability.

Ms. Client is prohibited from meaningfully accessing her immigration proceedings due to her disability. Ms. Client is entitled to fundamental fairness in her removal proceeding. *Matter of M-A-M-*, 25 I&N Dec. at 479. However, that is not possible unless the Court grants the accommodations requested. *See supra*. To avoid disability discrimination, the Court must afford Ms. Client the procedural protections requested, which would better enable her to access the benefit sought.

The modification Ms. Client seeks is reasonable and would not impose a fundamental alteration to her immigration proceedings. *See Alexander*, 469 U.S. at 299–300, 302 n.21 (1985); *see also* 28 C.F.R. § 35.130(b)(1)(7)(i) and § 35.150(a)(3); 6 C.F.R. § 15.30 and § 15.50; *cf. PGA Tour, Inc.*, 532 U.S. at 661–63 (a fundamental alteration is one that changes an “essential aspect” of the program) (citation omitted). Granting the reasonable accommodations sought pursuant to Section 504 and implementing regulations would adhere to the agencies’ obligations. *See e.g., Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1303 (D.C. Cir. 1998) (en banc) (determining that an interpretation of the hospital’s collective bargaining agreement that enabled it to implement its ADA obligations was “distinctly preferred.”).

IV. Conclusion

Thus, the Court has at least two independent bases for granting the safeguards and reasonable accommodations requested by Ms. Client.

Dated: [Date]

Respectfully submitted,

/s/ Laura Lunn

Laura Lunn, Esq.

ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK

Qualified Representative for Respondent

**INDEX OF EVIDENCE IN SUPPORT OF
MOTION FOR SAFEGUARDS**

Tab	Document	Pages
A	Court Ordered Competency Evaluation Completed by [NAME], M.D (Mar. 10, 2021)	1-10
B	Order of District Court Judge, [NAME] (Apr. 6, 2021)	11-13

CERTIFICATE OF SERVICE

I, Laura Lunn, hereby certify that on [DATE], I served a true and correct copy of the foregoing RESPONDENT’S MOTION FOR PROCEDURAL SAFEGUARDS AND REASONABLE ACCOMMODATIONS on the Department of Homeland Security via the ICE e-Service Portal at <https://eservice.ice.gov> located at the following address: Office of Chief Counsel, ICE-DHS, 12445 E Caley Ave, Centennial, CO 80111.

/s/ Laura Lunn
Laura Lunn

[DATE]
Date

G

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
AURORA, CO**

IN THE MATTER OF)
)
 LAST, First) File No. XXX-XXX-XXX
 Respondent.)
)
)
 In custody proceedings)

Motion for Custody Redetermination Hearing

Mr. VS, through undersigned counsel, moves this Court to schedule a custody redetermination hearing pursuant to 8 CFR § 1003.19(b), pursuant to the National Qualified Representative Program’s (NQRP) Nationwide Policy, and Section 504 of the Rehabilitation Act.

Respectfully submitted,

Conor Gleason, Esq.
Counsel for Mr. VS

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
AURORA, CO**

IN THE MATTER OF)
)
 LAST, First) File No. XXX-XXX-XXX
 Respondent.)
)
)
 In custody proceedings)

Introduction

Mr. VS, through undersigned counsel, respectfully moves this Court to schedule a custody redetermination hearing pursuant to 8 C.F.R. § 1003.19(b) and thereafter issue an order detailing under what statute the Department of Homeland Security (DHS) continues to detain Mr. Vasquez Serrano.

In addition, Mr. VS moves the Court to schedule a custody redetermination hearing due to his prolonged detention and the NQRP Nationwide Policy. Exhibit A1, U.S. Dep't. of Justice Memorandum, *Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions*, hereinafter Exhibit A1; Exhibit A2, U.S. Dep't of Justice, Executive Office for Immigration Review, *Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, hereinafter Exhibit A2; Exhibit A3, Dep't. of Homeland Security, *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions*, hereinafter Exhibit A3.

Pursuant to the NQRP Nationwide Policy, the Executive Office for Immigration Review (EOIR) must provide Mr. VS with a bond hearing after six months of detention.

Mr. VS also argues that his release is a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act.

For the following reasons, Mr. Vasquez Serrano's continued detention is not warranted. DHS cannot demonstrate that detention is appropriate due to the severity of Mr. Vasquez Serrano's intellectual disability and mental illness. Exhibit B, Psychological Evaluation of Mr. Vasquez Serrano, hereinafter Exhibit B. DHS will inevitably fail to demonstrate by clear and convincing evidence that Mr. VS must remain detained because Mr. VS is neither a danger to the community nor a risk of flight. This Court should therefore issue Mr. Vasquez Serrano's release.

Brief Factual & Procedural History

DHS detained Mr. VS 378 days ago on January 24, 2022. Exhibit C, Notice to Appear, hereinafter Exhibit C. DHS charged Mr. VS as removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA) for having been convicted of an aggravated felony as defined in INA §§ 101(a)(43)(A); 101(a)(43)(U). *Id.* The Court later found Mr. VS incompetent to represent himself and ordered he be provided counsel through NQRP on June 29, 2022. Exhibit D, NQRP Order, hereinafter Exhibit D. Undersigned counsel entered his appearance on Mr. Vasquez Serrano's behalf on July 15, 2022, and moved to terminate proceedings. The Court denied Mr. Vasquez Serrano's Motion to Terminate (MTT) and sustained the charges of removability in an oral decision on September 12, 2022.

Mr. VS sought relief from removal pursuant to Form I-589. Exhibit E, Form I-589, hereinafter Exhibit E. Mr. VS supported that request from relief with hundreds of pages of evidence filed on December 8, 2022. The Court considered the merits of Mr. Vasquez Serrano's

application for relief during two hearings on January 13, 2023 and January 24, 2023. The Court then ordered the parties to submit written closings on or before February 10, 2023. DHS continues to jail Mr. VS while his application remains pending.

Mr. VS now moves this Court to schedule a custody redetermination hearing.

Argument¹

This Court should grant Mr. Vasquez Serrano's request for release upon payment of a reasonable bond because he has met his burden² to show that he is neither a risk of flight nor a danger to the community. The Board of Immigration Appeals (BIA) provided a non-exhaustive list of factors to consider when deciding whether to release Mr. VS on bond. Those factors include:

(1) whether the [noncitizen] has a fixed address in the United States; (2) the [noncitizen's] length of residence in the United States; (3) the [noncitizen's] family ties in the United States, and whether they may entitle the [noncitizen] to reside permanently in the United States in the future; (4) the [noncitizen's] employment history; (5) the [noncitizen's] record of appearance in court; (6) the [noncitizen's] criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the [noncitizen's] history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the [noncitizen's] manner of entry to the United States.

Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006). “Any evidence in the record that is probative and specific can be considered,” *id.* at 40–41, including the fact that a noncitizen “with a greater likelihood of being granted relief from deportation has a greater motivation to appear for a deportation hearing . . . ,” *Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987). In light of these factors, the Court should order Mr. VS' release.

¹ Mr. VS preserves the right to provide additional evidence and argument at his forthcoming custody redetermination hearing.

² Mr. VS preserves that requiring him to carry the burden in these proceedings is a violation of his due process rights and that the Constitution requires DHS to shoulder the burden by clear and convincing evidence that he should remain detained. In addition, Mr. VS preserves that this Court must consider his ability to pay a reasonable bond, alternatives to detention, and that his mental health must be taken into account when reviewing any alleged contacts with the criminal legal system.

Moreover, Mr. VS has a right to a bond hearing pursuant to the NQRP Nationwide Policy since he has been detained for more than six months. Exhibit A1. EOIR created this policy after the permanent injunction in the *Franco-Gonzalez v. Holder* litigation. *Id.* DHS explicitly acknowledges this policy. Exhibit A3. Mr. VS squarely falls within the scope of the NQRP Nationwide Policy and warrants release on bond because he is neither a risk of flight nor a danger to the community. In the alternative, this Court should order his release as a reasonable accommodation pursuant to Section 504 of the Rehabilitation Act.

I. There is a Right a Custody Redetermination Hearing for Individuals Held in Detention Who Experience Serious Mental Disorders or Conditions.

Mr. VS has a right to an immediate review of his continued incarceration. In 2010, the American Civil Liberties Union (“ACLU”) filed a *writ of habeas corpus* and class action complaint in the U.S. District Court for the Central District of California. Throughout the litigation, the plaintiffs alleged that due to their mental disabilities they were incompetent to defend themselves in immigration removal proceedings, but nevertheless, the immigration courts forced them to proceed without representation although they failed to comprehend the nature of the removal proceedings or the repercussions of the outcomes. *See* Amended Complaint, *Franco-Gonzalez v. Holder*.³ On April 23, 2013, the United States District Court for the Central District of California entered a permanent injunction in the case of *Franco-Gonzales v. Holder*, making certain reforms mandatory for people held in immigration detention in the Ninth Circuit where indicia of incompetence were raised.⁴

³ https://www.aclu.org/sites/default/files/field_document/2010-8-2-GonzalezvHolder-AmendedComplaint.pdf

⁴ For the orders issued in *Franco*, please see the following:
https://www.aclu.org/sites/default/files/field_document/partial_judgment_and_permanent_injunction.pdf;
https://www.aclu.org/sites/default/files/field_document/order_re_permanent_injunction_04.23.13_final.pdf;
https://www.aclu.org/sites/default/files/field_document/ord_dct_786_order_further_implementing_pi.pdf.

Subsequent to the initial filing in *Franco-Gonzales v. Holder*, the BIA took up the issue of the need for procedural safeguards in cases where indicia of incompetence are raised in immigration proceedings. *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). In *M-A-M-* the Board created a concrete legal framework directing judges how to implement safeguards in order to ensure fundamental fairness in immigration proceedings. *Id.* The Board's willingness to issue a published decision in *M-A-M-* illustrates the understanding that competency is a pertinent issue that impacts litigants across the country. *See id.*

Further acknowledging the need for heightened protections for this particularly vulnerable population, on April 22, 2013, both DHS and EOIR announced plans to implement policy reforms by the end of 2013 to ensure that respondents receive necessary safeguards before the nation's immigration courts. *See* Exhibit A1; Exhibit A3. The timing of the new guidance coincided with the issuance of the court order in *Franco*, which served as the impetus for the reformed policy guidance that ultimately resulted in the creation of the NQRP Nationwide Policy. As a result, people held in DHS custody who are unrepresented and deemed incompetent by an Immigration Court are appointed counsel at no personal cost through this policy. *See* Exhibit A1.

In EOIR's policy memo, the agency narrowly expanded the class of individuals who are bond eligible. *See* Exhibit A1. According to guidance provided by EOIR's Chief Immigration Judge, Brian M. O'Leary, "unrepresented detained [noncitizens] who were initially identified as having serious mental disorder or condition that may render them incompetent to represent themselves and who have been held in detention by DHS for six months or longer will be afforded a bond hearing." *Id.*

The plain language of the memo seeks to afford a right to a bond hearing after six months of detention for those respondents who are suffering from severe mental illness. *See id.*

Inexplicably, the language also seems to limit such a right to only those mentally ill respondents who are unrepresented. *Id.* Such a reading, however, is contrary to the court's order in *Franco* and contravenes the underlying purpose of the EOIR memo—to provide safeguards to all respondents suffering from mental illness in the form of a Qualified Representative. *See generally* Exhibits A1–A2.

A contrary reading would mean that *only* respondents deemed incompetent *and* who are unrepresented by counsel would qualify for a custody redetermination proceeding. *See* Exhibit A1. After the implementation of the NQRP policy, the very program initiated by the EOIR memo that affords the right to a six-month bond hearing, under such a reading *zero* respondents would qualify for bond at the six-month mark because none of them would be unrepresented. Thus, denial of a bond hearing to a respondent represented pursuant to the NQRP would be contrary to the spirit of the program and the plain language of the agency policy guidance. Appropriately considered, the protections of the NQRP policy are initiated when an unrepresented detained noncitizen is found incompetent; those protections include a bond hearing at six months of confinement.

Accordingly, to ensure the consistent application of the principles set forth in *Franco* and in the EOIR memo itself, the right to a bond hearing exists for all mentally ill respondents, including those represented by counsel through NQRP.

a. Mr. VS Suffers from Serious Mental Disorders or Conditions and has a Right to a Custody Redetermination Hearing.

Mr. VS must benefit from the NQRP Nationwide Policy and be provided a bond hearing since he has been detained for longer than six months and this Court appointed him a Qualified Representative after determining that he is incompetent to represent himself. The EOIR memo announcing the NQRP Nationwide Program therefore provides Mr. VS the right to a bond hearing. *See* Exhibit A1 at 1.

II. DHS Must Carry the Burden of Proof Pursuant to the NQRP Nationwide Policy.

The NQRP Nationwide Policy requires DHS to carry the burden in Mr. Vasquez Serrano's forthcoming bond hearing. Although the *Franco* injunction is not binding outside of the Ninth Circuit, it is the best source of authority in terms of understanding how to provide adequate protections to respondents who suffer from severe mental illness in the immigration context. Therefore, adjudicators should rely on the *Franco* framework when overseeing immigration cases where competency is at issue.

In particular, the Court should rely on *Franco* in determining the burden of proof that applies in the context of a bond hearing for an individual deemed to have indicia of incompetency who has been detained for six months or longer. In the *Franco* decision, Judge Gee examined both Ninth Circuit and Supreme Court precedent in determining who bears the burden of proof in custody proceedings. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at *2 (C.D. Cal. Apr. 23, 2013). According to the court's analysis, *Franco* class members do not bear the burden of proof in custody redetermination hearings after six months of detention and instead DHS must establish by "clear and convincing evidence that further detention is justified." *Id.* at *3.

Cases examining the issue of prolonged detention provide additional guidance in how the Court should review custody redetermination proceedings under EOIR's policy guidance. Courts have found that the "clear and convincing" standard of proof is necessary in the prolonged detention context because "it is improper to ask the individual to 'share equally with society the risk of error when the possible injury to the individual' . . . is so significant." *Id.* at *13 (citing *Singh v. Holder*, 638 F.3d 1196, 1203–04 (9th Cir. 2011); see also *Tijani v. Willis*, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) (explaining that due process places a "heightened

burden of proof on the State” where the individual interests at stake are particularly important) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996)); see Section III(a) (collecting cases in the District of Colorado placing the burden of proof on DHS in bond proceedings).

In the context of people afforded counsel by the NQRP Nationwide Policy, the possible injury to the individual is heightened by virtue of their recognized disabilities; the law should afford them heightened protections to prevent unnecessary injury.

- a. Mr. VS Must be Released on a Reasonable Bond because DHS Cannot Carry its Heavy Clear and Convincing Evidence Burden.

DHS cannot clearly and convincingly demonstrate that Mr. VS is a risk of flight or a danger to the community requiring his continued detention. The clear and convincing evidence standard is a “heightened standard” that imposes a “heavy burden” of proof. *Cooper*, 517 U.S. at 361-62. In other words, the standard requires evidence that “instantly tilt[s] the evidentiary scales” and “place[s] in the ultimate factfinder an abiding conviction that the truth of [the proponent’s] factual contentions [is] highly probable.” *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Federal courts have found that the evidence submitted must be clear and convincing of *future* danger and flight. *E.g.*, *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011); *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (“presenting danger to the community at one point by committing crime does not place [one] forever beyond redemption”).

Here, Mr. VS acknowledges that there is no evidence in the bond proceeding, 8 C.F.R. § 1003.19(d) (making clear that the bond and removal proceedings “shall be separate and apart”) and preserves the right to file rebuttal evidence should DHS attempt to meet its burden by filing evidence in the bond record. Regardless of the evidence filed, DHS will not be able to meet its burden and Mr. VS should be granted a reasonable bond.

III. DHS’s Decision to Detain Mr. VS without Neutral Review and this Court’s Failure to Provide that Review is Violative of the Constitution.

“It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in [removal] proceedings.” *Reno v. Flores*, 507 U.S. 292, 306 (1993). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). This fundamental protection applies to all persons present in the United States, including both removable and inadmissible noncitizens. *See id.* at 721 (Kennedy, J., dissenting) (“both removable and inadmissible [noncitizens] are entitled to be free from detention that is arbitrary or capricious”). Due process requires “adequate procedural protections” to ensure that the government’s asserted justification for physical confinement “outweighs the [detained] individual’s constitutionally protected interest in avoiding physical restraint.” *Id.* at 690 (internal citation omitted). Civil immigration detention is therefore constitutional only in “certain special and ‘narrow’ nonpunitive ‘circumstances.’” *Zadvydas*, 533 U.S. at 690 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The Supreme Court identified those limited circumstances as mitigating the risk of danger to the community and preventing flight. *Id.* at 690–91; *see also Demore*, 538 U.S. at 515, 527–28.

The Supreme Court has repeatedly recognized that civil detention must be carefully limited to avoid due process concerns and ensure the government’s justifications for continued detention are legitimate. *See e.g., Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (upholding involuntary civil commitment of certain sex offenders but requiring “strict procedural safeguards” including a right to a jury trial and proof beyond a reasonable doubt); *Cooper*, 517 U.S. at 363 (“[D]ue process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of

money.”) (citation and quotation marks omitted); *Foucha v. Louisiana*, 504 U.S. 71, 80–83 (1992) (striking civil insanity detention statute because it placed the burden on the detained person to prove eligibility for release); *Addington v. Texas*, 441 U.S. 418, 423 (1979) (state must justify civil detention of allegedly dangerous individual with mental illness by clear and convincing evidence); *see also U.S. v. Salerno*, 481 U.S. 739, 750–52 (1987) (upholding federal bail statute permitting pretrial detention where statute required strict procedural protections, including prompt hearings where government bore the burden of proving dangerousness by clear and convincing evidence). It is of no consequence that these precedents are unrelated to immigration detention because “the ‘constitutionally protected liberty interest’ in avoiding physical confinement, even for [noncitizens] already ordered removed, [is not] conceptually different from the liberty interests of citizens considered in *Jackson*, *Salerno*, *Foucha*, and *Hendricks*.” *Velasco Lopez v. Decker*, 978 F.3d 842, 856 (2d Cir. 2020) (quoting *Demore*, 538 U.S. at 553 (Souter, J., concurring in part and dissenting in part)).

The Supreme Court recently had the opportunity to review the mandatory detention scheme pursuant to § 1226(c). *See generally Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Although *Jennings* interpreted and clarified the “shall detain” clause of § 1226(c), it expressly declined to reach the merits of the due process claim implicated here. *Id.* at 851.

Although the Tenth Circuit has yet to address the constitutionality of prolonged detention under INA § 236(c), courts in this District and around the country have adopted an individualized reasonableness test to consider whether the length of detention has become unconstitutionally prolonged. *de Zarate v. Choate*, No. 23-CV-00571-PAB, 2023 WL 2574370, at *3 (D. Colo. Mar. 20, 2023); *Daley v. Choate*, No. 22-CV-03043-RM, 2023 WL 2336052, at *5 (D. Colo. Jan. 6, 2023); *Viruel Arias v. Choate*, No. 22-CV-2238-CNS, 2022 WL 4467245 (D. Colo. Sept. 26,

2022); *Sheikh v. Choate*, No. 22-CV-1627-RMR, 2022 WL 17075894 (D. Colo. July 27, 2022); *Singh v. Garland*, No. 21-CV-00715 (CMA), 2021 WL 2290172, at *4 (D. Colo. June 4, 2021); *Villaescusa-Rios v. Choate*, No. 20-CV-03187 (CMA), 2021 WL 269766, at *3 (D. Colo. Jan. 27, 2021); *Singh v. Choate*, No. 19-CV-00909 (KLM), 2019 WL 3943960, at *5 (D. Colo. Aug. 21, 2019); *Banda v. McAlleenan*, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019); *Jamal v. Whitaker*, 358 F. Supp. 3d 853, 858059 (D. Minn. 2019); *Joseph v. Decker*, No. 18-CV-2640 (RA), 2018 WL 6075067, at *10-11 (S.D.N.Y. Nov. 21, 2018) (collecting cases from the Southern District of New York); *Fatule-Roque v. Lowe*, No. 17-1981, 2018 WL 3584696, at *5 (M.D. Penn. July 26, 2018) (collecting cases from the Middle District of Pennsylvania). Thus, DHS should bear the burden of establishing that it is reasonable to continue to detain NQRP nationwide policy members after six months of detention.

As discussed *supra*, Section II(a), DHS cannot meet that burden and Mr. VS must be released on a reasonable bond.

IV. In the Alternative, Release from Detention on Bond is a Reasonable Accommodation Under Section 504 of the Rehabilitation Act of 1973.

Should this Court erroneously deny Mr. Vasquez Serrano's motion for a custody redetermination pursuant to the NQRP Nationwide Policy and the Constitution, Mr. VS merits release on bond as a reasonable accommodation under Section 504 of the Rehabilitation Act. EOIR is governed by Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, which prohibits disability discrimination by any program or activity conducted by an executive agency. The regulations implementing Section 504 for EOIR define a person with disabilities as "any person who has a physical or mental impairment that substantially limits one or more major life activities . . ." 28 C.F.R. § 39.103. Regulations implementing Section 504 require that EOIR not discriminate or deny a benefit to an individual on account of a disability. 28

C.F.R. § 39.130 (DOJ Section 504 regulations, applicable to EOIR). Individuals with known disabilities can request accommodations to remedy any discrimination they may experience on account of their disabilities.

Section 504 forbids not only facial discrimination against individuals with disabilities, but also requires executive agencies such as DHS and EOIR to alter their policies and practices to prevent discrimination on the basis of disability. Reasonable modifications are required unless those modifications would create a “fundamental alteration” of the relevant program, service, activity, or would impose an undue hardship. *See Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 n.17 (1987); *Alexander v. Choate*, 469 U.S. 287, 300 (1985); *see also* 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”) (emphasis added).

Covered entities have an affirmative obligation under Section 504 to ensure that their benefits, programs and services are accessible to people with disabilities, including by providing reasonable modifications. *Pierce v. D.C.*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (“[B]ecause Congress was concerned that ‘[d]iscrimination against [people with disabilities] was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,]’ the express prohibitions against disability-based discrimination in Section 504 and Title II include an affirmative obligation to make benefits, services, and programs accessible to disabled people.”) (citing and quoting from *Alexander v. Choate*, 469 U.S. 287, 295 (1985)); *id.* at 269 (“[N]othing in the disability discrimination statutes even remotely suggests that covered entities

have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.”).

The requirements of Section 504 apply to the immigration benefits and proceedings that noncitizens may seek under the INA. *See Galvez-Letona v. Kirkpatrick*, 54 F.Supp.2d 1218, 1224–25 (D. Utah 1999), *aff’d on other grounds*, 3 F. App’x 829 (10th Cir. 2001) (holding that INS violated the Rehabilitation Act when it denied naturalization to an individual who, due to the disability of Down Syndrome, could not meet the attachment and oath requirements of citizenship set out in the naturalization statute); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d at 1053, 1056 (finding that people living with a disability in immigration detention “were not provided with even the most minimal of existing safeguards under [8 C.F.R. §] 1240.4, let alone more robust accommodations required under the Rehabilitation Act,” and ordering the appointment of a “qualified representative” for people with serious mental illness).

Reasonable accommodations are required unless such modifications would create a “fundamental alteration” of the relevant program, service, activity, or would impose an undue hardship. *See Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 n.17 (1987); *Alexander v. Choate*, 469 U.S. 287, 300 (1985); *see also* 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”). The requirements of Section 504 apply to the immigration benefits and proceedings that noncitizens may seek under the INA. *See Galvez-Letona v. Kirkpatrick*, 54 F. Supp. 2d 1218, 1224–25 (D. Utah 1999), *aff’d on other grounds*, 3 F. App’x 829 (10th Cir. 2001); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1053, 1056 (C.D. Cal. 2010).

- a. Mr. VS Suffers from Multiple Disabilities and the Court Should Accommodate his Disabilities by Releasing Mr. VS to His Family.

As discussed *supra* and evidenced by the attached, Mr. VS has been detained for over 378 days and he struggles with significant mental health disabilities that require his release as a reasonable accommodation. Exh. B.

Accordingly, Mr. VS merits the reasonable accommodation sought under Section 504 – namely, release from ICE custody.

Conclusion

Based on the foregoing, this Court should release Mr. VS pursuant to Section 504 of the Rehabilitation Act. In the alternative, the Constitution and NQRP policy require the Court to provide Mr. VS a bond hearing at which DHS must, *inter alia*, carry a clear and convincing evidence burden.

Respectfully submitted,

Conor Gleason, Esq.
Qualified Representative for Mr. VS



U.S. Department of Justice

Executive Office for Immigration Review

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Name:

A -809

Date of this notice: 7/11/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

Userteam: Docket

Falls Church, Virginia 22041

File: A -809 – Aurora, CO

Date:

JUL 11 2019

In re:

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Laura P. Lunn, Esquire

ON BEHALF OF DHS: Joshua I. Marrone
Assistant Chief Counsel

APPLICATION: Custody redetermination

In a decision dated February 7, 2019, an Immigration Judge denied the respondent's request for a change in his custody status. The reasons for the Immigration Judge's decision are set forth in a bond memorandum prepared on March 8, 2019. The respondent, a native and citizen of Mexico, has appealed from this decision. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2018). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Department of Homeland Security took the respondent into detention and concluded, on July 18, 2018, that he should be detained without bond (IJ at 1; Notice of Custody Determination (Form I-286)). On September 25, 2018, the Immigration Judge concluded that the respondent is not competent to represent himself in removal proceedings (IJ at 1). Pursuant to the Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions, he was provided with a qualified representative (IJ at 1). On January 29, 2019, the respondent, through his qualified representative, filed a motion for a redetermination of his custody status.

We agree with the Immigration Judge that the respondent is subject to mandatory detention pursuant to section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c)(1) (2012), and he lacked jurisdiction to consider the respondent's custody redetermination request for the reasons outlined in the Immigration Judge's decision (IJ at 2-5). We recognize that, under EOIR's Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Alien with Serious Mental Disorder or Conditions, unrepresented detained aliens who were initially identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and who have been held in detention for 6 months or longer must be afforded a qualified representative and a bond hearing, which was done in this case (Respondent's Br. at 17-18). Nonetheless, we remain bound by the governing regulations relating to custody

redetermination requests, which we are bound to follow. *See Matter of L-M-P-*, 27 I&N Dec. 265, 267 (BIA 2018) (affirming that neither the Immigration Judges nor the Board may “disregard the regulations, which have the force and effect of law”).

Under the regulations, neither an Immigration Judge, nor the Board “may . . . redetermine conditions of custody” for aliens who are “subject to section 236(c)(1) of the Act.” 8 C.F.R. § 1003.19(h)(2)(i)(D). Because both the Immigration Judge and this Board lack jurisdiction to redetermine the respondent’s custody, we will affirm the Immigration Judge’s decision to deny the respondent’s request for bond for lack of jurisdiction (IJ at 2-5).¹ Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



FOR THE BOARD

¹ In light of this disposition, we need not address additional issues.

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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NEW YORK - FEDERAL PLAZA IMMIGRATION COURT**

Respondent Name:

[REDACTED]

A-Number:

[REDACTED]

To:

Dalsimer, Sophie Star
156 Pierrepont Street
Brooklyn, NY 11201

Riders:

In Withholding Only Proceedings
Initiated by the Department of Homeland Security

Date:

02/13/2023

ORDER OF THE IMMIGRATION JUDGE

Respondent The Department of Homeland Security has filed the following motion in these proceedings:

Motion to Administratively Close Proceedings.

After considering the facts and circumstances, the motion is granted denied for the following reason(s):

Counsel filed the Motion to Administratively Close given the Respondent's current inability to effectively communicate and prepare with his attorney. Administrative closure is a discretionary determination within the province of the IJ. 8 C.F.R. § 1003.29. “[A]n [IJ] or the Board has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances.” Matter of Avetisyan, 25 I&N Dec. 688, 690 (BIA 2012). An IJ may consider, but is not limited to, the following factors:

(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the [r]espondent will succeed on any petition, application, or other action he or she is pursuing outside of the removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings . . .) when the case is recalendared before the [IJ] . . . Id. at 696.

In M-A-M-, the Court found that administrative closure may be an appropriate remedy in instances where a respondent is found incompetent and there are insufficient safeguards available to protect him. 25 I&N Dec. 474, 483 (BIA 2011). Here, an Immigration Judge previously found that the Respondent was incompetent and ordered a Qualified Representative for him. The record reflects that the

Respondent has been diagnosed with an intellectual disability/unspecified neurocognitive disorder and a delusional disorder. At this point in time, the Respondent's diagnosis and related symptoms render him unable to continue proceedings. Respondent's counsel further contends that it is impossible to implement adequate safeguards to protect respondent's due process rights at this time.

The Board has indicated that administrative closure may be appropriate in cases where "concerns [] remain" even though "the parties have undertaken their best efforts to ensure appropriate safeguards." M-A-M-, 25 I&N Dec. at 483. Although the presence of "an action or event that is certain to occur" is an important factor in determining whether administrative closure is appropriate, it is one of many factors and not dispositive. See Avetisyan, 25 I&N Dec. at 696. Mental competency varies over time and "is not a static condition." M-A-M-, 25 I&N Dec. at 480. Here, the court finds that respondent is presently unable to meaningfully participate in proceedings. The Respondent was recently admitted to [REDACTED] Hospital and hospitalized for three weeks after expressing passive suicidal ideations. His current mental health condition has not allowed counsel to work with him and there are no safeguards appropriate that would allow the hearing to go forward as scheduled on 2/15/23.



Immigration Judge: Thompson Jr., Donald 02/13/2023

Appeal: Department of Homeland Security: waived reserved
Respondent: waived reserved

Appeal Due: 03/13/2023

Certificate of Service

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Respondent Name : [REDACTED] | A-Number : [REDACTED]

Riders:

Date: 02/13/2023 By: Thompson Jr., Donald , Immigration Judge



U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
VARICK STREET IMMIGRATION COURT

In the Matter of

Respondent

In Removal Proceedings

File No.: A#

**RESPONDENT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
TERMINATION OR OTHER APPROPRIATE RELIEF PURSUANT TO *MATTER OF
M-A-M-*, 25 I&N DEC. 474 (BIA 2011) AND *MATTER OF E-S-I-*, 26 I&N DEC. 136 (BIA
2013)**

INTRODUCTION

Respondent () is a -year-old resident of who came to this country. suffers from Intellectual Disability, Moderate, *see* Dr. Cort Psychological Evaluation (hereinafter “Cort Eval.”), and has “significantly impaired cognitive functioning.” *Id.* is not competent to proceed due to his cognitive limitations and is unable to assist himself or his attorney in his defense. *Id.* Additionally, was found not competent to proceed in his criminal case by two doctors pursuant to N.Y. Crim. Proc. L. § 730. *See* Letter from Colleen King, Esq. Consequently, this Court must terminate proceedings given the circumstances of this case. *See generally Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (providing for safeguards for mentally incompetent respondents).

FACTS AND PROCEDURAL HISTORY

is a -year-old resident of who, prior to his detention, lived with his who was his primary caretaker. *See* Cort Eval. suffers from epilepsy which he has had since childhood and for which he requires daily medication. *Id.* was arrested by the Department of Homeland Security on or about He was served with a Notice to

Appear, which he refused to sign.

On July 7, 2018, Dr. Cort conducted a psychological evaluation in connection with the instant proceedings before the Court. *See* Cort Eval. Dr. Cort explained that [REDACTED] has “difficulty verbally articulating his thoughts/feelings” and that he “also had difficulty with recall of exact dates/time periods of events.” *Id.* at 2. Dr. Cort, prior to the examination, noted that an officer at the [REDACTED] Correctional Facility had concerns about [REDACTED]’s “ability to appropriately dress himself” as [REDACTED] was about to attend his evaluation with Dr. Cort while wearing shoes that were too large that would cause him to “trip and fall.” *Id.* [REDACTED] was confused throughout the evaluation and “could not explain the term ‘visa,’ nor could he recall when he received his visa.” *Id.* at 3. Additionally, “when asked to elaborate on the term ‘warrant,’ [REDACTED] stated that he couldn’t explain.” *Id.* [REDACTED] also could not tell Dr. Cort if any of his attorneys “were representing him on his immigration case and he was unaware of how he could assist them.” *Id.* Dr. Cort determined that [REDACTED]’s “insight and judgment impressed as poor, and impulse control impressed as limited.” *Id.* at 4.

When interviewing [REDACTED] to determine [REDACTED]’s adaptive functioning, Dr. Cort reported that she learned that [REDACTED] “was not able to think and make decisions on his own” and that although [REDACTED] could take a shower, “he often stood in the shower and let the water run over him, until she reminded him to use soap.” *Id.* at 5. Additionally, [REDACTED] explained that [REDACTED] “often forgot to take” his daily seizure medication “although he told [his [REDACTED]] he did.” *Id.* [REDACTED] also explained that [REDACTED] is “unable to initiate any conversation on his own and generally repeats phrases that he hears other people speak, but he does not know the meaning behind the words.” *Id.* Dr. Cort found that [REDACTED]’s “overall adaptive functioning was assessed as ‘low,’ indicating significant impairment also.” *Id.* at 6. She explained that [REDACTED] has “decreased

intellectual functioning which manifests as very simplistic and concrete thinking, as well as an extreme difficulty and limited ability to learn new tasks.” *Id.*

As a result of the evaluation, Dr. Cort determined that [REDACTED] is “not competent.” *Id.* at 6. Specifically, she found that [REDACTED], when asked to explain the legal proceedings, “was simply reciting words and phrases he had previously heard but did not understand, as he was unable to elaborate further when asked by the examiner.” *Id.* [REDACTED] is “unable to demonstrate understanding of the collaborative nature of the attorney/client relationship.” *Id.* Additionally, she explained that [REDACTED] “is not able to demonstrate a rational and factual understanding of the nature and object of his current legal proceedings, he is not capable of appropriately consulting with an attorney or representative if there is one, nor is he able to examine and present evidence and cross-examine witnesses.” *Id.* Dr. Cort further explained that [REDACTED] “will never have the mental capacity to be able to cooperate with his counsel to assist with his legal proceedings” and that he “will always need ongoing assistance and support on a daily basis to complete conceptual and practical tasks of daily living.” *Id.* at 6-7.

On [REDACTED], [REDACTED] was evaluated by two doctors in connection with his open criminal case in [REDACTED]. On [REDACTED], the doctors determined that [REDACTED] was unfit to proceed in his criminal case pursuant to Criminal Procedure Law (“CPL”) § 730. *See* Letter from Colleen King, Esq [REDACTED] was therefore deemed to “lack[] capacity to understand the proceedings against him or to assist in his own defense.” *See* CPL § 730.10(1).

STATEMENT OF THE ISSUES

[REDACTED] has a chronic cognitive impairment, which results in him being unable to properly dress or bathe himself. *See* Cort Eval. On [REDACTED] was deemed unfit to proceed in his criminal case pursuant to CPL § 730 because of his cognitive disability.

1. Whether [REDACTED] is competent to undergo removal proceedings, given his inability to understand the nature of the proceedings or assist his counsel.
2. Given his lack of mental competency, and the lack of any safeguards that would create a fundamentally fair proceeding, whether the instant proceedings should be terminated.
3. If proceedings continue, whether service in this case was improper, due to the fact that the Department was on notice of respondent's mental health issues, and yet failed to serve a person with whom the respondent resides and a relative, guardian, or a person similarly close to the respondent.

LEGAL STANDARDS

Pursuant to *Matter of M-A-M-*,

“the test for determining whether an alien is competent to participate in immigration proceedings 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.”

25 I&N Dec. at 479. If a respondent is found incompetent under this framework, then “Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.” *Id.* at 481-82. However, in some cases “concerns may remain” despite the implementation of safeguards. *Id.* at 483. Again, *M-A-M-*, provides a non-exhaustive list of remedies for such circumstances, including “alternatives” such as administrative closure of the case. *Id.* However, as the BIA noted in *M-A-M-*, “The [INA’s] invocation of safeguards presumes that proceedings can go forward, even where the alien is incompetent, *provided the proceeding is conducted fairly.*” 25 I&N Dec. at 477 (emphasis added).

The regulations and BIA case law provide for additional safeguards for mentally incompetent respondents. In cases where indicia of incompetency are manifest, the Department should serve three separate individuals:

“(1) a person with whom the respondent resides, who, when the respondent is detained in a penal or mental institution, will be someone in a position of demonstrated authority in the institution or his or her delegate and, when the respondent is not detained, will be a responsible party in the household, if available; (2) whenever applicable or possible, a relative, guardian, or person similarly close to the respondent; and (3) in most cases, the respondent.”

Matter of E-S-I-, 26 I&N Dec. at 145; *see also* 8 C.F.R. §§ 103.8(c)(2)(i) and (ii). The need for these additional steps in service is not obviated by service on counsel. *Id.* at 143. Such steps should be taken at the outset, particularly if DHS is on notice that “the respondent’s case involved potential mental competency issues.” *Matter of E-S-I-*, 26 I&N Dec. at 144.

ARGUMENT

I. This Case Should Be Terminated Because ██████ is Incompetent, He is Incapable of Assisting Himself or His Attorney in Preparing His Defense and No Other Remedy Would Adequately Safeguard His Rights.

The evidence before the Court demonstrates that ██████ suffers from Intellectual Disability, Moderate. *See* Cort Eval. Regarding his fitness to proceed, Dr. Cort reports that ██████ cognitive limitations are chronic and that because of his diagnoses, ██████ “will never have the mental capacity to be able to cooperate with his counsel to assist with his legal proceedings.” *Id.* Based on the foregoing, the Court should find that the evidence supports a finding of incompetency. *Matter of M-A-M-*, 25 I&N Dec. at 480 (discussing indicia of incompetency).

Due to the severity of ██████’s condition and the fact that his condition is chronic, the undersigned respectfully submits that the appropriate remedy in this case is termination. *See id.* at 481-83 (discussing implementation of safeguards upon finding of incompetency); INA § 240(b)(3). While case law and regulations anticipate that removal proceedings can go forward against incompetent respondents, *see Nee Hao Wong v. INS*, 550 F.2d 521 (9th Cir. 1977), it is well-established that the Fifth Amendment nevertheless entitles noncitizens to due process in

removal proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (S.Ct. 1993). This includes the right to present evidence on one's own behalf. INA § 240(b)(4)(B). However, ██████'s acute symptoms render him incapable of assisting himself or his attorney in preparing his defense and providing reliable evidence, in violation of his due process and statutory rights. For example, his potential applications for relief (Form I-589, for asylum, withholding and protection under the Convention against torture), require ██████ to affirm the veracity of the information he provides, and subjects the undersigned to potential civil penalties if untruthful information is provided. *See* Form I-589 at 10. His ability to provide accurate responses to a range of important questions will be compromised by his cognitive disorder. *See* Cort Eval. at 3 ("The examiner then asked the reason(s) a warrant was issued, ██████ stated that he "over stood his visa," but when asked to elaborate, he stated that he was unable to do so, and he also could not explain the term "visa," nor could he recall when he received his visa..").

Finally, continuation of proceedings under the present circumstances may inevitably result in breaches of the undersigned's professional responsibilities. *See, e.g.*, N.Y. R. Prof. Cond. 1.2(a) (providing that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued"); *see also* American Bar Association, "Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices," (July 2015).

Consequently, the appropriate remedy is termination.¹ *See* 8 C.F.R. 1240.12(c) ("The

¹ As ██████'s condition is chronic and as he "will never have the mental capacity to be able to cooperate with his counsel to assist with his legal proceedings," the undersigned respectfully submits that administrative closure would be an inadequate legal remedy. *See Matter of Avetisyan*, 25 I&N Dec. 688, 696 (BIA 2012) (providing that administrative closure is inappropriate when based on a "purely speculative" event). Additionally, *Avetisyan* was recently overturned so administrative closure is no longer an option in this case. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).

order of the immigration judge shall direct the respondent's removal from the United States, *or the termination of the proceedings*, or other such disposition of the case as may be appropriate.” (emphasis added)).

II. If the Court Continues Proceedings, the Department has Nevertheless Failed to Demonstrate Proper Service Under the Law Applicable to Mentally Incompetent Respondents.

Should the Court continue proceedings, the Department has failed to provide proof of proper service under the applicable regulations and case law, and can therefore also terminate on this basis. *See Matter of E-S-I-*, 26 I&N Dec. at 145; *see also* 8 C.F.R. §§ 103.8(c)(2)(i) and (ii) (service on incompetent respondents). As noted above, the law requires the Department to separately serve “a person with whom the respondent resides” and “a relative, guardian, or person similarly close to the respondent,” in addition to the respondent. *Matter of E-S-I-*, 26 I&N Dec. at 145. As these are safeguards to protect the rights of mentally incompetent respondents, these requirements are not obviated by the presence of counsel. *Id.* at 143. While the BIA, in *Matter of E-S-I-*, provided that the Department is entitled to a reasonable continuance to effectuate proper service in cases involving mentally incompetent respondents, such a continuance would be unreasonable where, as here, the Department has been on notice of potential incompetency issues. ██████ was detained by the Department on ██████. On that date, ██████ called the Deportation Officer and told him that ██████ has epilepsy and severely impaired cognitive functioning. Additionally, ██████’s counsel raised competency concerns beginning at the first Master Calendar Hearing on ██████ and the Court scheduled a competency hearing for ██████. Therefore, the Department has yet to effectuate proper service in this case and the proceedings cannot move forward. *See* INA § 239(a) (proceedings are initiated by DHS by service of notice to appear).

CONCLUSION

For the foregoing reasons, the undersigned respectfully requests that the Court declare [REDACTED] incompetent to face proceedings, and to issue an Order terminating proceedings. These proceedings cannot in any event move forward because the Department has yet to effectuate proper service in light of the Respondent's cognitive disabilities and evidence indicating that DHS should have been on notice of mental incompetency issues.

Dated: August 1, 2018

Respectfully Submitted,

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NON-DETAINED

Appointed Qualified Representative for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

In the Matter of:

A 00000000000

Respondent,

Hearing Date: June 4, 2020
Hearing Time: 1:00p.m.
Hearing Type: Master Calendar Hearing
Judge: Shadee M. Star

In Removal Proceedings.

RESPONDENT'S MOTION TO RECONSIDER

Respondent, Mr. X, through undersigned appointed counsel, respectfully moves this Court to reconsider its December 20, 2019 decision denying Mr. X's motion to terminate removal proceedings due to the factual and legal errors in the Court's prior decision. Contrary to this Court's prior determination that the record evidence does not demonstrate that DHS knew of Mr. X's mental health issues prior to issuance of the NTA, the record evidence in fact establishes that DHS was aware of Mr. X's mental health issues prior to the issuance and filing of the NTA and should have served Mr. X consistent with the requirements in *Matter of E-S-I*.

I. FACTS AND PROCEDURAL HISTORY

The Department of Homeland Security ("DHS") initiated proceedings in this case by filing a putative Notice to Appear ("NTA") with the Court on February 18, 2016. *See* Respondent's Motion to Terminate Under *Matter of E-S-I*- Tab A. The NTA does not contain a location, date or time for the hearing. Instead, the space for the "Complete Address of Immigration Court, including Room Number, if any" states "TO BE SET." *Id* at 1. The date and the time of the hearing is also listed as "To be set." *Id*. The putative NTA indicates that it was served on Mr. X in person on February 12, 2016. *Id*. at 2. The putative NTA shows that at the time the document was issued on February 12, 2016, Mr. XXX was "residing at: IN ICE CUSTODY." *Id*. at 1. No other individual was served.

Mr. XXX entered DHS custody from his prior facility with an ongoing prescription for antipsychotic medication, Risperdal.¹ *See* Respondent's Motion to Terminate Under *Matter of E-S-I*- Tab D, page 19. Medical staff at the DHS detention facility explicitly noted the prescription for Risperdal on February 14, 2016, four days before DHS filed the putative NTA with the immigration court. *See* Respondent's Motion to Terminate Under *Matter of E-S-I*- Tab D, page

¹ *See* <https://www.webmd.com/drugs/2/drug-9846/risperdal-oral/details>.

19. Three days before DHS filed the putative NTA with the immigration court, on February 15, 2016, medical staff at the detention facility referred Mr. XXX to “MH² regarding his psych meds.” *See id.* at 18. On that same day, Mr. XXX asked for “meds for depression” and he was prescribed Risperidone³, an anti-psychotic medication. *Id.* The day before DHS filed the putative NTA with the immigration court, on February 17, 2016, Mr. XX reported depressive symptoms to the detention facility medical staff. *See id.* at 15. That same day, the detention facility informed ICE of Mr. XXX’s symptoms and referred him to mental health staff. *Id.* at page 17.

On February 18, 2016, DHS filed the putative NTA with the immigration court and subsequently served Mr. XXXX, but did not effectuate service consistent with *Matter of E-S-I-*. On March 4, 2016, this Court served Mr. XX with notice of his first hearing and again did not effectuate service consistent with *Matter of E-S-I-* despite knowledge of Mr. XXX’s mental health issues. *See* Respondent’s Motion to Terminate Under *Matter of E-S-I-* Tab B (Notice of Hearing in Removal Proceedings, dated March 4, 2016). The hearing notice is the first document issued that contains any information regarding the time, date and place of the hearing, because the putative NTA lacked that information. The certificate of service states that the notice was served by mail to DHS and to Mr. XXX, listing an address of 630 Sansome Street, 6th Floor, San Francisco, CA for Mr. XXX. *Id.* No other individual was served.

That DHS had notice of Mr. XXX’s mental health issues at the time that DHS served the notice of hearing is indisputable. Two days prior to service of the hearing notice, on [DATE], DHS submitted documents concerning Mr. XXXX’s mental health status pursuant to *Franco-*

² Although not specified, the most reasonable interpretation of the abbreviation “MH” in this context is “mental health”.

³ Risperidone is a generic version of the anti-psychotic drug Risperdal. *See* <https://www.webmd.com/drugs/2/drug-9846/risperdal-oral/details>

Gonzalez. See Respondent’s Motion to Terminate Under *Matter of E-S-I*- Tab C. The documents include a signed statement from a licensed clinical social worker that Mr. XXXX has “a severe medical condition(s) (e.g., traumatic brain injury or dementia that is significantly impairing mental function.” *Id.* at 7. The documents also include a mental health assessment of Mr. XXX which revealed that “he has been hearing voices for sometimes[sic]” and “reports SI⁴” and “previous SI attempts”. *Id.* at 8. The medical staff further noted that Mr. XXX has had a Traumatic Brain Injury and that medications do not “fully help” with his mental health symptoms. *Id.* at 9. The medical staff also noted that when he hears voices he does not know what to do and that he has visual hallucinations as well, including one where he saw a neighbor walking on electric wires. *Id.* The mental health assessment and the licensed social worker’s statement are both dated February 22, 2016, four days after the putative NTA was filed with the court and 14 days before the hearing notice containing the time, place and date information was issued. On March 2, 2016, medical staff at the facility where Mr. XXX was being held further noted that he had been diagnosed with psychotic disorder due to traumatic brain injury as well as post-traumatic stress disorder. See Respondent’s Motion to Terminate Under *Matter of E-S-I*- Tab D, page 13.

Moreover, the hearing notice clearly indicates that the future hearing at issue was a “(JCI) IN PERSON HEARING”, a judicial competency inquiry to assess Mr. XXX’s competency to proceed unrepresented in his removal proceedings pursuant to *Franco Gonzalez*. *Id.* DHS was consequently clearly on notice of Mr. X’s mental health issues at the time the hearing notice was created.

⁴ Although not specified, the most reasonable interpretation of this abbreviation in context is “suicidal ideation”.

On November 22, 2019, Mr. XXX moved to terminate these proceedings under *Matter of E-S-I*, 26 I&N Dec. 136, 140 (BIA 2013). Mr. X's motion argued that jurisdiction never vested because the putative NTA, which was not served on the jail custodian as required by *Matter of E-S-I*, lacked time, date and place information and the two-step notice process set forth in *Matter of Bermudez Cota* 27 I&N Dec 441 (BIA 2018) is fundamentally irreconcilable with *Pereira v. Sessions*, 138 S. Ct 2105 (2018). Mr. XX argued in the alternative that, even if this Court were to find the two-step notice process to be valid, these proceedings must be terminated because the second step was never completed. The hearing notice containing time, place and date information was not served on anyone other than Mr. XXX, as required by *Matter of E-S-I*.

In an order dated December 20, 2019, this Court found that Mr. XX did not establish that DHS knew of his mental health issues at the time it issued and served the NTA. *See* Record of Proceedings ("ROP"). Mr. XXX now respectfully requests reconsideration of that decision, because it was based on factual and legal error.

II. ARGUMENT

A motion to reconsider seeks a new determination based on alleged errors of fact or law. *Doissaint v. Mukasey*, 538 F.3d 1167, 1170 (9th Cir. 2008). A motion to reconsider may be granted if it "specif[ies] the errors of fact or law in the Immigration Judge's prior decision and [is] supported by pertinent authority." 8 C.F.R. § 1003.23(b)(2). Here, the Court erred by concluding that DHS was not on notice of Mr. X's mental health issues at the time it issued and served the putative NTA when the record evidence establishes that Mr. X had an ongoing prescription for anti-psychotic medication at the time he entered DHS custody from his prior facility and had demonstrated depressive symptoms and the need for anti-depressant medication.

Additionally, the Court misapplied the law because DHS was clearly on notice of Mr. X's mental health issues at the time of the issuance of the hearing notice.

- A. The Court Erred by Concluding that the Evidence Did Not Establish that DHS Was on Notice of Mr. X's Mental Health Issues Upon Its Issuance and Filing of Mr. X's NTA.

Matter of E-S-I- requires that for cases involving a detained respondent showing indicia of incompetency, DHS must serve the charging document on the person in charge of the institution where the respondent is confined. 26 I&N Dec. 136, 139 (BIA 2013). The respondent in *E-S-I-* was transferred to DHS custody from a psychiatric hospital, so there was no question in that case that DHS was on notice of his mental health issues. *Id.* at 145. However, the BIA specifically addressed this issue, noting that even if a respondent is not transferred directly from a psychiatric hospital as the respondent in *E-S-I-* was, DHS frequently becomes aware of potential mental health issues for respondents in its custody because it must screen, diagnose and treat detainees with mental illness. *Id.* at 144.

Contrary to the Court's conclusion, DHS was aware of Mr. X's mental health issues at the time he was taken into custody. Mr. X had an ongoing prescription for antipsychotic medication from his prior facility when he entered DHS custody. DHS became further aware of Mr. X's mental health issues through its screening, diagnosis and treatment procedures prior to its issuance and filing of the NTA. In the time between when DHS issued the putative NTA on February 12, 2016 and filed it with the Court on February 18, 2016, detention facility medical staff referred Mr. X to mental health regarding his psychiatric medication, Mr. X was prescribed antipsychotic medication, he explicitly asked for anti-depressant medication and reported depressive symptoms, and detention facility medical staff informed ICE of Mr. X's symptoms.

[CITE]

Because DHS had knowledge of Mr. XX's mental health conditions prior to its issuance and filing of the NTA, DHS was required to properly serve the NTA on the person in charge of the facility. *Matter of E-S-I-* was clear that while DHS is not making the ultimate decision as to whether a respondent lacks competency (that will be made by the Court during proceedings), but in any case where DHS is aware of indicia of incompetency at the time it serves the NTA, it should handle it as a case of mental incompetency and serve the person in charge of the detention facility. 26 I&N Dec 136, 144. The Board directed DHS to be overly inclusive in order to ensure proper service, finding that "in nearly all cases the prudent course of action will be for the DHS to serve the respondent along with the head of the institution". *Id.* at 140.

Matter of E-S-I- also made clear that where a respondent has a "known history of mental illness," DHS is required to effectuate service consistent with *Matter of E-S-I-*. Here, Mr. X entered DHS custody is an ongoing prescription for antipsychotic medication from his prior facility and DHS' screening, diagnosis and treatment protocols immediately determined and responded to Mr. X's mental health needs. Consequently, DHS was on notice of Mr. X's mental health condition and was required to meet *E-S-I-*'s service requirements when issuing and serving the NTA.

In instead finding that DHS was unaware of Mr. X's mental health issues at the time it issued and served the NTA, this Court made a clear error of fact that should be corrected by granting this motion for reconsideration and terminating proceedings.

B. The Court Erred By Concluding that Mr. X's Notice of Hearing Was Properly Served.

Even if this Court finds no error in its factual determination that DHS was not aware of Mr. X's mental health issues at the time it issued and served the NTA, this motion to reconsider should be granted because of this Court's legal error. In his Motion to Terminate under *E-S-I-*,

Mr. X made two distinct arguments. First, he argued that his proceedings should be terminated because the putative NTA did not contain time, place or date information. *See* Respondent’s Motion to Terminate Under *E-S-I-* p. 3-6. In making that argument, Mr. X maintained that *Matter of Bermudez Cota*, 27 I&N Dec 441 (BIA 2018) and *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) were wrongly decided and the two-step notice process, whereby the information lacking in a notice to appear can be provided in a subsequent notice of hearing, is legally invalid under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

Second, and more relevant here, Mr. X argued in the alternative that even if the two-step notice process is legally valid and the phrase “charging document” can properly refer to both the NTA and the subsequently issued notice of hearing, jurisdiction never vested in his case because the notice of hearing was not properly served under *Matter of E-S-I-*. Since Mr. X’s NTA lacked time, date and place information, as required by the statute and regulations to vest jurisdiction, the “second step” of the notice of hearing containing that information is legally necessary for jurisdiction to vest. *Matter of Bermudez Cota*, 27 I&N Dec. at 447. This notice of hearing, however, must be properly served to take legal effect. *Id.* Here, there is no question that DHS was fully aware of Mr. X’s mental health condition when the notice of hearing was served where DHS had filed a notice of Mr. X’s *Franco Gonzalez* class membership and requested for the hearing in question a judicial competency inquiry. However, the notice of hearing was served only on Mr. X and thus violated *Matter of E-S-I-*. This Court erred in failing to conclude that service of the notice of hearing was improper under *Matter of E-S-I-* and consequently that jurisdiction never vested in these proceedings.

III. CONCLUSION

For the reasons outlined above, Mr. X respectfully requests that the Motion to Reconsider be GRANTED and these proceedings be terminated.

Dated: January 17, 2020

Respectfully submitted,

Laura Polstein
Qualified Representative

**United States Department of Justice
Executive Office for Immigration Review
Immigration Court
San Francisco, California**

In the Matter of: **XXXX**

A000000000

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of **Respondent's Motion to Reconsider**, it is HEREBY ORDERED that the Motion be () GRANTED () DENIED because:

- () DHS does not oppose the motion
- () The respondent does not oppose the motion
- () A response to the motion has not been filed with the court
- () Good cause has been established for the motion
- () The court agrees with the reasons stated in the opposition to the motion
- () The motion is untimely per _____.
- () Other: _____.

Deadlines:

- () The application(s) for relief must be filed by _____.
- () The respondent must comply with DHS biometrics instructions by _____.

Date

Immigration Judge Star

Certificate of Service

This document was served by: [] Mail [] Personal Service

To: [] Alien [] Alien c/o Custodial Officer [] Alien's Atty/Rep [] DHS

Date: _____

By: Court Staff _____

PROOF OF SERVICE

I, Laura Polstein, am over the age of 18 and not a party to this matter, hereby certify that I caused to be served a copy of the foregoing **Respondent's Motion to Reconsider** to ICE/DHS Office of the District Counsel, located at 100 Montgomery Street, Suite 200, San Francisco, CA 94104 by electronic service.

Laura Polstein
Managing Attorney
Immigrant Legal Defense
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Date: January 17, 2020

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NON-DETAINED

Appointed Qualified Representative for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

In the Matter of:

XXXXXXXXXXXXXXXXXX

Respondent,

In Removal Proceedings.

A 0000000000

Hearing Date: June 4, 2020
Hearing Time: 1:00p.m.
Hearing Type: Master Calendar Hearing
Judge: Shadee M. Star

**RESPONDENT'S MOTION TO TERMINATE
UNDER *MATTER OF E-S-I-***

Respondent, Mr. X (“Mr. X”), through undersigned appointed counsel, respectfully moves this Court to terminate proceedings for lack of jurisdiction because no proper charging document has been filed with the Court in this case. *See* 8 C.F.R. § 1003.14(a). Under the Supreme Court’s holding in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the putative notice to appear (“NTA”) filed by the Department of Homeland Security (“the Department”) in this case “is not a notice to appear under [INA] section [239(a)]” because it does not contain the date, time or location of a hearing. *Id.* at 2113-14. Mr. X acknowledges the decisions by the Board of Immigration Appeals (“Board”) in *Matter of Bermudez Cota*, 27 I. & N. Dec. 441 (BIA 2018) and the Ninth Circuit in *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), that subsequent service of a hearing notice indicating the date, time and location of a respondent’s hearing is sufficient for jurisdiction to vest with the Court. However, Mr. X maintains that these decisions are fundamentally irreconcilable with the Supreme Court’s decision in *Pereira*, and pursuant to *Pereira*, the Court lacks jurisdiction.

Moreover, even assuming that the two-step notice process set forth in *Bermudez Cota* were valid, the Court nonetheless lacks jurisdiction. Because Mr. X exhibited indicia of incompetency at the time of his detention, the Department was required to comply with the special service requirements set forth in *Matter of E-S-I*, 26 I&N Dec. 136, 140 (BIA 2013). Because it did not do so, service of the putative Notice to Appear and subsequent hearing notice were improper, and did not comply with the two-step notice process set forth in *Bermudez-Cota*. *See Matter of Bermudez-Cota*, 27 I. & N. Dec. at 447 (“a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings . . . , so long as a notice of hearing specifying this information is later sent to the alien”). Accordingly, this Court has no jurisdiction.

I. STATEMENT OF RELEVANT FACTS

The Department of Homeland Security initiated proceedings in this case by filing the putative NTA with the Court on February 18, 2016. *See* Tab A (Putative Notice to Appear). This document does not contain a location, date or time for the hearing. Instead, the space for the “Complete Address of Immigration Court, including Room Number, if any” indicates “TO BE SET.” *Id.* at 1. The date and the time of the hearing is listed as “To be set.” *Id.* The putative NTA indicates that it was served on Mr. X in person on February 12, 2016. *Id.* at 2. No other individual was served. On March 4, 2016, this Court served Mr. X with notice of his first hearing, to be conducted on March 9, 2016 at 1pm. *See* Tab B (Notice of Hearing in Removal Proceedings, dated March 4, 2016). The certificate of service indicates that the notice was served by mail to DHS and to Mr. X, listing an address of 630 Sansome Street, 6th Floor, San Francisco, CA for the Mr. X. *Id.* No other individual was served. The hearing notice indicates that it was a “(JCI) IN PERSON HEARING”, reflecting that a judicial competency inquiry would take place, pursuant to the settlement order in *Franco Gonzalez*. *Id.* On March 2, 2016 and April 5, 2016, the Department submitted documents concerning Mr. X’s mental health status. *See* Tab C (Department of Homeland Security’s Notice of *Franco Gonzalez* Class Membership and Request for Competency Inquiry), Tab D (Department of Homeland Security Updated submission of documents concerning mental health status). This Court subsequently found that Mr. X was mentally incompetent to represent himself and ordered the provision of a qualified representative pursuant to *Franco-Gonzalez v. Holder*, No. 10 Civ. 2211, 2013 WL 3674492, at 19 (C.D. Cal. Apr. 23, 2013). *See* Record of Proceedings (“ROP”).

On July 3, 2019, Mr. X’s prior qualified representative moved to terminate proceedings based solely on the jurisdictional regulation found at 8 C.F.R. §1003.15(b), without citing to the

Board's decision in *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013). *See* ROP. This Court denied that motion on July 26, 2019. *Id.* Following a determination that prior counsel's organization was no longer part of the National Qualified Representative Program, this case was transferred to undersigned appointed counsel. *Id.* Undersigned counsel entered her appearance as qualified representative on September 30, 2019. *Id.*

II. ARGUMENT

A. **As an initial matter, the Court lacks jurisdiction because Mr. X never received a valid charging document under *Pereira*.**

Jurisdiction vests in the immigration court when the Department files a properly executed charging document showing proof of service on the respondent. 8 C.F.R. § 1003.14(a). A Notice to Appear is a type of "charging document" contemplated by the regulations. 8 C.F.R. § 1003.13.

A "Notice to Appear" is a specific type of charging document with a precise definition under the INA. 8 U.S.C. § 1229(a) specifically states, among other things, that a NTA *shall* specify the "time and place at which the proceedings will be held." 8 U.S.C. § 1229(a)(1)(G)(i). In *Pereira v. Sessions*, the Supreme Court held that under the plain text of the INA, "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear under section 1229(a).'" *Pereira v. Sessions*, 138 S. Ct. at 2110. The Court described this conclusion as "clear and unambiguous" based on the statutory text. *Id.* at 2113. In this case, the putative NTA did not inform Mr. X of the date and time of his removal proceedings, as required by 8 U.S.C. § 1229(a)(1)(G)(i). *See* Tab A. Accordingly, under *Pereira*, it was not an NTA as defined under the INA, and jurisdiction cannot vest.

While Mr. X acknowledges that the Board and the Ninth Circuit have already decided this issue, Mr. X respectfully submits that both the Board in *Matter of Bermudez-Cota* and the

Ninth Circuit in *Karingithi* erred as a matter of law. Specifically, Mr. X submits that the plain meaning of the statute and the regulations, coupled with the *Pereira* Court’s interpretation of the plain meaning of the statute and regulations, preclude the Board’s, and ultimately, the Ninth Circuit’s, approval of the two-step notice process. The plain language of the regulations state that “[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service,” 8 C.F.R. § 1003.14, and a “Notice to Appear” is such a charging document. 8 C.F.R. § 1003.13. As the Supreme Court in *Pereira* held, the definition of a NTA is contained in the *statute*, section 239(a) of the Act, 8 U.S.C. § 1229(a), *not the regulations*. *Pereira*, 138 S. Ct. at 2111-14.

The regulations relied on by the Board in *Matter of Bermudez-Cota*, specifically 8 C.F.R. § 1003.15(b) and 8 C.F.R. § 1003.18(b), cannot override the “clear and unambiguous” definition of a NTA that Congress has supplied in section 239(a) of the INA, 8 U.S.C. § 1229(a). *Id.* at 2113. The Court in *Pereira* found that it did not need to resort to *Chevron* deference of the agency’s interpretation of section 239(a) of the Act, 8 U.S.C. § 1229(a), “for Congress has supplied a clear and unambiguous answer” in the statute. *Id.* at 2114. Consequently, the Court expressly rejected any application of defining a NTA through the regulations, in particular, the notice “where practicable” language contained in 8 C.F.R. § 1003.18(b).¹ *Id.* at 2111-14. Accordingly, the Board’s reliance on these regulations is legal error in light of Congress’ “clear and unambiguous” answer to the NTA requirements contained in the statute.

The definition of a NTA under section 239(a) of the Act, 8 U.S.C. § 1229(a), cannot mean one thing under the stop-time rule in *Pereira*, yet mean an entirely different thing for

¹ The Ninth Circuit in *Karingithi* recognized the fact that the Supreme Court “appears to discount the relevance of 8 C.F.R. § 1003.18(b)” in a footnote. *See Karingithi*, 913 F.3d at 1160, n.1. However, the court in *Karingithi* relies on that regulation despite the Supreme Court’s interpretation of it.

jurisdictional purposes, as the Ninth Circuit recently held in *Karingithi*. According to *Karingithi*, “the regulations, not § 1229(a), define when jurisdiction vests” with the immigration courts, and the definition of a NTA under 8 U.S.C. § 1229(a) and *Pereira* “does not govern” the definition of a NTA under the regulations for jurisdictional purposes. *Id.* Yet, this logic defies “common sense,” which reinforced the Court’s conclusion in *Pereira*. 138 S. Ct. at 2110, 2115. If “common sense” compels the conclusion that a “Notice to Appear” must include the date and time of the removal proceedings, *id.*, it is entirely inconsistent to hold that a NTA for jurisdictional purposes does not need to comply with same requirements. *Cf. Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314 (6th Cir. 2018) (“There is also some common-sense discomfort in adopting the position that a single document labeled ‘Notice to Appear’ must comply with a certain set of requirements for some purposes, like triggering the stop-time rule, but with a different set of requirements for others, like vesting jurisdiction with the immigration court.”).

Most importantly, the Court in *Pereira* specifically considered and rejected whether a subsequent hearing notice containing a specific date and time of the removal proceedings, such as the one in this case, could constitute a NTA. Section 239(a)(2) of the Act, 8 U.S.C. § 1229(a)(2), requires “a written notice . . . specifying . . . the new time or place of the proceedings” for any “change or postponement in the time and place” of the removal proceedings. 8 U.S.C. § 1229(a)(2)(i). The Court found that this section “presumes” that the Government has already served a NTA that “specifies a time and place as required by § 1229(a)(1)(G)(i),” strengthening the Court’s interpretation that the statute requires a date and time of the removal proceedings NTA. *Pereira*, 138 S. Ct. at 2114. Finally, any practical considerations raised by the government have already been rejected by the Court as “meritless and do not justify departing from the statute’s clear text.” *Id.* at 2118-19.

Accordingly, Mr. XXXX respectfully submits that the Board’s approval of the “two-step” notice in *Matter of Bermudez-Cota* and the Ninth Circuit’s approval of it in *Karingithi* are legal error, and that both section 239(a) of the Act, 8 U.S.C. § 1229(a), and *Pereira* compel the conclusion that jurisdiction never vested and therefore the proceedings should be terminated.

B. Even assuming the two-step notice process sanctioned in *Bermudez Cota* is valid, in this case, the Department failed to properly serve the putative NTA and subsequent hearing notice, precluding jurisdiction from vesting.

1. The Department failed to properly serve the putative NTA in compliance with the regulations governing mentally incompetent individuals.

Where indicia of incompetency are manifest, the regulations impose special requirements for service of the Notice to Appear and other documents. Where an alien is confined to a penal institution “or any other type of detention facility”, “person of authority in the institution or his delegate must be served, in addition to the respondent.” *Matter of E-S-I*, 26 I. & N. Dec. 136, 140 (BIA 2013) (citing 8 C.F.R. §§ 103.8(c)(2)(i)-(ii)). The term “in charge” describes the head of the institution or, at a minimum, a person of authority in the institution who has jurisdiction over the detention of the respondent.” *Id.* at 139. In addition, for “all individuals lacking mental competency”, “service shall also be made, whenever possible, on the near relative, guardian, committee, or friend.” *Id.* at 142; 8 C.F.R. § 103.8(c)(2)(ii). Where the Department has failed to comply with these requirements, service is not proper. *Matter of Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2006) (terminating proceedings where the Department claimed to have served the minor respondent’s uncle but there was insufficient evidence that the adult in question was, in fact, the respondent’s uncle, and the respondent’s parents were apparently in the United States). When a “detained respondent has a known history of mental illness, the case should be treated as one of “mental incompetency” for purposes of service. *Matter of E-S-I*, 26 I. & N. Dec at 144.

In Mr. XXX's case, because the Department was on notice that he exhibited indicia of incompetency at the time his notice to appear was issued, it was subject to the *Matter of E-S-I* service requirements. The medical records the Department itself submitted to this Court reveal that Mr. XXX suffered from mental health conditions impairing his competency. *See* Tabs C, D. These conditions were apparent shortly after he was booked into Department's custody at the Yuba County Jail. On February 15, 2016, he was prescribed the anti-psychotic drug Risperidone, for which he had held a prescription prior to being detained. *See* Tab D at 17-19. On February 17, 2016, he reported depressive symptoms. *Id.* at 15-16. Thus, at the time the Department filed the putative notice to appear on February 18, 2016, it was on notice that Mr. XXX had "a known history of mental illness" that triggered the *Matter of E-S-I* service requirements. 26 I. & N. Dec at 144 ("where the DHS is aware of indicia of incompetency at the time it serves the notice to appear, the case should be handled as 'a case of mental incompetency,' and the respondent should be served in accordance with 8 C.F.R. §§ 103.8(c)(2)(i) and (ii)," even though no official finding of incompetence has yet been made).

DHS failed to comply with these heightened requirements in serving the putative NTA. The certificate of service on the NTA does not indicate that anyone other than Mr. XXXX was served, despite the fact that it was filed after DHS first became aware of indicia of incompetency.

2. The Department similarly failed to properly serve the hearing notice setting forth the time and date of Mr. XXX's first hearing, precluding the mailing of the hearing notice from curing the jurisdictional defect in the putative NTA.

Under the two-step notice process prescribed in *Bermudez Cota*, a "notice to appear that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the

alien.” 27 I. & N. Dec. at 447. Notice of the initial hearing must be “proper” to cure the failure to include hearing information in the initial “Notice to Appear” document. 27 I. & N. Dec. at 447.

The Notice of the initial hearing was served on Mr. XXX on March 4, 2016. *See* Tab B. At that point, it should have been abundantly clear to DHS that Mr. XXXX had a known history of mental illness, triggering the heightened service requirements. On February 22, 2016, licensed social worker Rocio Rosas determined that he had a severe medical condition that was significantly impairing his mental function. *See* Tab C at 7-9. Ms. Rosas’s notes indicate that Mr. XXXX was suffering from both auditory and visual hallucinations, and had a history of traumatic brain injury. *Id.* On March 2, 2016, Dr. Joan Odom diagnosed him with psychotic disorder due to traumatic brain injury. *See* Tab D at 13. Dr. Odom noted that he had been experiencing auditory hallucinations since 2012. *Id.*

Because Mr. XXXX’s initial hearing notice did not comply with the *Matter of E-S-I* requirements, it was not properly served. The Certificate of Service for Mr. XXX’s initial hearing notice indicates it was mailed to him, courtesy of his custodial officer, but does not indicate service on his custodial officer or any other individual, as required by *Matter of E-S-I*. *See* Tab B. The individual in charge of the Yuba County Jail was not served, nor was any near relative, guardian, committee, or friend. *Matter of E-S-I*, 26 I. & N. Dec at 139-142. Because the regulations clearly impose the special service requirements detailed in *Matter of E-S-I* on hearing notices, service of the notice was not proper. *See* 8 C.F.R. § 103.8 (imposing special requirements on service of “notices, decisions, and other papers (except warrants and subpoenas) in administrative proceedings” before the Department.).

Because the Department therefore did not complete the two-step notice process contemplated by *Bermudez Cota*, it has not met the statutory requirements under INA § 239(a) to commence proceedings with this Court. Accordingly, this Court lacks jurisdiction over these proceedings and must terminate.

III. CONCLUSION

For the foregoing reasons, Mr. XXX respectfully requests this Court terminate these proceedings for lack of jurisdiction.

Dated: November 22, 2019

Respectfully submitted,

Laura Polstein
Qualified Representative

**United States Department of Justice
Executive Office for Immigration Review
Immigration Court
San Francisco, California**

In the Matter of: **XXXXX**

A000000

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of **Respondent's Motion to Terminate Under *Matter of E-S-I-***, it is
HEREBY ORDERED that the Motion be () GRANTED () DENIED because:

- () DHS does not oppose the motion
- () The respondent does not oppose the motion
- () A response to the motion has not been filed with the court
- () Good cause has been established for the motion
- () The court agrees with the reasons stated in the opposition to the motion
- () The motion is untimely per _____.
- () Other: _____.

Deadlines:

- () The application(s) for relief must be filed by _____.
- () The respondent must comply with DHS biometrics instructions by _____.

Date

Immigration Judge Star

Certificate of Service

This document was served by: [] Mail [] Personal Service

To: [] Alien [] Alien c/o Custodial Officer [] Alien's Atty/Rep [] DHS

Date: _____

By: Court Staff _____

**Exhibits in Support of Respondent's Motion to Terminate for Lack of Jurisdiction
XXXXXXXXXX A#00000**

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PROOF OF SERVICE

I, Laura Polstein, am over the age of 18 and not a party to this matter, hereby certify that I caused to be served a copy of the foregoing **Respondent's Motion to Terminate Under *Matter of E-S-I*** to ICE/DHS Office of the District Counsel, located at 100 Montgomery Street, Suite 200, San Francisco, CA 94104 by electronic service.

Laura Polstein
Managing Attorney
Immigrant Legal Defense
1322 Webster Street
Suite 300
Oakland, California 94612

Date: November 22, 2019

J

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NON-DETAINED
****NQRP****

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, COLORADO**

In the matter of:)
)
LAST, First) File No.: XXX-XXX-XXX
)
In Removal Proceedings)
)
)

**RESPONDENT'S MOTION TO WITHDRAW AND TERMINATE
REMOVAL PROCEEDINGS DUE TO
COMPETENCY FINDING**

Immigration Judge: [NAME]

Master Hearing Date: [DATE]

I. INTRODUCTION

Respondent, Mr. MD, through undersigned counsel, moves the Court for leave to withdraw as counsel and simultaneously moves to terminate proceedings. The Executive Office for Immigration Review (“EOIR”) appointed counsel through the National Qualified Representative Program (“NQRP”) Nationwide Policy on behalf of Mr. MD after finding him incompetent to represent himself in his removal proceedings. Although he is no longer detained, his level of competence remains static.

The NQRP Nationwide Policy will not fund legal representation post-detention for individuals covered by the program unless EOIR denies counsel’s motion to withdraw. Therefore, the sole mechanism for continued NQRP protections is afforded by the Court’s denial of this motion.

Should the Court grant Mr. MD’s Motion to Withdraw then it must also grant his request to terminate proceedings to protect his regulatory, statutory, and constitutional rights.

II. FACTUAL & PROCEDURAL HISTORY

On [DATE], the Department of Homeland Security (“DHS”) initiated removal proceedings through service of a Notice to Appear (“NTA”) and detained Mr. MD in [Location]. Mr. MD has a history of mental illness and was diagnosed with [unspecified schizophrenia spectrum and other psychotic disorder, delusional disorder]. After conducting a judicial competency inquiry (“JCI”), the Aurora Immigration Court entered an order finding Mr. MD unable to meaningfully represent in his removal proceedings, and appointed counsel pursuant to the NQRP Nationwide Policy. The Rocky Mountain Immigrant Advocacy Network (“RMIAN”) received the QR appointment for Mr. MD’s case on [DATE].

After contesting removability, on [DATE], the Immigration Judge (“IJ”) terminated Mr. MD’s removal proceedings, finding DHS did not meet its burden on establishing removability. DHS appealed that decision to the Board of Immigration Appeals (“Board”).

Given the Court’s analysis on removability, it found Mr. MD eligible for bond. It granted his release on [DATE]. Thus, Mr. MD is no longer detained and left Colorado to live with his cousin at the following address: **XXXX**. Subsequently, Mr. MD, through counsel, sought funding from EOIR for continued legal representation, seeking an exceptional circumstance exception to the limitation on providing a QR after a Nationwide Policy participant is released from detention. EOIR denied that request on [DATE].

On [DATE], the Board remanded Mr. MD’s case and venue automatically changed to the non-detained docket before the Denver Immigration Court. The Denver Court conducted a master calendar hearing on [DATE], waiving Mr. MD’s presence. At that hearing, undersigned counsel indicated Mr. MD continues to contest removability. However, the Court ordered Mr. MD to file applications for relief, due on [DATE]. MD’s next master calendar hearing is also scheduled for that same date.

In conjunction with this motion Mr. MD files a Motion to Terminate Given DHS’ Failure to Establish Removability.

III. BACKGROUND ON THE NQRP NATIONWIDE POLICY

EOIR created the NQRP Nationwide Policy in 2013 to provide enhanced protections to respondents who have mental illness and/or cognitive impairments that prevent them from representing themselves in their immigration proceedings.¹ Under the NQRP Nationwide Policy, a Qualified Representative’s (“QR”) work is only funded for 90-days after the client is released

¹ U.S. Dep’t of Justice, National Qualified Representative Program (“NQRP”), (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

from immigration detention unless either EOIR grants an exception or an IJ denies the QR's motion to withdraw as counsel.

The NQRP Nationwide Policy affords scant guidance but the NQRP Statement of Work provides:

B. Availability of Contract Funds Upon an NQRP Respondent's Release from DHS Custody 1) Upon an NQRP Respondent's release from DHS custody, Contract funds may be used to provide program services until that NQRP Respondent's covered immigration proceedings reach a final administrative order or determination, or up to 90 calendar days from the date of the NQRP Respondent's release from DHS custody, whichever comes first.

D. Availability of Contract Funds Where Motion to Withdraw Is Denied

1) Nothing in this Statement of Work or the attached Appendix A requires an NQRP Respondent's QR to move to withdraw for any reason.

2) In any case, however, where an NQRP Respondent's QR has chosen to move to withdraw from representation before the Immigration Court or BIA, and that motion is denied on the merits, Contract funds will remain available to provide program services to that NQRP Respondent, regardless of that NQRP Respondent's DHS detention status, unless and until:

a) A motion to withdraw in the same matter is later granted;

b) A motion for substitution of counsel by another legal representative (not provided through this Contract) in the same matter is later granted;

c) The NQRP Respondent's immigration proceedings reach a final administrative order or determination (except as program services are required under Part III.A.1.b, above);

d) Contract services are otherwise completed or terminated.

The NQRP Nationwide Policy, as written, creates an onerous framework where QRs must choose between: (a) Seeking withdrawal from a case after a client is released from detention to avoid not being compensated for future work; (b) Continue representing a client in profound need of legal guidance without compensation; or (c) Attempting to place the case with pro bono counsel, who are

ill-equipped to deal with the complexities presented in NQRP cases. Pathway (a) creates additional administrative hurdles and work for IJs adjudicating cases on a backlogged docket and slows judicial efficiency. Option (b) saddles nonprofit organizations with cases for which they cannot be compensated. Choice (c) creates instability for the respondent; generates significant work for nonprofits to recruit and train pro bono attorneys, who typically are not immigration practitioners, to transfer the case to new counsel; and reduces judicial efficiency.

Until EOIR amends the NQRP Nationwide Policy, the most favorable pathway for all parties is for IJs to deny motions to withdraw filed by QRs to ensure that covered respondents continue to access counsel with specific training in how to provide legal representation to persons protected by the NQRP Nationwide Policy.

IV. ARGUMENT

Noncitizens have the right to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Respondents found incompetent to represent themselves are entitled to additional protections to uphold these rights. INA § 240(b)(3); *Matter of M-J-K-*, 26 I&N Dec. 773, 778 (BIA 2016); *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011). Persons with mental disabilities are entitled to the protections afforded to them under Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794 and its implementing regulations that are binding on EOIR, 28 C.F.R. § 39.130, *et seq.* See, e.g., *Franco-Gonzalez v. Holder*, 2013 WL 3674492, at *6.

There are two possible avenues that would ensure Mr. MD’s rights are protected under the current circumstances: The Court could (1) grant his Motion to Withdraw and simultaneously terminate his removal proceedings; or (2) deny his Motion to Withdraw and proceed with adjudication of Mr. MD’s immigration case while ensuring he continues to access the safeguard/reasonable accommodation of a QR, *i.e.*, undersigned counsel. Granting withdrawal of

Mr. MD's QR without terminating proceedings would strip him of access to a critical safeguard and reasonable accommodation, which would violate his rights in immigration proceedings. *See Matter of M-J-K-*, 26 I&N Dec. at 778 (directing the IJ to explore the safeguard of appointing counsel where the Court terminated proceedings after finding the noncitizen incompetent to represent himself); *Franco-Gonzalez v. Holder*, 2013 WL 3674492, at *6 (finding appointment of a QR an appropriate modification to ensure "individuals who otherwise lack meaningful access to their rights in immigration proceedings as a result of mental incompetency" can participate in the federal program for which they otherwise qualify). Consequently, the Court must either grant this motion in its entirety—both withdrawal and termination—or not at all, explicitly denying the joint motion on both grounds.

There are at least three alternative bases on which the Court may terminate proceedings: (1) based on the Immigration & Nationality Act ("INA"), accompanying regulations, and precedent set forth by the BIA; (2) as a reasonable accommodation pursuant to Section 504; and (3) grounded in Mr. MD's Fifth Amendment due process rights.

A. The INA, Regulations, and BIA Precedent Authorize Termination as an Appropriate Safeguard

The INA affords heightened protections to immigrants whose disability/mental health condition affects competence in removal proceedings. "If it is impracticable by reason of [a noncitizen's] mental incompetency for the [noncitizen] to be present at the proceeding, the Attorney General *shall* prescribe safeguards to protect the rights and privileges of the [noncitizen]." INA § 240(b)(3) (emphasis added). In *Matter of M-A-M-* the BIA provided further clarification, stating "[i]f an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge will evaluate which available measures would result in a fair hearing." 25 I&N Dec. at 478. The NQRP Nationwide Policy

recognizes a QR is the minimum safeguard required to uphold fairness in immigration proceedings and if counsel is stricken, termination is the only viable alternative.

1. Legal Representation is an Essential Safeguard that Serves to Uphold Mr. MD's Statutory Rights Under the INA.

BIA precedent clearly contemplates appointment of counsel as an important safeguard that can ensure respondents' rights are preserved despite their limited capacities to represent themselves in removal proceedings. *Matter of M-A-M-*, 25 I&N Dec. at 478 (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“[A] person is not competent to stand trial if ‘he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.’”). This framework supports Mr. MD's request for termination.

A constellation of caselaw from the Board directs adjudicators to creatively apply safeguards to facilitate respondents' ability to proceed before the immigration court, irrespective of their ability to meaningfully participate in proceedings. *Matter of M-J-K-*, 26 I&N Dec. at 778; *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015); *Matter of E-S-I-*, 26 I&N Dec. 136, 144 (BIA 2013); *Matter of M-A-M-*, 25 I&N Dec. at 478. Dating back to the 1950s, the BIA found that a noncitizen's due process rights were upheld when represented by *an attorney* who introduces evidence, cross-examine witnesses, presented testimony from a doctor regarding the respondent's medical condition, and the respondent appeared to testify intelligently and rationally. *Matter of H-*, 6 I&N Dec. 358 (BIA 1954). Notably, none of the cases providing guidance on the application of safeguards contemplate allowing a respondent with a prior incompetency finding by EOIR to subsequently proceed *pro se* before the Court.

Provision of an attorney is a necessary safeguard to uphold the rights of a respondent deemed to be mentally incompetent. In *Matter of M-J-K-*, the BIA found that the IJ erred when

he terminated removal proceedings without first appointing a QR to explore whether that safeguard was sufficient to uphold the respondent's rights. 26 I&N Dec. at 778. In that case, the BIA opined that:

The participation of counsel increases the likelihood of finding a means to proceed fairly, despite the respondent's refusal to appear in court. For example, counsel might interact with the respondent, communicate with family, caregivers, and witnesses, or take other actions to advance the case. Such actions should include presenting legal arguments regarding removability and eligibility for relief from removal that are not dependent on the ability to communicate with the respondent. Additionally, even without assistance from the respondent, counsel could provide relevant objective documentation, such as background or country conditions evidence, to assist in adjudicating an application for relief.

Id. at 777. Prior to terminating proceedings, the IJ attempted a number of procedural safeguards, “including obtaining mental health evaluations, changing venue to a mental health docket, and granting multiple continuances.” *Id.* at 774. However, the IJ did not appoint counsel as a safeguard to uphold the respondent's statutory and due process rights—the very safeguard Mr. MD both requests and requires.

Mr. MD has a right to competent representation. INA §§ 242, 240(b)(4)(A). The right to counsel includes effective assistance of counsel. *See Hernandez-Gil v. Gonzales*, 476 F.3d 803, 808 (9th Cir. 2007) (“the statutory right to counsel exists so that [a noncitizen] has a *competent* advocate acting on his or her behalf”) (emphasis added); *see also Hernandez v. Mukasey*, 524 F.3d 1014, 1017 (9th Cir. 2008) (“if an individual chooses to retain counsel, his or her due process right includes a right to *competent* representation”) (quotation marks omitted).

Moreover, Mr. MD's mental conditions have not changed since the appointment of counsel and although competency is fluid, it has not been restored. Thus, he is unable to meaningfully represent himself in continued litigation.

Because EOIR previously appointed counsel after a finding of incompetency, forcing Mr. MD to proceed *pro se* would not satisfy his statutory right to adequate safeguards.

2. Should Undersigned Counsel's Motion to Withdraw Be Granted, the Only Appropriate Safeguard Is Termination.

The Court has authority, as an appropriate safeguard, to terminate removal proceedings based on a finding of mental incompetency. *Matter of M-A-M-*, 25 I&N Dec. at 481–82 (providing IJs wide discretion in identifying the types of safeguards to prescribe when a respondent is incompetent); *Matter of M-J-K-*, 26 I&N Dec. at 775 (same). Nothing prohibits an IJ from utilizing this authority to grant termination when the circumstances particular to a given respondent so require. *Matter of M-A-M-*, 25 I&N Dec. at 481–82.

Prior precedent establishes that IJs can order termination as a safeguard. *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 U.S. Dist. LEXIS 186258 (C.D. Cal 2013) (“Among the 14 [Franco plaintiffs] released, one has been granted relief and seven of them have had their removal proceedings terminated.”); Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired [Detained Persons] in Immigration Removal Proceedings*, 39 N.Y.U. Rev. L. & Soc. Change 313, 335–38 (2015) (describing three cases where IJs terminated removal proceedings where respondents were deemed incompetent, including two where respondents were represented by counsel); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 Hastings L.J. 1023, 1051 (2016) (stating based on interviews with immigration practitioners that immigration judges in some jurisdictions “are routinely ordering termination for incompetent respondents that appear before them”). Thus, precedent dictates that termination is appropriate in certain circumstances, which align with those presented in this case.

Moreover, IJs have authority to terminate removal proceedings over opposition from DHS. Regulation specifically states that IJs must exercise “independent judgment and discretion” and can take “any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of cases.” 8 C.F.R. § 1003.10(b). If an IJ needed to defer to the Department’s position regarding the disposition of a case, it would undercut their adjudicatory powers. *Matter of Cruz-Valdez*, 28 I&N Dec. 326, 329 (A.G. 2021) (overruling *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) and applying standard articulated in *Matter of Avetisyian*); *Matter of Avetisyian*, 25 I&N Dec. 688, 694 (BIA 2012); *Matter of Lamus-Pava*, 25 I&N Dec. 61, 64–65 (BIA 2009); *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009).

Unsurprisingly, the regulations support termination in the context of cases where mental competency is implicated. 8 C.F.R. § 1239.2(f), the only regulation addressing termination, does not explicitly endorse it based on mental incompetence, but does not preclude judges from pursuing termination as a safeguard. 8 C.F.R. § 1239.2(f) provides:

An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

If this regulation were interpreted as prohibiting termination based on mental incompetence, it would conflict with the statutory rights to present and examine evidence, cross-examine witnesses, and receive effective assistance of counsel. *See* INA §§ 240(b)(4)(B), 242. “Where an administrative regulation conflicts with the statute, the statute controls.” *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983). Thus, either the regulation must be interpreted as allowing termination based on mental incompetence, or it is *ultra vires* and invalid.

Requiring Mr. MD to defend his lawful permanent residency status without assistance of counsel would violate INA § 240(b)(3). If the Court grants withdrawal of his QR, it should also terminate removal proceedings.

B. Mr. MD Has a Known Disability and Termination Is a Reasonable Accommodation Pursuant to Section 504 of the Rehabilitation Act

Termination of removal proceedings may be the only way to comply with the statutory requirements set forth in Section 504 should the Court grant Mr. MD's Motion to Withdraw. *See Sarah Sherman-Stokes, No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 Vill. L. Rev. 787, 819–22 (2017).

Section 504 prohibits discrimination on the basis of a disability in programs, services, or activities conducted by U.S. federal agencies, including DHS and EOIR. 6 C.F.R. § 15.30(a) (applying to DHS); *accord* 28 C.F.R. § 39.130 (applying to EOIR). The Rehabilitation Act defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities of [the] individual.” 42 U.S.C. § 12102(1). Although “the same substantive standards apply under the Rehabilitation Act and the [Americans with Disabilities Act],” Section 504 applies to federal agencies and does not require exhaustion of administrative remedies. *Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 986 (10th Cir. 2021) (citation omitted).

Under Section 504, “[n]o qualified individual with a disability in the United States, shall, by reason of [their] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ... conducted by any Executive agency.” 29 U.S.C. § 794. Section 504 forbids facial discrimination against individuals with disabilities and requires that executive agencies such as DHS and EOIR alter their policies and practices to prevent discrimination on account of disability. The terms “benefit, programs, and services” are construed broadly. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (“Modern prisons provide [people who are incarcerated] with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’” the people imprisoned).

Section 504 forbids not only facial discrimination against individuals with disabilities, but also requires executive agencies such as DHS and EOIR alter their policies and practices to prevent discrimination on the basis of disability. Reasonable modifications are required unless those modifications would create a “fundamental alteration” of the relevant program, service, activity, or would impose an undue hardship. *See Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288

n.17 (1987); *Alexander v. Choate*, 469 U.S. 287, 300 (1985); *see also* 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

Covered entities have an affirmative obligation under Section 504 to ensure that their benefits, programs, and services are accessible to people with disabilities, including by providing reasonable modifications. *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (“[B]ecause Congress was concerned that ‘[d]iscrimination against [people with disabilities] was ... most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect[,]’ the express prohibitions against disability-based discrimination in Section 504 and Title II include an affirmative obligation to make benefits, services, and programs accessible to disabled people.”) (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)); *id.* at 269 (“[N]othing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.”).

The terms “benefit, programs, and services” are construed broadly. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (“Modern prisons provide [people who are incarcerated] with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could be ‘excluded from participation in.’”). Moreover, public entities must “provide ‘meaningful access’ to their programs and services.” *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007) (citation omitted).

Reasonable accommodations necessary to prevent disability discrimination are required unless such modifications would create a “fundamental alteration” of the relevant program, service, or activity, or would impose an undue hardship. *See Sch. Bd. of Nassau Cty., Fla.*, 480 U.S. at 288 n.17 (modification not required if it would require “a fundamental alteration in the nature of [the] program”) (citation omitted); *Alexander*, 469 U.S. at 300; *see also* 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”).

The requirements of Section 504 apply to the immigration benefits and proceedings that noncitizens may seek under the INA. *See Galvez-Letona v. Kirkpatrick*, 54 F.Supp.2d 1218, 1224–25 (D. Utah 1999), *aff’d on other grounds*, 3 F. App’x 829 (10th Cir. 2001) (holding that INS violated Section 504 when it denied naturalization to an individual who, due to the disability of Down Syndrome, could not meet the attachment and oath requirements of citizenship set out in the naturalization statute); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1053, 1056 (C.D. Cal. 2010) (finding that plaintiffs with disabilities in immigration detention “were not provided with even the most minimal of existing safeguards under [8 C.F.R. §] 1240.4, let alone more robust accommodations required under the Rehabilitation Act,” and ordering the appointment of a “QR” for people in detention with serious mental illness or disability).

Here, Mr. MD seeks to access meaningful “participation in the removal process.” *Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 748 (C.D. Cal. 2020), order clarified, No. EDCV 19-1546 JGB (SHKx), 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020), and rev’d and remanded, 16 F.4th 613 (9th Cir. 2021). It is undisputed that Mr. MD has a “disability” for

purposes of Section 504. *See* 42 U.S.C. §§ 12102(1)–(2); 28 C.F.R. §§ 35.108. He was diagnosed with [unspecified schizophrenia spectrum and other psychotic disorder, delusional disorder]. The Court already determined he is not competent to represent himself in removal proceedings. Thus, the agency is on notice of Mr. MD’s mental disability. *See* 28 C.F.R. § 35.108. (d)(2)(iii)(K).

Mr. MD cannot pursue the benefit sought without an accommodation. Mr. MD proposes two possibilities: (1) Continued appointment of a QR as a necessary safeguard for Mr. MD’s participation in the underlying removal proceedings; or (2) Termination if Mr. MD no longer has access to a QR.

The first accommodation sought is reasonable and would impose no fundamental alteration. *Sch. Bd. of Nassau Cty., Fla.*, 480 U.S. at 288 n.17 (modification not required if it would require “a fundamental alteration in the nature of [the] program”) (citation omitted). From its inception in 2013 through 2020, the NQRP Nationwide Policy provided counsel to over 2,000 people in immigration proceedings. Vera Institute of Justice, *Projects: National QR Program*, <https://www.vera.org/projects/national-qualified-representative-program>. Mr. MD already has a QR appointed to his case and the administrative burden of continuing such representation would be minimal. While the government would accrue additional cost to fund the QR’s salary, it would not create an undue burden.

However, should the first accommodation be denied, Mr. MD’s second proposed accommodation is termination. It is reasonable and does not constitute a fundamental alteration. As demonstrated *supra*, judges in analogous situations terminated proceedings for similarly situated individuals where appropriate. *See Franco-Gonzalez*, 767 F.Supp.2d at 1042, 1048. Further, fewer resources are required because it would cut the cost of further litigation. Finally,

should competency be restored, the Department can refile a NTA to initiate removal proceedings anew.

Therefore, termination is warranted as a reasonable accommodation under Section 504.

C. Pursuing Mr. MD's Removal Without Competent Representation Violates His Fifth Amendment Due Process Rights

The Fifth Amendment entitles noncitizens subject to removal proceedings access to due process of law, which includes the right to counsel. *Reno v. Flores*, 507 U.S. 292, 306 (1993). “Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adheres to individuals that are the subject of removal proceedings.” *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004).

When considering whether termination is appropriate if an individual is no longer represented by a QR, the Court must contemplate the three-part test for procedural due process established by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 219, 222 (1976). The test balances: (1) the importance of the interest at stake; (2) the risk of erroneous deprivation of the interest due to the procedures used and probable value of additional procedural safeguards; and (3) the government's interest. *Id.*

Mathews requires termination should Mr. MD be forced to proceed *pro se*. First, he entered the United States as a young child and has lived in this country for almost his entire life. Mr. MD's entire family resides in the United States, and the former U.S.S.R., the country where he was born, no longer exists. Given Mr. MD is stateless, his case presents novel complexity, which also implicates DHS' ability to effectuate removal.

Further, Mr. MD's disability/mental health condition requires intensive medical care. As a result, the individualized interest at stake is substantial given that it will dictate the longevity of

both his life and liberty. *Second*, EOIR already applied additional procedural safeguards after a finding of incompetency to uphold Mr. MD's rights. However, due to the nature of the NQRP Nationwide Policy, counsel is compelled to withdraw from the present matter, which in turn will create an unjust deprivation of Mr. MD's procedural due process rights. *Third*, the government's interest is two-fold: (1) The Department of Justice does not compensate QRs beyond a 90-day window for released clients who the Court deemed mentally incompetent, likely due to fiscal concerns; and (2) DHS is the government agency charged with prosecuting Mr. MD's removal case, which is one of many pending before the U.S. Immigration Courts. Halting further litigation through termination would be fiscally beneficial to both government agencies. Thus, the government's interest is not particularly compelling in comparison to Mr. MD's given what he is likely to lose should he be stripped of the safeguard/reasonable accommodation of a QR.

If Mr. MD loses the safeguard of a QR, termination is the only remedy available. The Court should either: (1) Ensure that Mr. MD have continued access to a QR; or (2) Grant termination.

V. CONCLUSION

The Court should either grant Respondent's Motion to Withdraw and Terminate Proceedings or deny both motions.

Dated: [DATE]

Respectfully submitted,

/s/ Laura Lunn

Laura Lunn, Esq.

QR for Respondent

ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DENVER IMMIGRATION COURT
1961 STOUT STREET, SUITE 3101
DENVER, CO 80294

In the Matter of: Mr MD, XXX-XXX-XXX

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of **Respondent's Motion to Withdraw as Counsel and Terminate Removal Proceedings Due to Competency Finding**, it is HEREBY ORDERED that the motion be **GRANTED** **DENIED** because:

- DHS does not oppose the motion.
- The Respondent does not oppose the motion.
- A response to the motion has not been filed with the court.
- Good cause has been established for the motion.
- The court agrees with the reasons states in the opposition to the motion.
- The motion is untimely per _____
- Other:

Deadlines:

- The applications(s) for relief must be filed by _____.
- The Respondent must comply with DHS biometrics instructions by _____.

Certificate of Service

This document was served by: Mail Personal Service
To: Noncitizen Noncitizen c/o Custodial Officer Noncitizen's Atty/Rep DHS

Date: _____

By: Court Staff _____

CERTIFICATE OF SERVICE

I, [NAME], hereby certify that on [DATE], I served a true and correct copy of the foregoing MOTION TO WITHDRAW AND TERMINATE REMOVAL PROCEEDINGS on the Department of Homeland Security via ICE e-Service Portal for the Denver Field Office.

Office of the Chief Counsel/ICE-DHS
12445 E. Caley Avenue
Centennial, CO 80111

Dated: [DATE]

/s/ Laura Lunn
Laura Lunn, Esq.
Qualified Representative for Respondent
ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK