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Incompetent Respondents in Removal Proceedings

by Mimi E. Tsankov

One of the many challenges facing immigration courts today involves respondents who are incompetent. Immigration Judges are challenged to provide fundamental fairness to individuals who may not be able to represent themselves effectively and cannot obtain representation. Immigration Judges do so within a limited regulatory framework and with sparse precedent case law. This article will set forth the regulatory structure that governs the provision of due process, survey how the cases have been adjudicated at the Board of Immigration Appeals and at the various circuit courts of appeals, and offer some practical solutions to address common challenges. The article will conclude by identifying specific issues in need of further clarity.

Constitutional and Regulatory Underpinnings

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. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Furthermore, the regulations require that aliens be given a reasonable opportunity to present, examine, and object to evidence. See 8 C.F.R. § 1240.10(a)(4). And while aliens have a right to counsel, they must retain counsel at their own expense. See 8 C.F.R. § 1240.3.

The regulations carve out special procedural safeguards for respondents classified as "incompetent respondents" at 8 C.F.R. § 1240.4. See also section 240(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(3) (directing the Attorney General to "prescribe safeguards to protect the rights and privileges" of aliens who are incompetent, where "it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding"). This regulation sets forth that "[w]hen 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.” 8 C.F.R. § 1240.4. The regulation goes on to state that “[i]f 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.” *Id.*

The regulations also prohibit an Immigration Judge 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(c). When an Immigration Judge decides, pursuant to this regulation, not to accept an admission of removability, the court is required to “direct a hearing on the issues.” *Id.*

The Executive Office for Immigration Review (“EOIR”) has not yet issued policy memoranda establishing procedures for mentally incompetent respondents in removal proceedings. However, recently the U.S. House of Representatives has passed a bill encouraging EOIR “to work with experts and interested parties in developing standards and materials for immigration judges to use in conducting competency evaluations of persons appearing before the courts.” 155 Cong. Rec. H1762 (Feb. 23, 2009) (quoting from an explanatory statement by the Chairman of the House Committee on Appropriations regarding H.R. 1105, Omnibus Appropriations Act, 2009).

Board Interpretations

In 1965, the Board issued its first and only published decision interpreting the regulations governing incompetent respondents. In *Matter of Stoytcheff*, 11 I&N Dec. 329 (BIA 1965), the Board held that a special inquiry officer did not violate due process when he applied the regulations used for mental incompetents in deportation proceedings to an alien in exclusion proceedings.

Since then, the Board has issued several unpublished decisions interpreting the applicable regulations. Although these decisions are not binding, and citation to them is disfavored by the Board, the reasoning used by the Board in these cases provides insight into this area of law and to similar fact patterns from which general guidance can be gleaned.

First, it is significant to note that the cases that have analyzed this issue have done so in the context of hearings where the respondents were present and, in

many instances, represented by counsel. None of these cases has involved a claim that it was impracticable for the respondent to appear before the immigration court because of mental incompetency. Rather, the regulations have been invoked after a respondent appeared, either with or without counsel, and subsequently argued that due process was denied due process when the Immigration Judge continued with the proceedings pursuant to the regulations, despite the respondent’s claim to mental incompetency.

As the cases below illustrate, the Board has yet to hold that a respondent’s due process rights have been violated because of incompetency during removal proceedings. The Board has reached its conclusions in two manners: (1) by finding that a given respondent, who often times has appeared pro se, has failed to demonstrate incompetence through testimonial and documentary evidence; and (2) by finding that despite proffering such evidence, a respondent who was represented was nevertheless able to understand the nature of the proceedings and the charges against him.

For respondents who are adjudged by an Immigration Judge to be incompetent and who are unrepresented by an attorney or other prescribed representative, there are no cases that consider how to conduct proceedings so that the safeguards of 8 C.F.R. § 1240.4 are met. As respondents must exercise their right to counsel at their own expense, in cases where they have chosen to exercise neither that right nor the right to have a near relative, legal guardian, or friend appear in court, Immigration Judges must rely upon policy-makers and higher courts to provide guidance as to the parameters for meeting due process standards.

Failure of Pro Se Respondent To Demonstrate Incompetence

The Board interpreted 8 C.F.R. § 1240.4 in an unpublished case involving a pro se respondent who had been receiving treatment in a residential treatment program for 2 years for schizophrenia and was controlling this disorder through the use of medication. *See Matter of S-*, 2007 WL 2463933 (BIA Aug. 6, 2007). The respondent had advised the Immigration Judge of his condition only after pleadings had been completed, and the respondent had declined opportunities to seek representation. The Immigration Judge, in deciding to uphold the pleadings, relied on the respondent’s assertions that he had been “okay,” though a “little bit confused” due to his medication,

when he entered his plea. *Id.* The respondent had also stated that he understood the proceedings and the charges that had been brought against him.

At a subsequent hearing, the respondent stated that he wished to go forward with the merits hearing. The Immigration Judge found that the respondent could receive a full and fair hearing so long as “he was capable of answering questions and understood the proceedings.” *Id.* Upon the respondent’s statement that it was “okay” to proceed, the Immigration Judge proceeded to the merits of the case and subsequently ordered the respondent removed. On appeal, the Board noted that although it is “well settled that an alien who is mentally incompetent is entitled to procedural safeguards to ensure that his due process rights are protected,” the respondent in this case had presented no evidence that he was mentally incompetent. *Id.* Because the respondent had indicated during his proceedings that he had understood the nature of the charges against him and because he had refused additional time to retain an attorney, the Board held that the respondent’s removal proceedings before the immigration court had comported with due process.

In *Matter of O-*, 2007 WL 4707468 (BIA Nov. 16, 2007), the Board considered whether an Immigration Judge is required to conduct a formal competency hearing upon an allegation of incompetency by a respondent. The respondent argued “on appeal that her psychiatric disability made her incompetent to act pro se” at her hearing and that the Immigration Judge “abused his discretion by not first holding a competency hearing.” *Id.*

Considering the case on appeal, the Board noted that while the Immigration Judge did not hold a formal competency hearing, “he did provide a thorough discussion of the psychiatric examinations and treatment records with a subsequent finding of fact that the respondent did not suffer with any significant symptoms of a psychiatric disorder when compliant with her medication.” *Id.* The Board also noted that while a psychiatric examiner had found the respondent “incompetent to participate in judicial proceedings” through October 26, 2005, a second examiner had found her “competent to handle her legal affairs” from September 19, 2006, to the time of her hearings in 2007. *Id.* The Board found that outpatient records from the year preceding her hearings, as well as her family’s testimony, corroborated the Immigration Judge’s finding that respondent was competent. Accordingly, the

Board upheld the Immigration Judge’s finding that the respondent was competent to proceed pro se despite the lack of a formal competency hearing.

Represented Respondent Deemed To Understand Proceedings

In *Matter of E-*, 2003 WL 23269901 (BIA Dec. 4, 2003), the Board held that due process and the safeguards of 8 C.F.R. § 1240.4 were satisfied despite the respondent’s alleged incompetency, in part because the respondent was represented at his hearings. In that case, the respondent moved to terminate his case before the immigration court due to his incapacity, stating that he had “been formally diagnosed as mentally disabled by medical and governmental authorities and that he ha[d] been hospitalized numerous times as a result” of this disability. *Id.* The Immigration Judge denied his motion.

On appeal, the respondent argued that he had been denied due process because he had been “unable to understand the nature and consequences” of his removal proceedings. *Id.* The Board noted that the respondent had submitted “no documentary or testimonial evidence” of his mental incompetency either on appeal or before the immigration court. *Id.* Furthermore, since the respondent had been represented at all merits proceedings by an accredited representative, the Board held that the regulatory procedural safeguards of 8 C.F.R. § 1240.4 had been met. Because the respondent’s representative had “had a full opportunity to challenge the factual and legal bases for the charge of removability,” the respondent had not been denied due process and his appeal was dismissed. *Id.*

Similarly, in 2006 the Board considered a claim by a respondent that he had been denied due process in his removal proceedings before the immigration court because of mental incompetency. *Matter of V-*, 2006 WL 2008263 (BIA May 24, 2006). On appeal, the respondent “submitted a copy of psychological records kept during his detention in prison,” which found “him subject to depression and an unspecified mental illness.” *Id.* Declining to find that the respondent had been denied due process, the Board determined that he had “not shown that he was not able to understand the nature of the action to be taken against him or . . . participate in his case.” *Id.*

In its *V-* decision, the Board noted that the respondent had “responded appropriately to all questions asked of him,” and it concluded that he had shown “no

signs of mental illness.” *Id.* The evidence submitted on appeal indicated that the respondent was “on medication, cooperating well and showing significant improvement.” *Id.* Furthermore, the Board noted that even if it had found the respondent to be mentally incompetent, the regulatory procedural safeguards simply require that “an attorney, legal representative, legal guardian, near relative, friend or the custodian of the respondent” appear on his behalf. *Id.* (citing to 8 C.F.R. § 1240.4). Because the respondent had been represented during proceedings, the Board held, “his rights were adequately protected.” *Id.*

Survey of Circuit Courts of Appeals Cases

The circuit courts of appeals have generally upheld the Board’s legal framework in cases involving claims of incompetency. However, some of the decisions imply that if an alien can establish some prejudice because of his or her mental incompetence—even if he or she is given the procedural protections of 8 C.F.R. § 1240.4—the alien would be entitled to further immigration proceedings that comport with due process.

The Ninth Circuit

The Ninth Circuit has been the most active on this issue and has issued several decisions on the topic. Like the Board’s decisions, however, most of these opinions are quite short in length, and all but one are unpublished. The most prominent case on the issue is *Nee Hao Wong v. INS*, 550 F.2d 521 (9th Cir. 1977), as it is frequently cited by the Board as well as the other circuits for the proposition that “the full trappings of procedural protections that are accorded criminal defendants are not necessarily constitutionally required for deportation proceedings.” *Id.* at 523.

The issue before the *Wong* court was “whether due process requires that deportation proceedings must be postponed until the alien is competent to participate intelligently in the proceedings.” *Id.* at 522. The petitioner in that case had been represented by counsel and “accompanied by his state court appointed conservator” during proceedings before the immigration court. *Id.* at 523. Nevertheless, he argued that he had been denied due process because “he was not competent to participate intelligently in the proceedings against him.” *Id.* The Ninth Circuit disagreed, citing a former provision of the Immigration and Nationality Act, which provided that a person who was mentally incompetent may be subject to

deportation proceedings so long as “necessary and proper safeguards” were in place to protect his or her rights. *Id.* (citing section 242(b) of the Act, 8 U.S.C. § 1252(b) (1970)). The court also cited to the accompanying regulation in effect at that time, 8 C.F.R. § 242.11 (1976), which allowed a “guardian, near relative, or friend” to appear on behalf of an incompetent respondent.¹

In the petitioner’s case, the Ninth Circuit held that these safeguards had been met because the petitioner had been “accompanied by his state court appointed conservator, who testified fully in his behalf, and by his counsel.” *Id.* Further, the panel found that Wong had not demonstrated that he had been prejudiced by his lack of competency and therefore held that he had not established a due process violation. *Id.* In so holding, the Ninth Circuit signaled its approval of the concept that proceedings against incompetent respondents can be permitted so long as safeguards are in place to protect these respondents.²

Unpublished decisions by the Ninth Circuit have upheld this framework. In the 1999 unpublished case of *De Leon-Lopez v. INS*, 1999 WL 993675 (9th Cir. Nov. 1, 1999), the petitioner argued that his proceedings should be reopened because his incompetency during his deportation proceedings equated to a denial of due process. The Ninth Circuit held that “[e]ven when an alien is not competent to participate intelligently in his deportation proceedings, such proceedings may still satisfy due process requirements.” *Id.* at *1. Given that the Immigration Judge and the Board had “provided adequate safeguards to protect the petitioner, and because the petitioner ha[d] failed to demonstrate any prejudice as a result of his incompetency, the petitioner’s due process argument” was found to be without merit. *Id.*

Similarly, in the unpublished decision of *Sanchez-Salvador v. INS*, 1994 WL 441755 (9th Cir. Aug. 15, 1994), the Ninth Circuit considered the claims of incompetency of a petitioner who had “been hospitalized for mental illness on more than one occasion” and who, at the time of the hearing and the appeal, “remain[ed] under the care of a physician.” *Id.* at *1. The court noted that because of his condition, the petitioner was “unemployable,” and he “relied on family members and Social Security disability benefits for assistance.” *Id.* Nevertheless, the court found that his “[l]ack of competency did not prevent [the] judge from determining either deportability or whether to grant relief.” *Id.* The court, citing *Wong*, held that “an alien can

obtain a full and fair hearing despite being incompetent.” *Id.* In this petitioner’s case, his “incompetence did not prevent him from presenting, through counsel, a strong case that relief [was] warranted.” *Id.* It was immaterial that the Board did not order, and his attorney did not request, a competency hearing, because he was not found to have been “prejudiced by the lack of competency hearing.” *Id.* at *2.

The Tenth Circuit

The Tenth Circuit has published a single case on the issue of incompetency in immigration proceedings. The 2006 decision in *Brue v. Gonzales*, 464 F.3d 1227 (10th Cir. 2006), is substantively identical to the Ninth Circuit’s unpublished decisions:

[W]e have held that, “when facing removal, aliens are entitled only to procedural due process, which provides the opportunity to be heard at a meaningful time and in a meaningful manner.” . . . Thus, contrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled . . . removal proceedings may go forward against incompetent aliens

Removal proceedings against mentally incompetent aliens, however, are not without constraint. . . . [A]n IJ may conduct the proceeding provided that the alien is represented by an attorney or other person; a custodian is required only when the alien has no other representative.

. . . .

Additionally, petitioner received the process he is due under the Fifth Amendment because he has not shown that the removal proceedings caused him prejudice, a requirement for a successful due process challenge

Id. (internal citations omitted).

The First Circuit

The First Circuit has not directly considered the incompetency regulation. However, in *Nelson v. INS*, 232 F.3d 258, 261-62 (1st Cir. 2000), the panel held that an alien’s complaint of a bad memory and headaches during a removal hearing was not enough to require that the Immigration Judge consider her to be mentally incompetent and thus trigger the procedural safeguards of 8 C.F.R. § 1240.4.

Additionally, in *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1 (1st Cir. 2008), the court held that the Immigration Judge’s failure to order sua sponte a competency evaluation did not violate the petitioner’s due process rights where the record contained no significantly probative evidence of any lack of competency and where the alien’s attorney did not raise the issue of competency. Although the petitioner claimed that his mental impairment was so obvious throughout proceedings that the Immigration Judge should have initiated a competency evaluation, the First Circuit disagreed, noting that it was the role of the petitioner’s attorney, not the Immigration Judge, “to broach the issue of mental competence” in the first instance because the Immigration Judge “is not normally expected to initiate evaluative proceedings sua sponte.” *Id.* at 6. However, the First Circuit quite vaguely noted that “exceptional circumstances,” though not present in that case, “may require extraordinary measures.” *Id.*

The Second Circuit

Similarly, the Second Circuit has not directly considered 8 C.F.R. § 1240.4. In an unpublished decision, *Nikolov v. Gonzales*, 204 Fed. Appx. 80 (2d Cir. 2006), the panel held that the respondent, who claimed to have “had difficulty understanding the proceedings,” was not entitled to be represented by a “special representative or medical expert.” *Id.* at 82-83.

The Sixth Circuit

The Sixth Circuit’s only decision on the issue, also unpublished, *Jaadan v. Gonzales*, 211 Fed. Appx. 422 (6th Cir. 2006), appears to set out a requirement that competency hearings must be held for an unrepresented alien in removal proceedings. The decision suggests that such a competency hearing should, however, be limited to a determination whether it is impractical for the alien

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MARCH 2009

by John Guendelsberger

The United States courts of appeals issued 521 decisions in March 2009 in cases appealed from the Board, nearly doubling the output for last month. The courts affirmed the Board in 474 cases and reversed or remanded in 47, for an overall reversal rate of 9%. The Second and Ninth Circuits together issued 80% of all the decisions and 83% of the reversals. There were no reversals from the First, Fifth, Tenth, and Eleventh Circuits.

The chart below provides the results from each circuit for March 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	%
1st	6	6	0	0.0
2nd	118	113	5	4.2
3rd	16	15	1	6.2
4th	20	19	1	5.0
5th	21	21	0	0.0
6th	15	11	4	26.7
7th	11	10	1	9.1
8th	5	4	1	20.0
9th	283	249	34	12.0
10th	2	2	0	0.0
11th	24	24	0	0.0
All:	521	474	47	9.0

Half of the reversals in the Ninth Circuit found fault with a denial of asylum. Of these, seven reversed the adverse credibility determination, four addressed the nexus determination, three addressed past persecution, and three cases involving claims from Indonesia found that the issue of “disfavored group” had not been addressed. Other reversals involved failure to complete fingerprinting (three cases), motions to reopen for ineffective assistance (two cases), and a number of cases involving various criminal grounds of removal.

The Second Circuit reversed in only five cases. The two asylum cases involved firm resettlement and a

remand to consider evidence in the record that had not been addressed. The court also remanded a motion denial in which it found that the Board had not addressed all of the evidence relevant to changed country conditions and remanded in another case in which it found that the Board had not addressed a motion to remand for adjustment of status. The other reversal found that the Board erred in looking outside the record of conviction to find an aggravated felony.

Two of the four decisions from the Sixth Circuit found that the Board had failed to address all of the evidence in denying reopening for changed country conditions. The Sixth Circuit also reversed in a decision addressing the persecutor bar.

The chart below shows the combined numbers for the first 3 months of 2009, arranged by circuit from highest to lowest rate of reversal. These numbers reflect the addition of 26 additional cases (23 affirmances and 3 reversals) decided in January 2009, which were not reflected in the January numbers because they were not published until March 2009.

Circuit	Total	Affirmed	Reversed	%
3rd	73	57	16	21.9
8th	16	14	2	12.5
9th	565	499	66	11.7
6th	42	38	4	9.5
7th	23	21	2	8.7
5th	54	51	4	7.4
2nd	292	272	20	6.8
11th	76	71	5	6.6
4th	46	45	1	2.2
10th	9	9	0	0.0
1st	19	19	0	0.0
All:	1216	1096	120	9.9

Last year at this point there were 1265 decisions and 174 reversals for a 13.8 % reversal rate.

John Guendelsberger is Senior Counsel to the Board Chairman, and he is currently serving as a temporary Board Member.

Evidence That Rules of Evidence *Do* Exist in Immigration Court

by Edward R. Grant

It is as tried and true as the phrase “tried and true” that the Federal Rules of Evidence do not apply in immigration proceedings. Thus, rules against the admission of hearsay evidence do not apply, and the test for admissibility is whether the evidence is “probative and fundamentally fair.” *Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009); *Doumbia v. Gonzales*, 472 F.3d 957, 962-63 (7th Cir. 2007); *Zerrei v. Gonzales*, 471 F.3d 342, 346 (2d Cir. 2006); *Hassan v. Gonzales*, 403 F.3d 429, 435 (6th Cir. 2005); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003) (hearsay admissible). However, as discussed in previous postings, the rule of “fundamental fairness” does restrict reliance on some forms of evidence, see *Corovic v. Mukasey*, 519 F.3d 90, 95-96 (2d Cir. 2008) (admission of report from Macedonian Government on authenticity of alien’s documents violated confidentiality), and also allows Immigration Judges to reject certain forms of unreliable corroborative evidence, see *Silva v. Gonzales*, 463 F.3d 68, 72-73 (1st Cir. 2006) (affirming a ruling that triple hearsay evidence is not probative or reliable). Another key issue is applicability of the “exclusionary rule.” See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (Fourth Amendment-based exclusionary rule is not applicable to deportation proceedings). As will be discussed, there is reason to conclude that in the Ninth Circuit at least, a version of the exclusionary rule *does* apply to removal proceedings.

The lack of hard and fast evidentiary rules does not, however, necessarily lead to fewer evidentiary disputes. As any Immigration Judge can attest, determinations regarding the admissibility and weight to be given various forms of evidence have become more complex in recent years. In criminal cases, the vagaries of the “categorical” and “modified categorical” approaches have generated copious litigation over what items in a record of conviction can be considered. In asylum cases,

the need to corroborate claims—and government efforts to investigate and impeach some of that corroborative evidence—have given rise to an equally fertile body of case law.

This article will review some recent developments on the rules of evidence in Immigration Court and analyze how they reflect the changing nature of immigration adjudication.

Evidence and Immigration: An Evolving Code

What we now experience as “quasi-judicial” administrative proceedings have their roots in something far more “operational” in character. Once rules were established in the late 19th and early 20th centuries regarding who could (and could not) enter the United States (and who, due to conduct before or after entry, ought to be deported), the enforcement of those rules became an essential operation of the Government. The process at ports of entry such as Ellis Island most clearly reflected this “operational” model of adjudication—and some elements of that model persist to the present day. Of necessity, certain “evidentiary” rules were established—and almost immediately, those rules became “sorted out” on grounds such as who bore the burden of proof. “Rules” of evidence were closely tied not only to the question of who had the burden of proof, but also to the question of what it is that had to be proven. These evidentiary standards evolved informally—there is no “landmark” such as the changes in substantive immigration law enacted by Congress in 1952 (McCarran-Walter Act), 1980 (Refugee Act), 1990 (IMMACT), 1996 (IIRIRA), or 2005 (REAL ID Act). However, as several immigration scholars and students noted, even before the explosion in immigration litigation of the past 15 years, the procedural rules in immigration law—including these informally evolved rules of evidence—can have profound substantive effect. See, e.g., Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); Paul R. Verkuil, *A Study of Immigration Procedures*, 31 U.C.L.A. L. Rev. 1141 (1984); Patricia J. Schofield, Note, *Evidence in Deportation Proceedings*, 63 Texas L. Rev. 1537 (1985); Brian L. Rooney, Note, *Administrative Notice, Due Process, and the Adjudication of Asylum Claims in the United States*, 17 Fordham Int’l L.J. 955 (1994).

In the years since these articles were written, the common-law like evolution of immigration evidence rules

has continued. Now, the topic embraces issues as diverse as whether an Abstract of Judgment can prove the factual basis for a criminal plea, *see Anaya-Ortiz v. Mukasey*, 553 F.3d 1266 (9th Cir. 2009) (abstract part of “record of conviction”; following *United States v. Snellenberger*, 548 F.3d 699 (2008)), to whether a “border statement” taken after several hours of overnight waiting and interrogation was fairly admitted to establish an alien’s knowledge of an alleged smuggler’s unlawful status, *see Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009) (excluding statement). In fact, the kaleidoscope of court decisions on evidence and immigration is now so complex that it is legitimate to ask whether we now *do* have a de facto “code of evidence” guiding our procedures. While a full answer to that question is beyond the scope of this article, the 2009 decisions discussed here provide some basis to conclude that the rules of evidence have become more formal.

Lopez-Rodriguez: Does the Exclusionary Rule Apply in the Ninth Circuit?

A recent Ninth Circuit decision to deny rehearing en banc raises the provocative question: Does the exclusionary rule, notwithstanding the Supreme Court’s 1984 decision in *Lopez-Mendoza*, apply in immigration proceedings in that circuit? *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), *reh’g en banc denied sub nom. Lopez-Rodriguez v. Holder*, 560 F.3d 1098 (9th Cir. 2009).

Lopez-Rodriguez involved a warrantless search by Department of Homeland Security (“DHS”) officers acting on a tip that an alien residing at a particular address was fraudulently using the birth certificate of a United States citizen to obtain employment. The alien’s uncontested account (the DHS did not produce the officers at the removal hearing, despite being granted a continuance to do so) was that the officers pushed open the door to the house and began interrogation, without asking specific permission to enter. The Immigration Judge concluded that there was a Fourth Amendment violation, but that it was not sufficiently “egregious” to warrant suppression of the evidence. The Board of Immigration Appeals affirmed.

A unanimous panel of the Ninth Circuit reversed, concluding that the warrantless entry without consent fell within the “egregious conduct” exception to the Supreme Court’s ruling in *Lopez-Mendoza*. The source

of this exception, as discussed below, is controversial. But the Ninth Circuit adopted it in several cases, notably *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994), and *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994), and the Board followed suit, at least in dicta, in *Matter of Cervantes-Torres*, 21 I&N Dec. 351 (BIA 1996) (noting agreement with Immigration Judge’s suppression of Form I-213 obtained in “egregious arrest”; deportability established through independent evidence). The Board also permits suppression of evidence acquired in direct violation of immigration regulations, where the purpose of such regulations is to benefit the alien. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). This “administrative exclusionary rule” was not addressed in *Lopez-Rodriguez*.

In assessing whether the officers’ conduct was egregious, the Ninth Circuit applied the two-part disjunctive test enunciated in *Gonzalez-Rivera*: was the evidence obtained by a deliberate violation of the Fourth Amendment, *or* by conduct that a reasonable officer should have known is in violation of the Constitution? *Lopez-Rodriguez*, 536 F.3d at 1018. Citing chiefly criminal cases, the court determined that this type of warrantless entry had been long held to violate the Fourth Amendment, and thus, that reasonable officers would not have thought it reasonable to push a door open simply because the occupant of the house did not tell them to leave or affirmatively refuse them entry. *Id.* at 1018-19 (citing *United States v. Shaibu*, 920 F.2d 1423 (9th Cir. 1990)).

Concurring in the judgment, Judge Bybee noted that the court’s analysis—which he concluded was dictated by circuit precedent—put the Ninth Circuit on a “collision course” with the Supreme Court’s decision in *Lopez-Mendoza*. *Id.* at 1019-20. First, the portion of Justice O’Connor’s opinion for the Court that suggested the existence of an “egregious conduct” exception to the nonapplicability of the exclusionary rule was not adopted by a majority of the Court. Rather, it was mentioned in a “coda” to Justice O’Connor’s opinion that was joined by only three other Justices—making it a plurality ruling. Second, the warrantless entry in this case was arguably less egregious than the Immigration and Naturalization Service’s conduct at issue in *Lopez-Mendoza*—when agents carried out a factory raid and pursued fleeing workers on the basis of their inability to speak English. That tactic, even Justice O’Connor’s plurality concluded, did not rise to the level of an “egregious” violation of the

Fourth Amendment. Third, the Ninth Circuit’s version of the “egregious conduct” exception ties it closely to the “qualified immunity” standard: any violation for which an officer would lose immunity from suit would trigger the exception. *Id.*

The denial of rehearing en banc provoked a strong dissent from five circuit judges: Bea, joined by O’Scannlain, Bybee, Tallman, and Callahan. In more pointed language, the dissent concludes that *Lopez-Rodriguez* and the circuit case law it relies upon “directly contradicts” *Lopez-Mendoza*. *Lopez-Rodriguez v. Holder*, 560 F.3d at 1099. “How we got there is an interesting—and perhaps cautionary tale. We seem to have turned Supreme Court plurality dicta into majority dicta simply by saying so. Then, we have applied that dicta, in a manner not consistent with the sole case cited in the dicta, to create a new rule—one never envisioned by either the Supreme Court majority or the plurality.” *Id.* In addition to the three points made by Judge Bybee, the dissent noted that even though the warrantless entry was clearly in violation of the Fourth Amendment, the *conduct* of the officers was in no way egregious. *Cf. Rochin v. California*, 342 U.S. 165 (1952) (cited in *Lopez-Mendoza*, 468 U.S. at 1050-51).

The Ninth Circuit appears to stand alone in its approach. Two other circuits that have adopted an “egregious” conduct standard limit it to situations beyond mere violation of settled Fourth Amendment law. *See also Kandamar v. Gonzales*, 464 F.3d 65, 71-72 (1st Cir. 2006) (denying motion to suppress; “egregious” misconduct by government agents is that which involves threats, coercion, or physical abuse); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006) (while DHS officer had no valid reason to stop alien and request identification, motion to suppress fruits of stop denied; seizure egregious if it is “grossly improper” or “sufficiently severe”).

For Immigration Judges and the Board, the intra-circuit debate in *Lopez-Rodriguez* illustrates the need for precision in interpreting and applying the “egregious conduct” exception hinted at by the Supreme Court plurality in *Lopez-Mendoza*. That exception—to the extent it applies at all to exclude evidence in immigration proceedings—operates in a far more restrictive manner within the Ninth Circuit than it does elsewhere. Furthermore, while the Board appeared to adopt the standard in *Matter of Cervantes-Torres*, it did not engage the question of what level of conduct would be sufficiently egregious to require

evidence to be excluded. The presumptive rule—outside the Ninth Circuit, that is—remains that the exclusionary rule does not apply to bar evidence obtained in violation of the Fourth Amendment from immigration proceedings.

As a footnote, two recent Eleventh Circuit decisions in criminal cases illustrate the dilemmas posed when the investigation of immigration status and offenses intersects with the investigation and prosecution of other criminal matters. *See United States v. Lopez-Garcia*, ___F.3d___, 2009 WL 1044594 (11th Cir. Apr. 21, 2009) (statements regarding immigration status elicited during course of arrest for unrelated drug offense not inadmissible); *United States v. Mitchell*, ___F.3d___, 2009 WL 1067212 (11th Cir. Apr. 22, 2009) (seizure by immigration agents of computer hard drive with multiple images of child pornography lawful at inception, but became unlawful due to 3-week delay in obtaining warrant; defendant’s substantial “possessory interest” in computer for personal use required compelling justification for delay).

A final point: even when evidence (such as a prior statement) is not deemed inadmissible due to “egregious” conduct in violation of the Fourth Amendment, it may be excluded due to lack of reliability arising from alleged “coercive” or other pressure applied by immigration agents. *See, e.g., Singh v. Mukasey*, 553 F.3d 307 (2d Cir. 2009) (*see also* Immigration Law Advisor, Vol. 3, No. 3 (Mar. 2009)); *Pinto-Montoya v. Mukasey*, 540 F.3d 126 (2d Cir. 2008) (questioning of suspected alien smugglers upon disembarkation from airplane not a “seizure” under Fourth Amendment; statements not suppressed).

Confidential Information and Denial of Asylum in Discretion

Another recent Ninth Circuit decision addresses an equally contentious question: the use of classified evidence in removal proceedings. *Kaur v. Holder*, ___F.3d___, 2009 WL 839282 (9th Cir. Apr. 1, 2009). Previously, the Ninth Circuit reversed a Board decision concluding that Kaur had engaged in terrorist activity and concluding that Kaur’s husband, even if he had engaged in such activity, posed a danger to the security of the United States. However, in that case, the Board had not relied for its decision on confidential evidence present in the record. *Cheema v. Ashcroft*, 383 F.3d 848, 853 (9th Cir. 2004). While the case was on remand, Kaur’s husband decided to abandon his applications for relief and he was deported to India. The subsequent decisions

of the Immigration Judge and the Board regarding Kaur relied on classified evidence to conclude that Kaur did not merit a discretionary grant of asylum. The Board, quoting from an unclassified summary of the classified evidence, noted that “reliable confidential sources have reported that Kaur has conspired to engage in alien smuggling; has attempted to obtain fraudulent documents; and has engaged in immigration fraud by conspiring to supply false documents for others.” *Kaur*, 2009 WL 839282, at *3.

The Board erred in relying on such evidence, the Ninth Circuit held, because the unclassified summary of such evidence provided to Kaur violated the regulatory requirement that such a summary be “as detailed as possible,” in order to give the applicant “an opportunity to offer opposing evidence.” *Id.* (quoting 8 C.F.R. § 1240.33(c)(4)). The court acknowledged that the regulations do not require *any* summary of classified evidence to be provided but held that such a summary, once provided, must meet the regulatory standard of specificity. Since the evidence related to the respondent’s own alleged involvement in alien smuggling and immigration fraud, “then she personally would be knowledgeable of the details of what occurred, so there is little justification for failing to provide enough detail in the summary to allow her to respond to specific allegations.” *Id.* at *4. The court also found that the failure to provide a more detailed summary of the evidence was “fundamentally unfair” and thus violated Kaur’s due process rights. *Id.* at *5.

The issues in *Kaur*, however, were not as straightforward as this brief summary of the majority decision suggests. First, there were two concurring opinions. Judge Noonan, author of the original decision in *Cheema v. Ashcroft*, suggested that no use of confidential evidence could be consistent with due process. *Id.* at *6-7. Judge Rawlinson, who dissented in *Cheema*, stated that he “reluctantly” joined the majority in this instance, due to his view that the unclassified evidence in the case provided adequate support for the denial of asylum to Kaur. *Id.* Second, the sole issue at this juncture of the case was whether Kaur merited asylum in the exercise of discretion. At the conclusion of a 75-page unclassified decision (which was accompanied by a classified decision appendix), the Immigration Judge found as a matter of fact that Kaur had engaged in immigration fraud and that despite her overall credibility, she lacked candor on some issues. These were the *first* factors cited by the Board in determining that Kaur (contrary to the Immigration

Judge’s conclusion) did *not* merit a favorable exercise of discretion. The Ninth Circuit criticized the Board’s reliance on the “lack of candor” finding, saying that in light of the Immigration Judge’s overall positive credibility finding, the lack of candor on some issues could *not* serve as the basis for a discretionary denial of asylum: “Because the BIA did not disturb the credibility finding, it cannot now latch onto an isolated, unsupported reference as a basis for its discretionary denial of asylum.” *Id.* at *6.

A third factor to consider is who, in this instance, had the burden of proof. The regulations specific to asylum applications provide for the admissibility of classified information. 8 C.F.R. § 1240.33(c)(4) (regulations pertaining to exclusion proceedings commenced prior to April 1, 1997); *see also* 8 C.F.R. § 1240.11(c)(3)(iv) (applicable to removal proceedings). Here, the topic of the classified information was known to the applicant, was presumably within her capacity to rebut or at least deny, and pertained not to the Government’s burden to establish inadmissibility or deportability, but rather, to the applicant’s suitability for a favorable exercise of discretion. The due process analysis in *Kaur* did not differentiate between the use of classified information to establish removability and its use in determining matters of discretion. The constitutional concerns would appear to be higher in the first instance than in the second; for this reason and others, Congress limited the use of classified information in establishing removability to cases of alleged terrorists. *See* sections 501-507 of the Act, 8 U.S.C. §§ 1531-1537 (“Alien Terrorist Removal Procedures”). Ironically, we may never know if the Ninth Circuit would apply a higher due process standard to the use of confidential evidence in alien terrorist removal proceedings—judicial review is limited to the U.S. Court of Appeals for the District of Columbia. Section 505 of the Act.

In Absentia Proceedings: Removability Must Still Be Established

In cases involving in absentia proceedings, the issues typically center on the adequacy of notice and whether exceptional circumstances excused the alien’s failure to appear—or whether the alien’s tardiness actually constituted a “failure to appear.” *See Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008) (alien who arrived 2 hours after the scheduled time of her hearing did not “fail to appear”). However, yet another recent Ninth Circuit decision serves as a reminder that the more fundamental question may

be whether the Government has met its burden on the charges of removability.

Al-Mutarreb v. Holder, ___F.3d___, 2009 WL 903358 (9th Cir. Apr. 6, 2009), involved an alien from Yemen who filed an asylum application while still in F-1 student status. He thus received a notice of intent to deny from the DHS (rather than a referral to Immigration Court), to which he replied. He claimed not to have received any response. A Notice to Appear (“NTA”) was later sent to a post office box; it was returned unclaimed, but the NTA was not resent to a street address on file, or to the alien’s attorney who represented him on the asylum application. His motion to reopen proceedings based on lack of notice was denied by the Immigration Judge, and that decision was affirmed by the Board. The Ninth Circuit remanded the case, on joint motion of the parties, to reconsider solely the issue of removability. On remand, the Board concluded that the Immigration Judge, in the initial in absentia order, “must have” found that the alien violated his student status, as alleged in the original NTA.

After noting that there are “substantial” questions regarding the adequacy of notice—including the unresolved issue whether service should be required on counsel who represented the alien in a prior application—the panel stated that it need not reach those issues, because the underlying order of removal was invalid. The sole ground of removability charged in the NTA was the alien’s alleged failure to attend college. “[N]ot an iota of evidence, let alone substantial evidence,” was present in the record to support the charge, the court concluded. *Id.* at *4. The only evidence on point would have been the respondent’s asylum application, which failed to list attendance at any U.S. college or university. The inference that the alien thus did not comply with the requirements of his F-1 visa was insufficient to support the charge, the court held. Furthermore, it rejected the Government’s argument of “harmless error,” based on the fact that, by this time, the alien had overstayed the expiration date on his visa: “We have no power to affirm the BIA on a ground never charged by the Service or found by the IJ.” *Id.* at *5.

The court concluded that a new NTA may be filed, but that under principles of *res judicata*, it cannot be based on a charge that could have been brought at the time of his original in absentia proceeding. *Id.* at *6; *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007).

Proving Removability for Crimes: New Rules on the “Official Record”

We have previously discussed the Ninth Circuit’s landmark decision holding, in a criminal reentry case, that information contained in a “minute order” is among those documents in a record of conviction that may be relied on to establish, under the modified categorical approach, that an alien’s conviction under a “divisible” statute was for an aggravated felony. *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (*see* Immigration Law Advisor, Vol. 2, No. 10 (Oct. 2008)). Recently, the Ninth Circuit extended that holding, in a civil removal case, to information included in an “abstract of judgment,” a common document in California records of conviction. *Anaya-Ortiz v. Mukasey*, 553 F.3d 1266 (9th Cir. 2009). The court’s analysis of the admissibility of the abstract of judgment paralleled its analysis in *Snellenberger*: the abstract is a “contemporaneous, statutorily sanctioned, officially prepared clerical record of the conviction and sentence” that is prepared by the clerk of court and subject to amendment by the judge upon motion of either party. *Id.* at 1272 (citation omitted). The court also rejected the alien’s argument that the abstract failed to indicate that he had been convicted “as charged in the Information,” as “here the abstract of judgment provides sufficient information to establish that he was convicted of each element of the generic federal crime, without reference to his charging document.” *Id.* at 1273.

A recent Third Circuit case, however, rejected reliance on two forms of evidence: judicial statements in a record of sentencing and admissions by an alien before an Immigration Judge. *Evanson v. Att’y Gen.*, 550 F.3d 284 (3d Cir. 2008). At issue was whether the respondent’s State conviction for possession of marijuana with intent to deliver could have been prosecuted as a Federal felony and thus meet the standards for a “drug trafficking offense” established in circuit law. *See Jeune v. Att’y Gen.*, 476 F.3d 199 (3d Cir. 2007) (conviction for distribution of marijuana will be treated as Federal misdemeanor absent further evidence in record of conviction regarding amount of drug); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (distribution of marijuana without remuneration not inherently a felony; treated as a misdemeanor under Federal Controlled Substances Act). In *Evanson*, the Immigration Judge found that the record of conviction did not establish that the respondent had been convicted of conduct that would constitute a Federal felony and

further found the respondent eligible for cancellation of removal. The Board reversed, relying on evidence that the respondent had been convicted of “possession with intent” of close to a half-pound of marijuana, not a small amount amenable to lenient treatment as a misdemeanor under 21 U.S.C. § 844. The Third Circuit concluded that it was impermissible to look at documents beyond the record of conviction—including the judgment of sentence—to establish the amount of marijuana. Nor could the respondent’s own admissions before the Immigration Judge meet the requirements of the modified categorical approach. *Evanson*, 550 F.3d at 292-94.

Evanson is somewhat limited in application to the Third Circuit, which places an unusually heavy burden on the Government to establish that an alien convicted of a “possession with intent” crime involving marijuana to prove that the alien could *not* have been prosecuted under the more lenient provisions of 21 U.S.C. § 844. See *Matter of Aruna*, 24 I&N Dec. 452, 457 n.4 (BIA 2008). However, its holding regarding the reliability of factual statements in a judgment of sentence are applicable to any situation requiring application of the modified categorical approach and suggests a potential outer boundary for the type of evidence in criminal proceedings that can be employed under that approach.

Conclusion

While most of the cases discussed here emanate from the Ninth Circuit, all of them fill in small gaps in the incremental development of the law of evidence in immigration proceedings. And, as noted at the start, they illustrate the ever-complex task faced by Immigration Judges in their own evidentiary rulings, most often made without the relative leisure enjoyed by appellate courts.

Board Member Edward R. Grant has served on the Board of Immigration Appeals since January 1998.

RECENT COURT DECISIONS

Supreme Court:

Negusie v. Holder, 129 S. Ct. 1159 (Mar. 3, 2009): *Negusie*, discussed in greater depth in volume 2, issue 11 of the ILA, remanded to the Board the following question: Does the “persecutor bar” to the grant of asylum of withholding

of deportation include a “duress exemption” for those who have been coerced to participate in persecution? The Court decided that the Board’s refusal to acknowledge a duress exemption was based on legal error: the Board cited to the Court’s own decision in *Fedorenko v. United States*, 449 U.S. 490 (1981), which concluded that there was no duress exemption to the persecutor bar under the Displaced Persons Act of 1948. Since the persecutor bar for asylum was enacted as part of the Refugee Act of 1980, the textual analysis which supported the holding in *Fedorenko* does not apply, and thus the Board erred in citing *Fedorenko* for its holding in asylum cases.

The impact of *Negusie* will depend on how the Board resolves, on remand, the issue of the duress exemption. However, the exemption has been claimed by numerous aliens in asylum cases over the years and has been consistently denied. Pending further review of the issue by the Board, further commentary on *Negusie* in these pages will necessarily be limited. However, we will revisit the case in our end-of-Term analysis, to discuss how the Court reached its decision, and also the opinions of the concurring and dissenting Justices.

Nken v. Holder, __U.S.__, __S. Ct.__ (Apr. 22, 2009). The Fourth Circuit held in this case that when determining whether an alien filing a petition for review should be granted a stay of removal, it is bound to apply the standard in section 242(f)(2) of the Act, 8 U.S.C. § 1252(f)(2): the alien must show “by clear and convincing evidence” that the order was “prohibited as a matter of law.” See *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008). Only the Eleventh Circuit joined the Fourth Circuit in this view; the remaining seven circuits to have addressed the issue determined that the “traditional” stay factors of likelihood of success on the merits, i.e., irreparable harm, injury to other parties, and the public interest, should be applied.

The Court agreed with the majority of the circuits. The provisions of section 242(f)(2) of the Act relate to the injunction power, which the Court concluded is materially different from the authority to issue a stay pending appeal. While both result in a “command” for one or more parties to take or refrain from taking certain action, a stay is different from an injunction because it operates upon the judicial proceeding itself, holding an order in abeyance until a reviewing court may resolve the matter on appeal. Suspension of the “historic office” of

the stay should not be inferred in the absence of more specific congressional intent, which is absent here.

The petitioner's victory in this case, however, may be some pyrrhic—particularly for aliens in those circuits with more generous practices in granting stays. The Court majority, and in particular a concurring opinion by Justice Kennedy joined by Justice Scalia, emphasized that stays are not automatic, and that more than a mere possibility of prevailing on appeal, or of sustaining burden or injury from removal, is required. According to the majority, “courts should not grant stays of removal on a routine basis.”

Nijhawan v. Holder, 523 F.3d 387 (3d Cir. 2008), cert. granted, 129 S. Ct. 988 (Jan. 16, 2009). The Supreme Court granted certiorari, limited to the following question: “whether petitioner’s conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud qualifies as a conviction for conspiracy to commit an ‘offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000,’ 8 U.S.C. 1101(a)(43)(M)(i) and (U), where petitioner stipulated for sentencing purposes that the victim loss associated with his fraud offense exceeded \$100 million, and the judgment of conviction and restitution order calculated total victim loss as more than \$680 million.”

The issue, in briefer terms, is the viability of the Board’s decision in *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007), holding that the “loss to the victim” clause in section 101(a)(43)(M)(i) of the Act is a “nonelement” fact that may be proven by evidence, such as a presentence report, even though such evidence is not part of the formal record of conviction. The Third Circuit, relying on its own precedents, held in *Nijhawan* that the “loss to the victim” does not need either to be proven either as an element of the offense or established as a factual matter by record evidence such as a plea colloquy – the type of evidence required under the “modified categorical approach” to establish that a conviction under a divisible statute meets the defined criteria of an “aggravated felony.”

There are thus two questions before the Court: whether a loss to the victim in excess of \$10,000 must be an element of the offense for which the alien was convicted and, if not, whether that amount must be proven by evidence equivalent to that required under the modified categorical approach. See *Dulal-Whiteway*

v. U.S. Dept of Homeland Sec., 501 F.3d 116, 131 (2d Cir. 2007) (requiring amount of loss to be established by facts necessarily beyond a reasonable doubt by judge and jury). During oral argument before the Supreme Court on April 27, 2009, counsel for the petitioner appeared to concede at one point that the “loss” could be proven by a stipulation in a plea colloquy—even when the amount is not an element of the offense. The Justices generally seemed to be skeptical of the argument that the amount of loss must be an element of the offense, in part because very few fraud crimes include loss as an element, and partly because of the clear intent of Congress in 1996 when it lowered the threshold loss amount to \$10,000 to expand the reach of this ground of deportability. Things seemed to go more smoothly for the Solicitor General—until the Chief Justice inquired why, since fraud itself is not an “aggravated” offense, proof beyond a reasonable doubt should not be required of that factor—the amount of loss—that converts it to an “aggravated” offense. One can only speculate whether this might lead the Court to give substantive content to the term “aggravated felony”—that is, to use that phrase as an interpretive tool, rather than recognize it as a pure “term of art” employed by Congress to embrace a laundry list of criminal offenses of varying degrees of severity. For that, we must await the end of Term.

First Circuit:

Larngar v. Holder, ___F.3d___, 2009 WL 903948 (1st Cir. Apr. 6, 2009): The First Circuit remanded the record to the Board to reconsider its determination that the respondent’s motion to reopen to apply for CAT relief was untimely. In 1997, the respondent was convicted of the aggravated felony of assault with a deadly weapon. In moving to reopen, he claimed changed circumstances arising from the fact that the victim of his assault (a fellow Liberian) had now become the head of a heavily armed government security force and had threatened the respondent with serious harm or death. The court rejected the Board’s determination that the change was self-induced and therefore constituted a change in personal circumstances, as opposed to the change in country conditions required for late-filed motions. While agreeing that the respondent’s assault of the victim was “self-induced,” the court found that the basis stated for the reopening—the victim’s rise to power—was beyond the respondent’s control and was therefore not a personal change.

Lin v. Holder, ___F.3d___, 2009 WL 806897 (1st Cir. Mar. 30, 2009): The court dismissed the appeal of an Immigration Judge’s denial of an asylum claim from China, which was upheld by the Board. The court found that substantial evidence supported the Immigration Judge’s adverse credibility finding where the respondent could not offer any explanation as to why the police would suspect her of Falun Gong activity; the claimed facts gave rise to a more likely explanation for her arrest, namely, her involvement in underage drinking and disorderly conduct; and seemingly available corroboration was not provided.

Second Circuit:

Weng v. Holder, ___ F.3d ___, 2009 WL 982452 (2d Cir. April 14, 2009): The petitioner—a citizen of China—sought review of the Board’s decision denying her application for asylum and withholding for removal and her application for protection under the CAT. The Immigration Judge denied relief after concluding that she was a persecutor because of her job as a nurse’s assistant at a public hospital that performed forcible abortions. The court found that the petitioner’s “post-surgical care did not contribute to, or facilitate, the victims’ forced abortions in any ‘direct’ or ‘active’ way. Her conduct neither caused the abortions, nor made it easier or more likely that they would occur.” The court remand the case to the Board to determine, in the first instance, if the petitioner is eligible for asylum or withholding of removal.

Fourth Circuit:

Hui Zheng v. Holder, ___F.3d___, 2009 WL 1015029 (4th Cir. Apr. 16, 2009): The Fourth Circuit dismissed the appeal from the Immigration Judge’s denial of a “motion to file a successive asylum application” under 8 C.F.R. § 1208.4. The Board had affirmed on appeal the Immigration Judge’s denial of the respondent’s first asylum application in 2002, and in 2005 had denied a motion to reopen based on the birth of her two USC children. The court joined eight other circuits in granting deference to the Board’s decision in *Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007), and holding that a motion to reopen meeting time and number requirements and showing changed country conditions must be filed in conjunction with a successive asylum application.

Sixth Circuit:

Ba v. Holder, ___F.3d___, 2009 WL 928492 (6th Cir. Apr. 8, 2009): The Sixth Circuit reversed the Board’s affirmance of the Immigration Judge’s denial of a motion to reopen and

rescind an in absentia order of removal. In her motion, the respondent claimed that she did not receive the notice of hearing, as she had moved from the address where the notice was sent. As proof, the respondent offered evidence that she had informed the USCIS of her new address in her application to renew employment authorization. The Immigration Judge found such evidence insufficient, as the respondent did not inform USCIS of the new address until 2 months after the in absentia order was entered. On appeal, the court disagreed. Citing *Matter of M-R-A-*, 24 I&N Dec. 665 (BIA 2008), and *Matter of C-R-C-*, 24 I&N Dec. 665 (BIA 2008), the court found that although the respondent’s attempt to keep the Government apprised of her current address was ineffective, it evidenced an interest in pressing forward with her asylum case. The court held that the respondent deserved the opportunity to establish her address at the time the notice was mailed; if successful, she would thus rebut the presumption of notice.

Demjanjuk v. Holder, ___F.3d___, 2009 WL 995387 (6th Cir. Apr. 14, 2009): The court granted the respondent’s petition for a stay of removal pending consideration of his petition for review. The respondent appealed from the Board’s order denying his motion for a stay pending consideration of his motion to reopen. The motion claims that because of his medical condition and the fact that he faces arrest, incarceration, and trial in Germany, his removal would violate the Convention Against Torture. The court rejected the Government’s claim that it lacked jurisdiction to review the denial of a stay by the Board.

Ninth Circuit:

Ramos-Lopez v. Holder, ___ F.3d___, 2009 WL 1012062 (9th Cir. Apr. 16, 2009): The Ninth Circuit denied the appeal of a Honduran asylum seeker, whose claim was denied by an Immigration Judge. The Board affirmed the Immigration Judge’s determination that the respondent’s fear of the MS-13 gang, whose recruitment efforts he had refused, was not on account of a particular social group. The court first considered whether the Board’s decision in *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008), should be afforded *Chevron* deference. It concluded that it should, finding “particular social group” to be an ambiguous term to which the Board intended to provide concrete meaning. Finding the Board’s decision to be reasonable, the court rejected the respondent’s claimed social group. The court further deferred to the Board’s interpretation of the term “political opinion” and found no imputed political opinion in the respondent’s refusal to join the gang.

BIA PRECEDENT DECISIONS

In *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), the Board considered a number of issues relating to eligibility requirements for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229(b)(1), filed after the effective date of the REAL ID Act of 2005, Division B of Pub. L. No. 109-13, 119 Stat. 231 (“REAL ID Act”). The respondent, who last arrived in the United States without being admitted or paroled after inspection, was convicted of vehicle theft under California Vehicle Code section 10851(a). He applied for cancellation of removal. The Immigration Judge concluded that the respondent was not eligible for that relief because he failed to establish that he had not been convicted of a crime involving moral turpitude. In reaching this conclusion, the Immigration Judge found that the statute of conviction was a divisible one, and under the REAL ID Act, the respondent bears the burden to prove he is eligible for relief from removal. The Immigration Judge requested that the respondent provide copies of his criminal court proceedings to determine if he had admitted facts that would establish whether his crime involved moral turpitude. When he did not provide them, the Immigration Judge denied the application.

In affirming the Immigration Judge, the Board first found that the respondent’s plea, which was entered under *People v. West*, 477 P.2d 409 (1970) (characterized as a plea of nolo contendere that does not establish factual guilt but allows the court to treat the defendant as if he were guilty), would not support a finding of removability, but that was not at issue here. In this case the respondent was applying for discretionary relief, so under the REAL ID Act, he bore the burden of proving the facts of the conviction, which included the burden to produce corroborating evidence requested by the Immigration Judge. Such a request was appropriate, because a *West* plea is ambiguous, and further evidence, such as a plea colloquy, was required to clarify the ambiguity. The Board distinguished *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), which held that an alien who has the burden of proof to establish that a conviction is not for an aggravated felony for discretionary relief purposes has met that burden when he produces an inconclusive record of conviction. *Sandoval-Lua* was a pre-REAL ID Act case, and the Immigration Judge there did not specifically request evidence.

The Board resolved the question whether an Immigration Judge has jurisdiction to adjudicate an application submitted by an arriving alien from Cuba under the Cuban Adjustment Act (“CAA”) in *Matter of Martinez-Montalvo*, 24 I&N Dec. 778 (BIA 2009). The Board found that an Immigration Judge does not have jurisdiction, and that *Matter of Artigas*, 23 I&N Dec. 99 (BIA 2001), was superseded. The Board found that *Matter of Artigas* was decided under a prior regulatory scheme where to decide otherwise would have precluded arriving Cubans from applying for adjustment. The interim regulations promulgated since *Matter of Artigas* make clear that an arriving alien can apply for adjustment under the CAA before the Department of Homeland Security. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(2) (2008). Therefore the concerns that led to the decision in *Matter of Artigas* are no longer present. Further, if the Attorney General had intended to exempt CAA cases for arriving aliens from the regulatory scheme, it would have been a simple matter to include such an exception.

In *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), the Board considered the factors to be considered when adjudicating an alien’s unopposed motion to continue ongoing removal proceedings to await the adjudication of a pending family-based visa petition. The Board noted the inherent tension between the conflicting purposes of bringing finality to removal proceedings and giving respondents an opportunity to apply for relief, particularly when the respondent may be eligible for lawful permanent resident status through family-based petitions. The Board stated that adjudication of a motion for a continuance should begin with the presumption stated in *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), that discretion should be favorably exercised where a prima facie approvable visa petition and adjustment application have been presented to the Immigration Judge. A variety of factors may be considered, including, but not limited to, (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment of status merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.

The Board elaborated on the above factors. As regards the first, if the DHS affirmatively does not oppose, the proceedings should ordinarily be continued

absent unusual circumstances. If DHS opposes, the Immigration Judge should evaluate the reasonableness of the arguments. As regards the second and third, the Immigration Judge may have to consider the viability of the visa petition and eligibility for adjustment of status. Submission of the respondent's visa petition and adjustment application, as well as any prior visa petitions and DHS's determinations on those petitions may be necessary. Evidence regarding admissibility and any necessary waivers may also be required. The Board also elaborated on relevant discretionary factors. As to other reasons for the continuance, the Board noted that the question of which party is responsible for the processing delay may be critical. The Board noted that case completion goals are not a proper factor in deciding a continuance request, and the number and length of prior continuances are not alone determinative.

In this case, the respondent was a native and citizen of Pakistan who arrived as a visitor in 2000. He married a United States citizen in 2001. He was placed in proceedings in 2003 and at his first appearance indicated he was going to apply for adjustment. The Immigration Judge granted him four continuances to await the adjudication of the visa petition, but denied him the fifth. The delays were primarily due to the DHS. The Board remanded the case for the Immigration Judge to consider the continuance request in light of the factors articulated above.

REGULATORY UPDATE

74 Fed. Reg. 15,367

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
8 CFR Part 208

Forwarding of Affirmative Asylum Applications to the Department of State

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations to alter the process by which it forwards Form I-589, Application for Asylum and Withholding of Removal, for asylum applications filed affirmatively with U.S. Citizenship and Immigration Services (USCIS) to the Department of State (DOS). The affirmative asylum process allows individuals, who are physically present in the United States, regardless of their manner of arrival and regardless of their current

immigration status, to apply for asylum. The current regulation requires USCIS (formerly Immigration and Naturalization Service (INS)) to forward to DOS a copy of each completed asylum application it receives. This rule provides that USCIS will no longer forward all affirmative asylum applications to DOS. Instead, USCIS will send affirmative asylum applications to DOS only when USCIS believes DOS may have country conditions information relevant to the case. This change will increase the efficiency of DOS' review of asylum applications. Additionally, in accordance with the Homeland Security Act, this rule revises references to legacy INS in 8 CFR 208.11.

DATES: Effective date: This final rule is effective April 6, 2009.

Incompetent Respondents *continued*

to be present at removal hearings because of mental incompetency:

The only time a competency hearing may be required in the immigration context is to determine whether an *unrepresented* alien shows sufficient evidence of incompetency to require an attorney or guardian to represent the alien's interests at the proceedings. . . . Here, Jaadan was represented by counsel in the deportation proceedings, and the IJ considered the applicability of immigration regulations regarding competency. . . . In short, Jaadan's due-process competency rights are limited to a determination of whether his incompetency requires that he have a representative at his deportation proceedings, not whether his incompetency precludes deportation altogether. Because Jaadan had counsel, he had all he was entitled to.

Id. at 430-31.

Another relevant case arose before a district court situated in the Sixth Circuit, in the context of a denaturalization hearing. In *United States v. Mandycz*, 199 F. Supp. 2d 671 (E.D. Mich. 2002), the court determined that denaturalization proceedings in Federal courts may proceed against mentally incompetent defendants. The court reasoned that since due process does not protect an

incompetent respondent from deportation, it does not protect an incompetent individual from denaturalization. *Id.* at 674.

The Eighth Circuit

The Eighth Circuit has approached this matter under different procedural circumstances. In *Mohamed v. Gonzales*, 477 F.3d 522 (8th Cir. 2007), the court held that failure to hold a competency hearing was neither an abuse of discretion nor a violation of procedural due process. In that case, the petitioner had been granted asylum, but was later convicted of criminal sexual conduct. *Id.* at 524. “Criminal proceedings were stalled for more than two years while Mohamed was adjudged incompetent to stand trial” and ordered committed to the Minnesota Security Hospital. *Id.* He was found guilty in November 2000. *Id.* He “completed his prison sentence in April 2001” but thereafter remained at the Hospital.” *Id.*

The former Immigration and Naturalization Service “commenced removal proceedings in June 2001,” and the petitioner conceded deportability but sought relief under Article III of the Convention Against Torture. *Id.* at 524-25. The Immigration Judge continued his hearing three times so the petitioner could obtain counsel, but the case proceeded with the petitioner acting pro se after he failed to find counsel. *Id.* at 525. The hearing was conducted via video conference as the petitioner was confined to the Hospital. *Id.* The Immigration Judge did not conduct a competency hearing before ordering the petitioner removed. *Id.*

Subsequently, the petitioner retained counsel and appealed to the Board, which acknowledged that the petitioner was “‘mentally ill’ but found ‘no evidence in the record . . . that Mohamed was unable to comprehend the nature of the [removal] proceedings.’” *Id.* (quoting from the Board’s decision). While his appeal to the Board was pending, Mohamed petitioned for a writ of habeas corpus in Federal district court. *Id.*

The district court granted the petition, holding that it had been an abuse of discretion for the Immigration Judge not to hold a competency hearing or inquire into the petitioner’s condition, given that the Immigration Judge was “faced with . . . evidence that” the petitioner had been “treated for the sort of mental illness that would render him incompetent.” *Mohamed v. TeBrake*, 371

F. Supp. 2d 1043, 1047-48 (D. Minn. 2005). The court ordered a new removal hearing to evaluate Mohamed’s competency. *Id.*; see also Thomas Hutchins, *Mohamed v. TeBrake: A Case Study on the Mentally Ill in Removal Proceedings, and an Example of How REAL ID Violates the Suspension Clause*, 82 Interpreter Releases, No. 32, at 1297 (Aug. 15, 2005).

In the meantime, however, the President signed into law the REAL ID Act, which denied “the writ of habeas corpus to aliens resisting a removal order.” *Mohamed*, 477 F.3d at 525. Accordingly, the district court amended its judgment on August 2, 2005, transferring the case to the Eighth Circuit. *Id.* The Eighth Circuit then held that Mohamed’s Fifth Amendment right to due process was not violated because Mohamed had “answered the charges against him, testified in support of his claim, and arranged for two witnesses to appear on his behalf,” thus demonstrating the ability to comprehend the nature of the proceedings and assist in preparing his own defense. *Id.* at 527.

Other Circuits

The Third, Fourth, Fifth, Seventh, Eleventh, D.C., and Federal Circuit Courts have not considered this issue.

Practical Suggestions

The published and unpublished case law suggests that the procedural safeguards for mentally incompetent aliens are satisfied when a respondent is accompanied by a representative prescribed in 8 C.F.R. § 1240.4. Moreover, when a respondent is unable or unwilling to appear, but a custodian of the respondent appears on his or her behalf, this too meets the procedural safeguards.

However, the existing precedent case law and regulatory framework do not provide comprehensive guidance about the following types of cases:

- (1) When an unrepresented respondent asserts mental incompetency, has no § 1240.4 prescribed representative, has no custodian of record, and then fails to appear at a hearing;
- (2) When an unrepresented respondent pleads and later claims mental incompetency;
- (3) When an unrepresented respondent presents evidence of incompetency (and the circumstances

under which a competency hearing would be appropriate); and

(4) When an unrepresented respondent asserts mental competency but displays indicia of incompetency before the Immigration Judge.

Until more guidance is available, Immigration Judges can consider employing the following common sense solutions. As a general matter, when a respondent asserts mental incompetency, the court should employ techniques that show sensitivity to those with cognitive disability issues.

Communication Considerations

The Department of Labor suggests that in communicating with individuals with cognitive disabilities, all parties should be prepared to repeat what is being said, provide extra time for decision-making and responses, offer assistance in understanding instructions, and practice patience, flexibility, and supportiveness. See Office of Disability Employment Policy, U.S. Dep't of Labor, *Communicating With and About People with Disabilities* (Aug. 2002), <http://www.dol.gov/odep/pubs/fact/comucate.htm>. Taking time to make sure that the respondent understands all aspects of the proceedings is of utmost importance should a reviewing authority need to analyze the due process questions raised in a case.

The Partners in Justice project ("PIJ"), funded by The Arc of North Carolina and the North Carolina Council on Developmental Disabilities, provides information to criminal justice system employees about addressing individuals with cognitive disabilities in court proceedings. Though these suggestions are presented in the context of criminal proceedings, they may be helpful in other contexts, including immigration court proceedings.

PIJ suggests using simple, direct sentences, and being patient in the proceedings. When possible, questions could be phrased in an open-ended manner and, if necessary, repeated. If the Immigration Judge is unsure if the respondent understands what the parties are saying, the court may ask the respondent to repeat what has been said in his or her own words. See Partners in Justice Home Page, <http://72.167.22.100/services/pij/>. Along these lines, the Immigration Judge may make verbal observations on the record regarding aspects of

the respondent's behavior in court in terms of perceived awareness of the proceedings, the manner of interaction with court professionals, the respondent's ability to express him or herself, and other factors. Moreover, commenting on the appropriateness of the respondent's answers to questions and the respondent's demeanor could be helpful to a reviewing authority.

The more an Immigration Judge develops the record of competency through recitation of observations, and produces a transcript reflecting the respondent's appropriate responses to open-ended questions, the better a reviewing authority will be able to evaluate claims of mental incompetency. In circumstances where the respondent informs the Immigration Judge after the pleadings that his mental competency is impaired, the court may wish to develop the record regarding the respondent's prior mental state at the hearing where pleadings were taken. Testimony regarding the extent to which the respondent was medicated at a prior hearing, and the extent to which he fully understood the proceedings, could assist the court and an appellate authority in determining whether due process had been provided.

Documentation of Mental Incompetency

The court can order the respondent to provide it with documentary and testimonial evidence of incompetency, should such a claim be made. The Immigration Judge can then assess the documentary and testimonial evidence regarding competency on the record.

Maria Baldini-Potermin, in a recent article published in *Interpreter Releases* analyzing competency claims in a humanitarian asylum context, suggests that practitioners document mental competency through the use of:

(1) Affidavits and other documents from medical providers regarding "[d]iagnoses," "[p]rior medications with dosages and whether the medications were effective in controlling the symptoms," and "[p]rior physical therapy treatments";

(2) Affidavits and other documents from medical providers regarding "[c]urrent treatment," including "current medications and whether they are effective in controlling . . . symptoms,"

“side effects of each medication,” current “[p]sychotherapy,” and current “[p]hysical therapy”;

(3) Affidavits and other documents from medical providers regarding “[p]rognosis,” including “[a]nticipated treatment” and likelihood of improvement/deterioration of symptoms;

(4) “School records regarding special education classes or individualized education plans,” transcripts, letters or affidavits from teachers, counselors or social workers regarding ability to learn;

(5) “Social Security Administration records or decisions regarding applications for disability benefits”; and

(6) Evidence of “[p]articipation in programs for individuals with mental illness and evaluations from those programs.”

See Maria Baldini-Potermin, Past Persecution, Mental Illness and Humanitarian Asylum: Creating the Record to Win the Claim, 86 Interpreter Releases, No. 4, at 261, 265-66 (Jan. 26, 2009).

After assessing this type of evidence, the Immigration Judge may be on stronger footing to rule about whether he or she should proceed even if the respondent is unrepresented. If the Immigration Judge is not satisfied that the procedural safeguards have been applied in a manner to satisfy due process, then from a practical standpoint, the court has the option of resetting

the case for the respondent to obtain counsel or be accompanied by a near relative, legal guardian, or friend.

However, this leaves open the question of how the court should proceed if the respondent does not exercise his right to a 8 C.F.R. § 1240.4 defined representative. Granting serial continuances may contribute to crowded dockets, waste resources and not serve the best interests of the respondent. Moreover, unscrupulous respondents and attorneys may attempt to raise unmerited competency claims for the purposes of delay.

Conclusion

Immigration Judges strive to provide fundamental fairness to respondents who may be unable to represent themselves effectively or obtain representation. Despite a limited regulatory framework, sparse precedent case law, and a lack of issued policy memoranda, Immigration Judges must continue to adjudicate cases and provide due process. To that end, the suggestions provided herein may provide practical solutions for dealing with mental competency in proceedings.

Mimi E. Tsankov is an Immigration Judge at the Los Angeles Immigration Court. She wishes to thank Judicial Law Clerks Robert Stalzer and Julia Smith-Aman for their assistance in the research and writing of this article.

1. A review of that regulation reveals that it was substantially similar to the modern version set forth in 8 C.F.R. § 1240.4. *Compare* 8 C.F.R. § 242.11 (“[T]he guardian, near relative, or friend who was served a copy of the order to show cause shall be permitted to appear on behalf of the respondent.”) *with* 8 C.F.R. § 1240.4 (“[T]he 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.”).

2. As noted above, the current standard is set forth in section 240(b)(3) of the Act, which states that “[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.”

EOIR Immigration Law Advisor

Juan P. Osuna, Chairman
Board of Immigration Appeals

Michael C. McGoings, Acting Chief Immigration Judge
Office of Chief Immigration Judge

David L. Neal, Vice Chairman
Board of Immigration Appeals

Jack Weil, Acting Assistant Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Librarian
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Carolyn A. Elliot, Senior Legal Advisor
Board of Immigration Appeals

Emmett D. Soper, Attorney Advisor
Office of the Chief Immigration Judge

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