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3	UNITED STATES I EXECUTIVE OFFICE IMMIG			
IN THE MATTEI	ROF	) IN REMOVAL PROCEEDINGS		
		) ) FILE NO.:		
Respondent		) ) DATE: _)		
CHARGES:	INA § 237(a)(2)(A)(iii); Convicted of an Aggravated Felony as defined in Section 101(a)(43)(G) of the Act, a crime of theft for which the term of imprisonment imposed is at least one year.			
MOTION:	Termination of Removal Proceedings			
ON BEHALF OF THE RESPONDENT:		ON BEHAI	ON BEHALF OF THE DEPARTMENT:	
		Assistant Ch Department	nief Counsel of Homeland Security	
DEC	CISION AND ORDER	OF THE IMMIGRA	ATION COURT	
I. JURISDIC	FION AND PROCEDU	JRAL HISTORY		
The filing of the NT	pear ("NTA") against th	e above-named respo ngs and vested jurisd	ity ("DHS" or "Department") ondent. iction with this Court. 8 CFR §	
	respondent is not a citize a native and citizen of	n or national of the U	Jnited States;	

- 3. On or about the united by the was admitted to the United States at as a lawful permanent resident;
- 4. On the second second second section of section 487(c) of the second second section 487(c) of the second sec
- 5. He was sentenced to one year and four months of incarceration.

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<sup>&</sup>lt;sup>1</sup> The Department also served the respondent with "Additional Charges of Inadmissibility/Deportability," Form I-261. However, for purposes of this decision, it will be referred to as part of the NTA, unless otherwise noted.

The Department charged the respondent as removable from the United States pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, "in that, at any time after admission, [he was] convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment was at least one year was imposed."

On the custody of the Department. (Form I-286.)

On the court determined that the respondent was unable to understand the rights advisals that were provided to him nor the allegations and charges against him. Thereby, the Court continued the proceedings for the respondent to seek coursel.

On designated designat

On **Construction**, the Court also found that based upon a totality of the circumstances, "the respondent was unable to effectively participate in a coherent matter, to comprehend that nature and consequences of the proceedings, to communicate to the Court, to assert or waive any rights, to seek various forms of relief, and to assist himself." (Order of Immigration Court

examination of the respondent. (*Id.*; Audio Rec.

On during a master calendar hearing, the Department informed the Court that steps had been taken to effectuate a mental competency examination, but the examination had not been completed. (Audio Rec. **1999**)

On **Construction** On **Construction** In a probono capacity, filed a Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court. (Form EOIR-28.)

On contract of the during a master calendar hearing, the Department informed the Court that the respondent's mental evaluation was completed, however, it would not provide the Court with the report at that time. (Audio Rec. **Contract of the Court** instructed it would further investigate whether the report could be released. (*Id.*) The Court instructed the Department to provide the Court and counsel with a copy of the report and any summary of the mental competency examination. (*Id.*)

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On during a master calendar hearing, the Department informed the Court that it would not comply with the Court's Order to provide the report of the mental competency examination to either the Court or respondent's counsel. Counsel for the respondent informed the Court at that time that the respondent would not meet with him or respond to his numerous inquiries for information. (Order of Immigration Court

On **Construction**, the Court ordered that the Department produce the report of the completed mental competency examination under seal, or provide a written explanation regarding the reasons why it would not comply with the Court's order. Counsel for the respondent was instructed to provide to the Court a written account of counsel's efforts to represent the respondent.

On a construction of the Department submitted a statement of position, stating it would not provide a report of the mental health evaluation based upon the Department's policies of disclosure, but that counsel could obtain such evaluation through a request made to the Department of Immigration Health Services. (Department Position Statement, 2 ) On the services of the respondent submitted a written account of efforts to represent the respondent.

# II. STATEMENT OF LAW

"The Supreme Court has recognized that immigration proceedings, while not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process." Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings, 3 Immigration Law Advisor*, No. 4, at 1 (April 2009) (citing Reno v. Flores, 507 U.S. 292, 306 (1993).). An alien in deportation proceedings is entitled to due process in the form of a "full and fair" hearing. See, e.g., Admed v. Gonzales, 398 F.3d 722, 725 (6<sup>th</sup> Cir. 2005). An alien must be given "a reasonable opportunity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government." Admed, 398 F.3d at 725; see also INA § 240(b)(4)(B); 8 C.F.R. § 1240.10(a)(4).

"An incompetent alien is entitled to additional procedural safeguards to help ensure the realization of his due process right to a fundamentally fair hearing." *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1<sup>st</sup> Cir. 2008). "Fundamental fairness means in general terms that the alien must have a meaningful opportunity to present evidence and be heard by an impartial judge." *Id.* 

An immigration judge must provide safeguards to protect the rights and privileges of an alien that is mentally incompetent. See INA § 2401(b)(3); 8 C.F.R. § 1240.4; see also Dusky v. United States, 362 U.S. 402 (1960) (per curiam) (holding that a defendant lacked the requisite mental competency when he or she lacked a rational and factual understanding of the proceedings against him or her.) Section 240(b)(3) of the Act sets forth guidelines for the immigration judge to conduct proceedings for deciding the inadmissibility or deportability of an incompetent alien: "[i]f it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien." The U.S. Court of Appeals for the Ninth Circuit has held

that aliens in deportation proceedings are not entitled to "the full trappings of procedural protections that are accorded criminal defendants. ..." Nee Hao Wong v. INS, 550 F.2d 521, 523 (9<sup>th</sup> Cir. 1977). Thus, proceedings against incompetent respondents can be permitted; however, safeguards must be in place to protect these respondents. (*Id.*)

Under 8 C.F.R. § 1240.4, an attorney, legal representative, legal guardian, near relative, friend or the custodian of the respondent may appear on his or her behalf. "When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien 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). "An agency has the duty to follow its own federal regulations, even when those regulations provide greater protection than is constitutionally required." *Nelson v. INS*, 232 F.3d 258, 262 (1<sup>st</sup> Cir. 2000) (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954)(applying doctrine in the context of immigration).

# III. FINDINGS AND ANALYSIS

## A. Safeguards to Protect the Rights and Privileges of the Respondent

The respondent's mental incompetency has been apparent throughout the course of the proceedings. Although the Court attempted to elicit information to make a determination as to the issues of his matter, the respondent failed to coherently or appropriately answer questions asked of him and exhibited significant symptoms of psychiatric impairment. In response to the Court's questions, the respondent has consistently exhibited illogical speech and evidenced an inability to understand the nature of the proceedings.

The respondent is inadequately represented. While *pro bono* counsel has entered an appearance in this matter, the respondent's mental condition has rendered counsel's representation ineffective and inadequate in these proceedings. Despite numerous attempts, the respondent has repeatedly refused to meet with counsel, has failed to provide counsel with necessary information, and has been unable to understand the nature and purposes of the proceedings as conveyed to him by counsel. (Counsel Affidavit **Counsel**)<sup>2</sup> The respondent's adversity to his representation has achieved the result of rendering counsel's assistance as ineffective.

In that the respondent is opposed to communication with counsel, the Court finds that it may not proceed through counsel without an appreciation of whether the respondent has assented or declined to such representation. See INA § 240(4)(A) (in removal proceedings, "the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien 's choosing.") Moreover, without any understanding of the respondent's mental capacity, the Court cannot assess the respondent's ability to assert or waive important rights, such as his right to counsel. The Court must determine that either the respondent is mentally incompetent

<sup>2</sup> During the proceedings, the respondent also declined representation by the who has submitted an *amicus curiae* memorandum of law.

and is in turn adequately represented, or that he has the capacity to voluntarily, knowingly, and intelligently waive those rights proscribed by the regulations.<sup>3</sup>

## 1. Mental Health Evaluation

Based upon foregoing factors which exhibited the respondent's mental impairment, the Court found sufficient basis to warrant further inquiry as to if the respondent is mentally incompetent, such that, he is not "present" for purposes of the proceedings. INA § 240(b)(3). ("[i]f it is impracticable by reason of an alien's mental incompetency for the alien to *be present* at the proceeding, the Attorney general shall prescribe safeguards to protect the rights and privileges of the alien.") To that end, the Court ordered that the Department conduct a mental competency evaluation of the respondent. The Department conducted and completed the evaluation on an unknown date, and on the Department informed the Court that they obtained the report.

Thereby, the Court ordered that the Department produce and file the referenced mental evaluation to the Court. 8 C.F.R. § 1003.35(b) ([i]n any proceeding before an Immigration Judge, other than under 8 CFR part 335, the Immigration Judge shall have exclusive jurisdiction to issue subpoenas requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both. An Immigration Judge may issue a subpoena upon his or her own volition."); see also 8 C.F.R. § 1003.36 ("[t]he Immigration Court shall create and control the Record of Proceeding."). Nevertheless, the Department failed to provide the Court or the respondent with the report. The Department stated that:

[t]he policy of the Department is not to provide these evaluations. The concern is that the Department does not wish to be responsible for the sensitive material that be released as a result of such disclosure.<sup>4</sup> The Department did explain that the respondent, who is

While the Department did not make such a request here, the Court nevertheless directed in its order that such information be submitted to the Court under seal to protect the interests of all parties.

<sup>&</sup>lt;sup>3</sup> "When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided *that the alien 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). "If the alien is unrepresented, the Immigration Judge *must* determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 1003.25(b).

<sup>&</sup>lt;sup>4</sup> The Court notes that during removal proceedings, should the Department believe information to be confidential and sensitive in nature, the Department may request the Court to accept such documents under seal. 8 C.F.R. § 1003.46(b) ("[t]he Service may at any time after filing a Notice to Appear, or other charging document, file with the Immigration Judge, and serve upon the respondent, a motion for an order to protect specific information it intends to submit or is submitting under seal. The motion shall describe, to the extent practical, the information that the Service seeks to protect from disclosure. The motion shall specify the relief requested in the protective order. The respondent may file a response to the motion within ten days after the motion is served.").

represented, can contain such evaluation through a request made to Department of Immigration Health Services (DIHS).<sup>5</sup>

(Department Brief, 1

Without being provided with a mental competency evaluation, the Court is unable to move forward on the issue of removability. Doing so would be in violation of INA § 240(b)(3), which requires the Court to prescribe safeguards to protect the rights and privileges of incompetent aliens.

#### 2. DHS Failure to Disclose Evaluation

The Department violated its regulations when it failed to disclose the mental evaluation to the Court. The Department has set forth regulations in which to address the disclosure of alien medical records.<sup>6</sup> See Privacy Act of 1974; Department of Homeland Security U.S. Immigration and Customs Enforcement - 013 Alien Medical Records System of Records, 74 Fed. Reg. 215, 57688 (Nov. 9, 2009) (effective Dec. 9, 2009); 6 C.F.R. § 5.20 (6 C.F.R. Part 5 "contains the rules that the Department of Homeland Security (Department) follows under the Privacy Act of 1974 (5 U.S.C. 552a). These rules should be read together with the Privacy Act, which provides additional information about records maintained on individuals."). The Department may disclose individual records

to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has

<sup>6</sup> "It is important to note that DHS/ICE/DIHS *is not subject* to the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulation, 'Standards for Privacy of Individually Identifiable Health Information' (Privacy Rule), 45 CFR Parts 160 and 164. DHS/ICE/DIHS does not meet the statutory definition of a covered plan under HIPAA, 42 U.S.C. 1320d(5), and is specifically carved out of the application of HIPAA as a 'government funded program whose principal activity is the direct provision of healthcare to persons.' 45 CFR 160.103 (definition of a health plan). Because DHS/ICE/DIHS is not a covered entity, the restrictions proscribed by the HIPAA Privacy Rule are not applicable." 74 Fed. Reg. 215 at 57689.

Nevertheless, if HIPAA were to apply in these proceedings, it provides that "[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 C.F.R. § 164.508, psychotherapy]," 45 C.F.R. § 164.512, "in the course of any judicial or administrative proceeding [] [i]n response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i).

<sup>&</sup>lt;sup>5</sup> Furthermore, in that, the Department contends these records are in the purview of DIHS is superfluous; pursuant to the agreement set forth by DHS in 2007, alien medical records are shared and maintained by the Department of Homeland Security (DHS), the U.S. Immigration and Customs Enforcement (ICE), and the Division of Immigration Health Services (DIHS), a division within the Office of Detention and Removal Operations (DRO). 74 Fed. Reg. 215 at 57688, 57689.

made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

5 U.S.C. § 552a(b)(7). The Department may disclose records

to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual.

5 U.S.C. § 552a(b)(8). Furthermore, under the Privacy Act, the Department may disclose orders "pursuant to the order of a court of competent jurisdiction."5 U.S.C. § 552a(b)(9).

"In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in [the Alien Medical Records] system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (including United States Attorney Offices) or other Federal agency conducting litigation or in *proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation* and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof[.]"

74 Fed. Reg. 215 at 57690. The Department was expressly permitted, by its own regulations, to disclose this information, and was provided with explicit terms to do so in proceedings before this Court.

## **B.** Prolonged Detention

The Court finds that further continuance of these removal proceedings would be in violation of the respondent's civil and constitutional rights, as he has been the subject of prolonged detention. The respondent has been detained in the custody of the Department for more than one year.

The Department's failure to comply with the regulations and with the Court's Order has prejudiced the respondent's rights. As required by the regulations, the Court continued the proceedings for the period of time necessary for the Department to complete examinations.<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> "DHS shall endeavor to initiate all relevant identity, law enforcement, or security investigations or examinations concerning the alien or beneficiaries promptly, to complete those investigations or examinations as *promptly as is practicable* (considering, among other things, increased demands placed upon such investigations), *and to advise the immigration judge of the results in a timely manner*, on or before the date of a scheduled hearing on any application for immigration relief filed in the proceedings. The immigration judges, in scheduling hearings, shall allow a period of time for DHS to undertake the necessary identity, law enforcement, or security investigations or examinations prior to the date that an application is scheduled for hearing and disposition, with a view to minimizing the number of cases in which hearings must be continued." 8 C.F.R. § 1003.47(e).

However, the Department failed to timely address the respondent's mental capacity and sought hearing continuances to obtain evidence which it did not intend to enter into the record of proceedings. It was not until *five months* after the respondent's initial detention that the Department sought a custodian for the respondent, despite his apparent mental impairments. Nor was it until *six months* later that the Department formally informed the Court that it would not disclose reports arising from the mental competency examination for which purpose the Court had continued the proceedings.

In consideration of the prolonged period of detention and the repeated requests this Court has made to timely and fairly adjudicate this matter, the Court finds the respondent's rights will be violated should he continue to be detained as a result of these factors which are beyond his control.

## C. Factual Allegations and Charge of Removability

On Department submitted a brief on removability, whereby the Department stated:

[b]ecause the Department has served Respondent's custodian with a copy of the NTA, as well as with this brief and supporting document, the court may proceed with Respondent's removal proceedings, despite Respondent's mental incompetency. Further, the court may determine Respondent's removability through Department's documentation, in the absence of admissions by Respondent or his custodian.

The Court has carefully considered the entire record of proceeding, which includes exhibits (1) through (15). The Notice to Appear states that the respondent has been a lawful permanent resident in the United States for more than twenty years. The respondent, however, has asserted a claim to United States citizenship.

On contract of the initially unaware of the extent of the respondent's mental illness, the Court attempted to advise the respondent of his rights and take pleadings. Based upon nature of the proceedings, this Court finds that it is prohibited from accepting any admissions from the respondent, in that there is reason to believe he is mentally incompetent and lacks adequate representation. 8 C.F.R. § 1240.10(c).

Furthermore, the Court may not move forward on the contested issue of removability as the respondent's mental impairment and lack of adequate representation has also prevented him from effectively presenting his claim to United States citizenship. Despite the Department's request for the contrary, this Court finds that adjudicating this matter in the present circumstances would be in blatant violation of basic notions of fundamental fairness.

On this basis, the Court does not sustain the factual allegations or charge of removability; if there is any suggestion of a finding as to removability in record, it is hereby withdrawn.

# IV. CONCLUSION

The Court finds that the respondent is unable to effectively participate in a coherent manner, to comprehend the nature and consequences of the proceedings, to communicate with the Court in any meaningful dialog, to assert or waive any rights, and to seek various forms of relief. The respondent has repeatedly demonstrated his inability to adequately represent himself before this Court, and present counsel has been unable to effectively communicate and represent the interests of the respondent.

Considering the respondent's apparent mental illness, and based upon the Department's unwillingness to provide even the respondent with a copy of his mental evaluation, more less timely comply with the Court's orders, the Court will exercise its discretion to terminate proceedings. 8 C.F.R. § 245.1(c)(8)(ii)(D).

Accordingly, the following Order shall be entered:

# **ORDER:** IT IS HEREBY ORDERED that the proceedings in the above-referenced matter be TERMINATED.



**APPEAL RIGHTS:** Both parties have the right to appeal the decision of the Immigration Judge in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before thirty calendar days from the date of service of this decision.