Melissa Crow
Emily Creighton
Beth Werlin
American Immigration Council
1331 G Street NW, Suite 200
Washington, DC 20005
Tel: (202) 507-7523
Fax: (202) 742-5619

Attorneys for *Amici Curiae*

DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
L-T-	)	**File No: Redacted**
In removal proceedings	)	

BRIEF *AMICUS CURIAE* OF THE AMERICAN IMMIGRATION COUNCIL, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE PENNSYLVANIA IMMIGRATION RESOURCE CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

Legislative History

Pleadings

Miscellaneous

On June 24, 2010, the Board of Immigration Appeals requested supplemental briefing to address various procedural issues regarding the treatment of mentally disabled respondents in removal proceedings. The Board granted *Amici Curiae*'s request for an extension until September 14, 2010. *Amici Curiae* American Immigration Council, American Immigration Lawyers Association and the Pennsylvania Immigration Resource Center respectfully submit the following in response to the Board's request. Section I of this *amicus* brief will address certain preliminary questions; section II will address questions 4, 6 and parts of questions 1, 2, 3 and 7 of the BIA's request; section III will address question 9 and parts of question 5; and section IV will address the remaining parts of question 5.

INTERESTS OF *AMICI CURIAE*

The American Immigration Council ("AIC") (formerly the American Immigration Law Foundation) was established in 1987 as a not-for-profit educational and charitable organization. AIC works to promote the just and fair administration of our immigration laws and to protect the constitutional and legal rights of immigrants, refugees and other non-citizens. To this end, AIC engages in impact litigation and appears as *amicus curiae* before administrative tribunals and federal courts in significant immigration cases on targeted legal issues.

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States and overseas. AILA's members regularly practice before the immigration courts and federal courts. AILA's members have a strong interest in ensuring that their clients' rights are protected by the Board of Immigration Appeals and the federal courts.

The Pennsylvania Immigration Resource Center ("PIRC") is a non-profit legal services organization that provides legal information to non-citizens detained by the Department of Homeland Security ("DHS") at the York County Prison and the Berks Family Shelter through a federal Legal Orientation Program contract. PIRC also provides pro bono referrals for indigent detainees as well as legal representation for survivors of torture and individuals with mental disabilities in removal proceedings at the York Immigration Court.

Amici Curiae have a substantial interest in the issues presented in this case as they impact whether non-citizens with mental disabilities are provided a meaningful opportunity to be heard during the removal adjudication process. In light of their extensive experience in immigration law and practice, *Amici Curiae* are well-placed to assist the Board in understanding the rights of non-citizens in removal proceedings and the challenges under the current statutory and regulatory framework, and to suggest an alternative to deciding all of the issues presented.

I. THE BOARD SHOULD NOT ISSUE A PUBLISHED DECISION IN THIS CASE, AND ITS DECISION SHOULD BE LIMITED TO THE FACTS PRESENTED.

Amici Curiae urge the BIA to decide this case in an unpublished decision and refrain at this juncture from setting forth broad policies and procedures regarding the treatment of mentally disabled respondents in removal proceedings. The BIA has requested supplemental briefing to address nine multi-part questions relating to procedures for adjudicating cases involving respondents with mental disabilities. These questions reflect an appreciation of the complexity of the issues and a desire to resolve what has been an unsettled, confusing and – for those involved – critically important

aspect of the removal adjudication process. Nonetheless, because mental incompetence arises in different degrees and affects individuals in different ways,[1] *Amici Curiae* believe that a single respondent's case, which does not raise fully all the issues that need to be resolved, is not the proper forum for deciding these complicated issues with such far-reaching implications. For the reasons discussed below, rulemaking procedures would be a more appropriate way to resolve these issues.

Just over a year ago, *Amici Curiae* and approximately sixty organizations and individuals wrote to Attorney General Eric Holder outlining proposed modifications to existing regulations and immigration court practices in removal proceedings for respondents with mental disabilities and requesting that the Department of Justice initiate a process for discussing these recommendations. *See* Letter to Eric Holder, Atty. Gen. (July 24, 2009), *available at* http://www.legalactioncenter.org/sites/MentalDisability-7-24-09.pdf. Specifically, the letter stated:

> We strongly recommend that the DOJ revise and expand the existing regulations and policies regarding removal proceedings . . . . We therefore urge you to hold discussions on these recommendations with disability rights advocates, mental health professionals, legal experts, social service providers and legal professionals who represent non-citizens in removal proceedings, and other stakeholders.[2]

---

[1] *See* section III.B, *infra*, regarding this point, which was the basis for the Supreme Court's recent decision in *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

[2] In response to a subsequent inquiry from AILA about whether EOIR is considering the regulatory changes and other guidance recommended in this letter, EOIR said:

> EOIR is committed to ensuring due process and fair treatment for all individuals in removal proceedings. EOIR is sensitive to the needs of vulnerable individuals, including respondents with mental disabilities, and works with the Department of Homeland Security to ensure fundamental fairness for all individuals in removal proceedings.

See AILA-EOIR Liaison Meeting Agenda Questions and Answers, at 2 (Oct. 28, 2009), *available at* http://www.justice.gov/eoir/statspub/eoiraila102809.pdf.

Id. *Amici Curiae* continue to believe that the appropriate course of action is to engage not only the immigration law community, but also disability rights advocates, mental health professionals and social service providers in a thoughtful discussion about these issues. A rulemaking process, with outreach to a broad spectrum of stakeholders and an opportunity for discussion and formal comments, is the appropriate mechanism for establishing procedures in this context.

EOIR has already taken some agency-wide steps to engage a broader community and address the challenges of protecting the rights of respondents with mental disabilities. As EOIR reported in October 2009:

> EOIR is presently focusing on providing training to all appropriate EOIR legal staff on mental health issues in removal proceedings. For example, at the recent 2009 EOIR Legal Training Conference, Dr. Melissa Piasecki led a training session that specifically focused on handling cases involving individuals with mental disabilities. EOIR is continuing to work with Dr. Piasecki to develop standards of competence in removal proceedings. We are also working with the National Judicial College to develop training on dealing with diverse populations in removal proceedings. Also, one resource addressing competency issues that is available to EOIR's legal staff is the article "Incompetent Respondents in Removal Proceedings," published in the April 2009 edition of the Immigration Law Advisor. In addition, through EOIR's Legal Orientation and Pro Bono program, EOIR is exploring how it might identify individuals with possible mental disabilities for referral to pro bono services.

See AILA-EOIR Liaison Meeting Agenda Questions and Answers, at 2-3 (Oct. 28, 2009), *available at* http://www.justice.gov/eoir/statspub/eoiraila102809.pdf. In addition, EOIR has expanded the Immigration Judge Benchbook (hereinafter "IJ Benchbook") to include a section focusing on mental health issues in immigration court. *See* Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, "Mental Health Issues," *available at* http:/www.justice.gov/eoir/vll/benchbook/tools/MHI.

DHS also has begun to discuss potential measures to protect the rights of detained respondents with mental disabilities. For example, in October 2009, Immigration and Customs Enforcement ("ICE") issued a report, "Immigration Detention Overview and Recommendations," authored by Dr. Dora Schriro, which recommended that ICE take steps to better identify and meet the medical needs of detainees with mental health issues. *See* Dept. of Homeland Security, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations (2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. The report further stated that "ICE should develop specialized caseloads of aliens including those who are chronically, medically, or mentally ill or have been detained a significant length of time to improve case management and expedite removal, release or relief." *Id.* at 22.

In addition, ICE has engaged stakeholders in its consideration of a plan to house some detainees with mental disabilities in a dedicated facility. On September 24, 2010, ICE and the DHS Office for Civil Rights and Civil Liberties will hold a "Mental Health Roundtable," which will bring together legal advocates, medical professionals, disability rights advocates, and government officials to discuss how to identify persons with mental disabilities, how to care for them in detention facilities, and due process concerns affecting this population in the removal adjudication process. *Amici Curiae* also understand that DHS and DOJ are exploring an appointed counsel pilot project for respondents with mental disabilities, which – as discussed in section III – is critical to ensure that their removal hearings comport with due process.

Although these efforts are still in the preliminary stages and – as the questions posed by the BIA indicate – numerous questions and challenges remain, *Amici Curiae*

urge the Board to allow the ongoing consultations to continue. Initiating a formal rulemaking process regarding appropriate case adjudication procedures for respondents with mental disabilities should be the next step in this process. Not only is rulemaking preferable to adjudication given the complexity of the issues, the inadequacy of any one case as a forum to construct a comprehensive system that will be responsive to a variety of fact-specific variables, and the need to consult experts from outside the legal community, but such a process would allow EOIR to reassess and amend current regulations. As noted throughout this brief and discussed most prominently in section IV, current regulations have proven inadequate, unworkable, and potentially in conflict with due process and the ethical obligations of lawyers. The instant case can be resolved in an unpublished decision affirming the Immigration Judge's termination of proceedings, as explained in section II. However, more deliberation and discussion are required before finalizing far-reaching policies and procedures governing the adjudication of removal cases for respondents with mental disabilities.

II. WHERE, AS HERE, DHS PREVENTS THE IMMIGRATION JUDGE FROM DETERMINING WHETHER ADDITIONAL SAFEGUARDS ARE NEEDED, TERMINATION OF PROCEEDINGS IS APPROPRIATE.

In the case at bar, the Immigration Judge made every effort to prescribe safeguards to protect the respondent's right to a fair hearing, as required by section 240(b)(3) of the Immigration and Nationality Act ("INA"). *See* section III.B, *infra.* After establishing, based upon L-T-'s conduct during the hearing and reports from his lawyer, that the respondent was unable to participate meaningfully in the proceedings or to communicate effectively with counsel, the Court properly called for an evaluation of L-T-'s mental competency. Decision and Order of the Immigration Judge ("I.J.

Decision") at 2. Such an evaluation is a prerequisite for application of 8 C.F.R. § 1240.4, which obligates an Immigration Judge to afford specific procedural protections to at least some detainees with serious mental disabilities.[3] Six months later, following repeated delays in arranging for the requested examination, DHS refused to comply with the Court's subsequent order to provide a copy of the examination report to the Court and the respondent's counsel.[4] I.J. Decision at 2.

DHS suggests in its appeal brief that it had no obligation to provide the Court with the evaluation report. DHS argues that respondent's counsel could seek to obtain the report by filing a Freedom of Information Act request with the Department of Immigration Health Services. DHS Opening Appeal Brief ("DHS Brief") at 6. However, requiring this step to obtain the evaluation would only promote further delay and prolong the respondent's detention.

DHS also suggests that the Health Insurance Portability and Accountability Act barred production of the report. DHS Brief at 5-6. However, as the Immigration Judge's decision explains, that statute does not prohibit DHS from releasing the respondent's mental competence evaluation to the Court or the respondent's counsel. I.J. Decision at 6, n.6. Even if the evaluation had been confidential or particularly sensitive, DHS could have submitted it under seal. *See id.* at 5, n.4.

---

[3] While the Court's request for a mental competency examination was proper under these circumstances, *Amici* believe that the examination should have been conducted by an independent psychiatrist, psychologist, licensed clinical social worker, or comparable mental health professional with appropriate experience rather than DHS, the agency that was seeking to remove the respondent from the United States.

[4] Regarding the Court's authority to order the production of the report, *see* INA § 240(b)(1) (permitting the immigration judge to issue subpoenas for the attendance of witnesses and presentation of evidence).

DHS also incorrectly argues that the requested mental evaluation was "an unnecessary procedure, particularly in light of the Department's concession that the respondent is mentally incompetent, as well as the availability of a legal representative to act on his behalf . . . ." DHS Brief at 13. As discussed in section III.B, *infra*, mental incompetence is not a unitary concept, with the result that it may manifest itself differently depending on the circumstances and individuals involved. *See Indiana v. Edwards*, 128 S. Ct. 2379, 2386 (2008). Accordingly, mentally incompetent respondents have a range of capabilities and needs, and the procedural safeguards required under INA § 240(b)(3) vary from case to case. Thus, notwithstanding DHS's concession that L-T- was mentally incompetent, a mental evaluation was still necessary. Moreover, as discussed in section IV, legal representation, while essential, may not be sufficient to ensure a fair hearing.[5] Where a respondent is so severely incapacitated that he can neither communicate with his lawyer nor participate meaningfully in his removal proceedings, the appointment of a guardian, next friend or relative may also be required. If the requisite procedural safeguards are unavailable, termination of proceedings is the only appropriate course of action. *See* 8 C.F.R. § 245.1(c)(8)(ii)(D).

[5] The stakes in L-T's case were particularly high because the respondent's conduct suggested that he wished to waive his right to counsel. Without an understanding of the respondent's mental capacity, the Court could not assess whether the apparent waiver was "voluntary, knowing, and intelligent." *See* 8 C.F.R. § 1003.25(b); *cf. McKaskle v. Wiggins*, 465 U.S. 168, 178-79 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible).

III. THE IMMIGRATION AND NATIONALITY ACT ("INA") REQUIRES IMMIGRATION JUDGES TO APPOINT COUNSEL FOR UNREPRESENTED RESPONDENTS IN REMOVAL PROCEEDINGS WHO ARE NOT COMPETENT TO REPRESENT THEMSELVES.[6]

A. All Non-Citizens, Including Those with Mental Disabilities, Have a Right to a Full and Fair Hearing.

Non-citizens' due process rights in removal proceedings are protected by the Fifth Amendment to the United States Constitution. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). In this context, due process requires the government to provide respondents a full and fair hearing. *See Cinapian v. Holder*, 567 F.3d 1067, 1073 (9th Cir. 2009); *Matter of D-*, 20 I. & N. Dec. 827, 831 (BIA 1994). Section 240 of the INA dictates that respondents in removal proceedings be afforded a fair hearing; specifically, it sets forth the requirements that a respondent have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. INA § 240(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4).

To carry out these tasks, an unrepresented respondent must be competent to understand and participate in the proceedings. *See, e.g., Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 809 (9th Cir. 2003) (holding, in the context of post-conviction habeas proceedings, that the "capacity to communicate remains a

[6] The authors of this brief defer to other *Amici* with expertise in psychiatry, psychology and disability rights regarding the standard of competence that would render a respondent unable to proceed *pro se*, the circumstances that should trigger a competency assessment, and the procedures for carrying out such an assessment. Despite the reference in the immigration regulations to "incompetent" respondents, neither the regulations nor existing BIA precedent define this term. Case law from other contexts makes clear that removal adjudication procedures must distinguish between people incompetent to proceed *pro se* and people incompetent to proceed at all, even with the assistance of counsel. *See Indiana v. Edwards*, 128 S. Ct. 2379.

cornerstone of due process"). Yet some respondents, because of their mental disabilities, will be unable to understand the charges against them, recall relevant biographical facts, testify credibly, compile evidence, and cross-examine witnesses without the assistance of an attorney. *See* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System*, at 25-31 (Jul. 25, 2010), *available at* http://www.hrw.org/en/reports/2010/07/26/deportation-default-0. Without counsel, these vulnerable individuals will be deprived of a meaningful opportunity to be heard. Moreover, removal proceedings are adversarial, and DHS appoints trial attorneys to represent its interests. This only exacerbates the imbalance of power between DHS and an unrepresented incompetent respondent.

B. The INA Prescribes Safeguards for Mentally Incompetent Respondents, Which Must Include Counsel.

The INA charges the Attorney General with "prescrib[ing] safeguards to protect the rights and privileges" of any respondent whose mental incompetence makes it impracticable for him or her to be present at removal hearings. *See* INA § 240(b)(3); *cf. Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (comparing the ban against trials of those incapable of understanding the nature and object of proceedings to the ban against trials in absentia). Although several regulations acknowledge the need for safeguards for "incompetent" respondents, *see, e.g.*, 8 C.F.R. § 103.5a(c)(2)(ii) (obligating DHS to ensure alien is competent to accept service of Notice to Appear); 8 C.F.R. § 1240.10(c) (precluding the Immigration Judge from accepting an admission of removability from an incompetent, unrepresented respondent under certain circumstances), no regulation either requires or forecloses the appointment of counsel as a safeguard in certain cases.

As the Supreme Court recently noted, "[m]ental illness is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 128 S. Ct. at 2386. Just as in the criminal context described in *Edwards*, an individual in removal proceedings may be sufficiently competent to work with an attorney to present his case, but may not have the mental capacity to represent himself. *Id.* In the removal context, the Immigration Judge must, at a minimum, appoint counsel to protect the statutory and constitutional due process rights of respondents whose mental disabilities would otherwise preclude meaningful participation in their removal hearings. As discussed in section IV, *infra*, additional procedural safeguards, including the appointment of a guardian, friend or relative, may also be required for detainees who are so severely impaired that they cannot meaningfully participate in their removal proceedings even with the assistance of an attorney.

Congress, recognizing the importance of counsel in removal proceedings, provided that non-citizens have a statutory right to counsel:

> In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

INA § 292; *see also* INA § 240(b)(4)(A). The legislative history of section 292 of the INA confirms that Congress intended to confer a *right*. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (citing H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1712).

While this statutory provision does not confer a right to appointed counsel, it also does not preclude an Immigration Judge from finding that due process requires the appointment of counsel to preserve fundamental fairness in cases where an unrepresented respondent is not competent to proceed *pro se*. Indeed, some federal courts have recognized that appointed counsel may be required to assist certain non-citizens in removal proceedings. *See, e.g.*, *Lin v. Ashcroft*, 377 F.3d 1014, 1034 (9th Cir. 2004) (holding in the context of unaccompanied minors in removal proceedings that "[a]bsent a minor's knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to take an affirmative role in securing representation by competent counsel"); *Escobar Ruiz v. INS*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986) ("The Fifth Amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel despite the prohibition of section 292.") (internal citations omitted); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) ("The test for whether due process requires the appointment of counsel for an indigent alien is whether, in any given case, the assistance of counsel would be necessary to provide 'fundamental fairness—the touchstone of due process.'") (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)); *United States v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995) ("in some circumstances, depriving an alien of the right to counsel may rise to a due process violation"); *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) ("an alien has a right to counsel if the absence of counsel would violate due process under the fifth amendment" because, in some cases, "the laws and regulations determining [an alien's] deportability [a]re too complex for a pro se alien") (internal citations omitted).

The Supreme Court has recognized a similar need in various civil contexts where, as here, the deprivation of liberty is at stake. *See, e.g.*, *In re Gault*, 387 U.S. 1, 41 (1967) (finding due process requires appointment of counsel for juveniles in civil delinquency proceedings); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (appointment of counsel may be required in probation revocation hearing). *See also Lassiter v. Dept. Social Servs.*, 452 U.S. 18, 25 (1981) (appointment of counsel may be required in parental rights termination proceedings even where physical liberty is not at stake). In each of these cases, the central question was whether "fundamental fairness" required the appointment of counsel. *See, e.g.*, *Lassiter*, 452 U.S. at 26; *Gagnon*, 411 U.S. at 790. Here, a respondent with a mental disability faces prolonged detention and potential banishment from this country. Given these potential deprivations of liberty, the government must not be permitted to pursue a removal case against *pro se* respondents who do not have the capacity to represent themselves.[7]

C. The INA Does Not Prohibit the Appointment of Paid Counsel Where Necessary To Protect Due Process Rights of Indigent Respondents.

Nothing in the INA, including section 292, prohibits the appointment of paid counsel to selected individuals whose procedural rights under the statute would otherwise be compromised. The plain language of this section affords a person the right to representation by a lawyer of his or her choice, but does not establish a right to a paid lawyer. Importantly, the parenthetical "at no expense to the Government" describes only this right to representation and does not serve as

[7] Although the Board and numerous courts of appeals have allowed removal proceedings to go forward against incompetent respondents, the vast majority of these cases involved individuals who were represented by counsel. *See, e.g.*, *Wong v. INS*, 550 F.2d 521, 522 (9th Cir. 1977) (petitioner represented by counsel and accompanied by state court appointed conservator who testified on his behalf).

an affirmative limitation on the government's authority to appoint paid counsel. *Accord Escobar Ruiz v. INS*, 838 F.2d 1020, 1028 (9th Cir. 1988) (en banc). Moreover, INA § 240(b)(3) requires safeguards to protect the "rights and privileges" of incompetent respondents incapable of proceeding *pro se*, which – as discussed above – include the privilege of being represented by counsel.

A federal agency is permitted to spend generally appropriated funds if it "is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law." *See* 66 Comp. Gen. 356, at *8 (1987) (discussing the federal agency expenditures statute, 31 U.S.C. § 1301(a)). Paid counsel for respondents with mental disabilities is necessary and contributes materially to the immigration court's adjudicatory function. Not only would paid counsel increase efficiency and expedite the immigration court process, but it would enable immigration judges to comply with the dictates of due process and INA § 240.[8]

[8] Because many respondents with mental disabilities are detained, paid counsel would not only help to streamline the court's docket, but would also shorten detention periods and thereby reduce the cost on the government. *See* American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Proceedings*, at 40 (February 2010), *available at* http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf. (explaining that *pro se* litigants can cause delays in proceedings and thus impose a substantial financial burden on the government; in contrast, " . . . the presence of competent, well-prepared counsel on behalf of both parties helps to clarify the legal issues and allows courts to make more principled and better informed decisions . . . and speed the process of adjudication . . ."); (internal citations omitted); Letter to Eric Holder, Atty. Gen. (July 24, 2009), *available at* http://www.legalactioncenter.org/sites/MentalDisability-7-24-09.pdf (explaining that many respondents will remain in detention for many months while their cases are on hold because the Immigration Judge will not accept admissions of removability from mentally

To the extent that 5 U.S.C. § 3106 has been interpreted to bar the appointment of paid counsel to respondents in removal proceedings,[9] *Amici Curiae* submit that such an interpretation is indefensible. Section 3106 requires federal agencies to refer to the Department of Justice ("DOJ") any litigation in which the U.S. government, a government agency or employee is a party and precludes agencies from employing other counsel. It states:

> Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

5 U.S.C. § 3106. This provision was intended to centralize litigation authority within the federal government and make DOJ the chief litigator for the United States. *See The Attorney General's Role as Chief Litigator For the United States,* 6 Op. O.L.C. 47 (Jan. 4, 1982).

5 U.S.C. § 3106 has no bearing on the appointment of paid counsel for respondents in removal proceedings. Appointed lawyers would not be "employed" by the government because they would not be supervised by a government official. *See* 5 U.S.C. § 2105 (defining an "employee" as an individual who has been appointed in the civil service by, and acts under the supervision of, one of a number of enumerated government officials); *cf.* 44 Comp. Gen. 605 (Apr. 2, 1965) (stating that attorneys

---

incompetent respondents without representation; the result is an increase in healthcare and litigation costs).

[9] *See* Memorandum from David Martin, General Counsel, to T. Alexander Aleinikoff, Executive Associate Commissioner, Programs, "Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings" (Dec. 21, 1995) (reading 5 U.S.C. § 3106 in conjunction with INA § 292 as prohibiting the appointment of paid counsel for respondents in deportation proceedings).

appointed to represent indigent defendants under the Criminal Justice Act of 1964 and who have received compensation for such service have not established an employer-employee relationship with the government). A lawyer appointed to handle removal proceedings would also not be representing the government's interests. In any case, section 3106 applies only to "litigation," meaning federal court litigation and has no bearing on administrative proceedings such as removal hearings.[10]

IV. THE BOARD MUST RECOGNIZE THAT CURRENT REGULATIONS, WHICH FAIL TO DISTINGUISH THE ROLES OF LEGAL REPRESENTATIVES FROM OTHERS AUTHORIZED TO APPEAR ON BEHALF OF INCOMPETENT RESPONDENTS, ARE INHERENTLY FLAWED.

Current regulations confuse the important role that lawyers play in representing respondents whose mental disabilities preclude them from proceeding *pro se* – which, as explained above, is critical to ensure a fair hearing – with the non-specialized support provided by guardians, relatives, friends and custodians. Although the assistance provided by guardians, relatives and friends may be helpful or even indispensable to provide due process for incompetent respondents, it cannot substitute for legal representation. In addition, the appointment of a custodial officer to appear on behalf of an incompetent respondent, which creates an irreconcilable conflict of interest, is inappropriate under any circumstances.

A. An Attorney Plays a Fundamentally Different Role than a Guardian, Friend or Relative Authorized to Appear on a Respondent's Behalf.

While an attorney helps a litigant to understand the proceedings and make more informed choices, a guardian or other individual acting in this role exercises decision

[10] An alternative reading of "litigation" which included administrative proceedings would mean that DHS attorneys would have no authority to represent DHS at removal hearings.

making authority in the place of a litigant who does not have the capacity to make decisions alone. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990) (finding in the habeas corpus context, that a "next friend" may represent the interest of a party only after providing "an adequate explanation – such as inaccessibility, mental incompetence, or other disability – why the real party in interest cannot appear on his own behalf" and "must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate") (internal citations omitted). The Model Rules of Professional Conduct specifically distinguish the function of an attorney, who is tasked with a client's legal representation, from that of "family members or other persons," who may exercise decision making authority on behalf of a client with mental disabilities under particular circumstances. See Model Rules of Prof'l Conduct R. 1.14 cmt, *available at* http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html. Some sections of the immigration regulations make similar distinctions. *See, e.g.*, 8 C.F.R. § 103.2(a)(2) (permitting a legal guardian to sign an application or petition for a mentally incompetent person); 8 C.F.R. § 103.2(a)(3) (specifying that an applicant or petitioner may be represented by an attorney or BIA accredited representative).

The Board and the Attorney General have erected a comprehensive, complex, and sophisticated system governing the practice of attorneys appearing before them. *See* 8 C.F.R. §§ 292.3, 1003.101-108. The primary purpose of these regulations is to set standards and protect the public from practitioners who fail to meet those standards. *See* Professional Conduct for Practitioners – Rules and Procedures, 65 Fed. Reg. 39513, 39514 (June 27, 2000). Because guardians, friends and relatives are not subject to the

same regulatory framework, it would be incongruous to allow such individuals to provide legal representation in immigration court.

Given the different skills and obligations of guardians and attorneys, many courts have found that guardians are not qualified to provide legal representation. *See, e.g.*, *Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (holding that a minor could not be "represented" by a non-attorney acting as a guardian in a federal civil proceeding, and stating that "[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.") (internal citations omitted); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) (rejecting, in involuntary commitment context, the "state's contention that appointment of a guardian ad litem may displace a requirement of appointed counsel" and finding it "apparent…that appointment of a guardian *ad litem* cannot satisfy the constitutional requirement of representative counsel"), *vacated and remanded on other grounds by Schmidt v. Lessard*, 414 U.S. 473 (1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) ("appointment of a guardian *ad litem* is not a substitute for appointment of counsel"), *rev'd in part on other grounds by Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980). For the same reasons, friends and relatives do not have the requisite qualifications to provide legal representation.

Further, some respondents who suffer from mental illness have the capacity to decide what is in their best interests even though they are not competent to represent themselves. While such respondents cannot represent themselves in removal proceedings, they also should not be forced to give up their decision making authority.

See Indiana v. Edwards, 128 S. Ct. at 2386 (holding that because "[m]ental illness itself is not a unitary concept," defendant could be competent to plead guilty but not to represent himself at trial). In such cases, the appointment of a third party to appear on a respondent's behalf would undermine due process. *See, e.g., Neilson v. Colgate-Palmolive Co.*, 199 F. 3d 642, 651 (2d. Cir. 1999) ("Because a litigant possesses liberty interests in avoiding the stigma of being found incompetent and in retaining personal control over the litigation, the Due Process Clause of the Fifth Amendment limits the district court's discretion with respect to the procedures used before appointing a guardian ad litem.") (internal citations omitted); *In re Guardianship of Reyes*, 152 Ariz. 235, 236 (Ariz. Ct. App. 1986) ("The appointment of a guardian often involves significant loss of liberty similar to that present in an involuntary civil commitment for treatment of mental illness where constitutionally proof must be by clear and convincing evidence.").

However, a respondent's mental capacity may be so limited as to preclude him from effectively consulting with his counsel, understanding the proceedings against him, and assisting in the preparation of his case. Under these circumstances, appointment of a guardian, next friend or relative – in addition to a lawyer – may be necessary to ensure a fair hearing. In cases involving severely impaired individuals, the representation of such respondents by attorneys without the participation of a guardian may create serious ethical dilemmas for attorneys. In cases where respondents are unable to make decisions or effectively communicate their preferences and goals, an attorney is ethically prohibited from substituting her own judgment for that of her client. Model Rules of Prof'l Conduct R. 1.14(b), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html. Without clear guidance, however, an attorney's obligation to provide zealous representation may be

nearly impossible to fulfill. *See* 8 C.F.R. § 1003.102. Under these circumstances, the ABA Model Rules explicitly permit an attorney to "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Model Rules of Prof'l Conduct R. 1.14(b), *available at* http://www.abanet.org/cpr/mrpc/rule_1_14.html. By suggesting in its appeal brief that the Immigration Judge should have required L-T's counsel to proceed despite his inability to communicate with his client, DHS Brief at 11, DHS appears to condone unethical conduct.

To protect the interests of respondents who lack the mental capacity to consent or object to the appearance of third parties on their behalf, Immigration Judges should follow the example of federal court judges by examining the qualifications and motivations of individuals appearing as guardians, next friends or relatives in immigration proceedings. *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (explaining, in the habeas context that "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another" as certain prerequisites must be met); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (finding mother successfully met prerequisites of "next friend" to a son when she presented evidence of his mental incapacity and because she represented his "best interests"). Even in the absence of clear guidance as to the requisite qualifications of individuals acting in these capacities, Immigration Judges have implicit authority to question their fitness under INA § 240(b)(3).

B. Current Regulations Blur the Distinctions Between the Roles of Attorneys and Third Parties Appearing on Behalf of Respondents.

Under 8 C.F.R. § 1292, only the following individuals may represent respondents in removal proceedings: attorneys, certain law students and law graduates not yet admitted to the bar, certain reputable individuals of good moral character who have a pre-existing relationship with the respondent and appear without remuneration, representatives accredited by the Board, and certain accredited officials of the foreign government to which the respondent owes allegiance. 8 C.F.R. § 1292.1(a); *see* 8 C.F.R. § 1240.3 ("The respondent may be represented at the hearing by an attorney or other representative qualified under 8 CFR part 1292."); *see also Toban v. Ashcroft*, 385 F.3d 40, 46 n.7 (1st Cir. 2004) (reasoning that a non-lawyer was probably ineligible to represent the respondent because he did not fulfill the requirements of 8 C.F.R. § 1292).

Yet, another regulation, 8 C.F.R. § 1240.4, seems to blur the line between a legal representative and a guardian, next friend or relative appearing on behalf of a respondent. This regulation states:

> **§ 1240.4 Incompetent respondents.** When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

To the extent that 8 C.F.R. § 1240.4 permits a lawyer or a legal representative to speak *for* a respondent whose mental incompetence prevents him or her from participating in the hearing,[11] the regulation conflicts with the lawyer's ethical obligation to consult with

[11] Notably, 8 C.F.R. § 1240.43, which applies to proceedings commenced prior to April 1997, permits only a guardian, near relative or friend to appear on behalf of a mentally incompetent respondent.

the client regarding the goals of the representation and thereby deprives the respondent of a fair hearing. *See* Model Rules of Prof'l Conduct R. 1.4, *available at* http://www.abanet.org/cpr/mrpc/rule_1_4.html (governing client-attorney communication); 8 C.F.R. § 1003.102(r)(2) (grounds for sanctions include failing to consult "with the client about the means by which the client's objectives are to be accomplished"). Conversely, to the extent that this regulation may be construed to allow a guardian, relative or friend to serve as a legal representative, it conflicts with 8 C.F.R. § 1292. Both possible readings bolster the argument in section I, *supra*, that new rulemaking is long overdue.

C. Permitting a Custodial Officer To Appear on Behalf of an Incompetent Respondent Would Create an Irreconcilable Conflict of Interest and Violate Due Process.

Another particularly problematic aspect of 8 C.F.R. § 1240.4 is that it allows the "custodian" to act on behalf of the respondent. The regulations are ambiguous as to whether this "act[ion]" refers to legal representation or instead to action as a guardian, but in either case, it is inappropriate. Immigrants detained by DHS are held in facilities operated by DHS, a state or local government, or a private company. In any of these situations, the custodian is either employed by DHS or acting under contractual authority to detain on behalf of DHS, the very agency seeking the respondent's removal. Under these circumstances, the appearance of a custodian on the respondent's behalf would create an irreconcilable conflict of interest, destroy the respondent's trust in the individual appearing on his behalf, and thereby undermine the integrity of the adjudicative process. *See* 8 C.F.R. § 1003.102(n) (prohibiting "conduct that is prejudicial

to the administration of justice or undermines the integrity of the adjudicative process").[12]

Also problematic is that custodial officers, like most guardians, next friends and relatives, are generally not licensed to practice law or familiar with the complexities of immigration law. Without the requisite training, custodial officers would be hard-pressed to provide competent representation, assuming that the regulation refers to legal representation. *See* 8 C.F.R. § 1003.102(o) (authorizing sanctions against lawyers who do not provide "competent representation," which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as an "inquiry into and analysis of the factual and legal elements of the problem . . .").

The recently released supplement to the IJ Benchbook, which addresses issues arising in cases where respondents have mental health issues, encourages immigration judges to "take steps to ensure fundamental fairness inheres," including the option of terminating proceedings. Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, "Mental Health Issues," available at http:/www.justice.gov/eoir/vll/benchbook/tools/MHI. The IJ Benchbook specifically mentions instances where a custodian appears on behalf of an incompetent respondent:

> [I]t remains an open question under the Fifth Amendment Due Process Clause whether proceedings could be terminated to assure fundamental fairness where an alien is severely or profoundly incompetent, and no person can be identified to protect his or her interests other than a DHS custodian.

[12] PIRC makes note of the practice at the York County Prison which prohibits correctional officers from serving as witnesses when inmates wish to notarize documents with a third party witness or as witnesses on behalf of immigrant detainees in removal proceedings. Such practice, regardless of whether it derives from official policy, underscores the hypocrisy of permitting correctional officers to appear on behalf of respondents in the same context where they are prohibited from serving as lay witnesses.

Id. Because the appearance of a DHS custodian on a respondent's behalf would pose an irreconcilable conflict of interest, *Amici Curiae* contend that termination of proceedings would be the only course of action that would comport with the requirements of due process in the rare circumstances where no alternative guardian is available.

CONCLUSION

For the foregoing reasons, *Amici Curiae* American Immigration Council, American Immigration Lawyers Association, and Pennsylvania Immigration Resource Center respectfully request that the BIA affirm the Immigration Judge's decision to terminate proceedings in *Matter of L-T-*.

Respectfully submitted this 14th day of September 2010,

_____

Melissa Crow
Emily Creighton
Beth Werlin
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
Tel: (202) 507-7523
Fax: (202) 742-5619

Attorneys for *Amici Curiae*

Matter of L-T-
A Number Unknown

PROOF OF SERVICE

On September 14, 2010, I, Melissa Crow, sent via first class mail a copy of the foregoing Brief *Amicus Curiae* of the American Immigration Council, the American Immigration Lawyers Association and the Pennsylvania Immigration Resource Center to:

Michael P. Davis, Chief Appellate Counsel
Department of Homeland Security
5201 Leesburg Pike, Suite 1300
Falls Church, VA 22041

U.S. DHS – Trial Attorney Unit/EAZ
Post Office Box 25158
Phoenix, AZ 85002

Federation for American Immigration Reform
25 Massachusetts Avenue, NW, Suite 330
Washington, DC 20001

_____
Melissa Crow