U.S. Department of Justice
Executive Office for Immigration Review

https://www.justice.gov/eoir/immigration-law-advisor

Immigration Law Advisor

Fall 2022 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 12 No. 1*

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Matter of M-A-M- and Its Progeny: Procedural Tools for Navigating Competency Issues in Immigration Proceedings

by Anne J. Greer

Introduction

Unlike in the criminal context, a lack of competency in civil immigration proceedings does not preclude an Immigration Judge or the Board of Immigration Appeals from moving forward to resolve the case. Until 2011, precedential case law did not provide guidance on how to address mental competency issues in immigration proceedings. The Immigration and Nationality Act ("INA") and its implementing regulations only provided general directions for handling competency issues and did not specify procedural steps that adjudicators should follow in addressing them.

To fill this gap, the Board issued a series of precedential decisions providing critical procedural guidance for adjudicators and parties, starting with its decision in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). In that decision, the Board set forth an overarching procedural framework for how adjudicators and parties should navigate mental competency issues in immigration proceedings. This article summarizes the Board's framework in *Matter of M-A-M-* and discusses the cases the Board issued in its wake, clarifying *M-A-M-*'s framework and addressing, among other issues: how adjudicators should allocate the burden of proof for establishing a noncitizen's competency; the standard of proof adjudicators should apply in determining competency; the implementation of appropriate procedural safeguards to ensure that an incompetent noncitizen receives a full and fair hearing; and how the Board should review an Immigration Judge's determinations regarding these issues.[1] This article also discusses significant circuit court decisions to the extent they address *Matter of M-A-M-*'s framework and that decision's progeny.

Matter of M-A-M-'s Framework

In *Matter of M-A-M-*, 25 I&N Dec. at 476, the Board addressed three questions: "(1) When should Immigration Judges make competency

Recent Federal Circuit Decisions: A Top 10

The following are ten significant Federal court decisions that shaped the field of immigration law in 2022, in no particular order of importance. This is a good time to re-familiarize yourself with the consequential changes, distinctions, or clarifications they made in immigration law:

1. *Freza v. Att'y Gen. U.S.*, 49 F.4th 293 (3d Cir. 2022)

Due process and right to counsel. The Third Circuit concluded that an Immigration Judge's decision to deny a continuance violated the noncitizen's right to due process and statutory right to counsel where the noncitizen diligently sought counsel in detention, there were no indicia of dilatory tactics, and the 1-year gap between the noncitizen's first master calendar hearing and individual hearing was not of his making.

2. *Avilez v. Garland,* 48 F.4th 915 (9th Cir. 2022)

Custody. Based on ***Jennings v. Rodriguez*** , 138 S. Ct. 830 (2018), the Ninth Circuit held that a noncitizen remains detained under INA § 236(c), during administrative removal proceedings and subsequent judicial review, and ***Casas Castrillon v. DHS***, 535 F.3d 942 (9th Cir. 2008), has been abrogated to the extent it holds otherwise.

3. *Parada v. Garland,* 48 F.4th 374 (5th Cir. 2022)

Stop-time rule. Joining the Ninth and Tenth Circuits in *Quebrado Cantor v. Garland*, 17 F.4th 869 (9th Cir. 2021), and *Estrada-Cardona v. Garland*, 44 F.4th 1275 (10th Cir. 2022), the Fifth Circuit held that the "stop-time" rule

determinations? (2) What factors should Immigration Judges consider and what procedures should they employ to make those determinations? [and] (3) What safeguards should Immigration Judges prescribe to ensure that proceedings are sufficiently fair when competency is not established?"

Indicia of Incompetency

In answering the first question, the Board found as "a threshold matter" that a noncitizen "is presumed to be competent to participate in removal proceedings," and "[a]bsent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency." *Id.* at 477. As the Board explained, "Indicia of incompetency include a wide variety of observations and evidence." *Id.* at 479. For example, indicia may include: a noncitizen's behavior, such as the inability to understand or respond to questions; school records regarding special education or individualized education plans; other official records, like reports from social workers or applications for disability benefits; witness testimony or affidavits from friends or family; and medical evidence of mental illness or incompetency.

In *Matter of M-A-M-*, the record included several psychiatric reports diagnosing the respondent with mental illness, as well as evidence that during his criminal proceedings, the respondent was found to be unfit to proceed with a trial. *Id.* at 484. The record also demonstrated that the respondent had difficulty answering basic biographical questions, he stated he was diagnosed with schizophrenia and needed medication, and he asked to see a psychiatrist. The Board concluded based on this evidence that indicia of incompetency were present.

Determining Competency

Where indicia of incompetency are present, the Board concluded that an Immigration Judge is required to "take measures to determine whether [the noncitizen] is competent to participate in proceedings." *Id.* at 480. The Board emphasized that the approach taken to determine competency will vary based on the circumstances of the individual case. *Id.* However, the Board emphasized that "a diagnosis of mental illness does not automatically equate to a lack of competency." *Id.*

In determining what constitutes competency, the Board relied on cases from the Supreme Court of the United States in the criminal context discussing a defendant's competency to stand trial. *Id.* at 478 (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). The Board noted, however, that unlike in criminal proceedings, a lack of competency does not preclude an Immigration Judge from completing immigration proceedings, so long as the hearing satisfies principles of due process and fundamental fairness.

To satisfy principles of due process and fundamental fairness, the Board held that "Immigration Judges must accord [noncitizens]

is only triggered either by a statutorily compliant notice to appear or the commission of certain offenses, and thus a final administrative order of removal does not trigger the rule.

4. *Gonzalez-Castillo v. Garland,* 47 F.4th 971 (9th Cir. 2022)

Serious nonpolitical crime bar. Distinguishing *Matter of W-E-R-B-*, 27 I&N Dec. 795 (BIA 2020), the Ninth Circuit held that an INTERPOL Red Notice was insufficient to trigger the "serious nonpolitical crime" bar to withholding of removal where it did not establish "probable cause" to believe that any specific crime had been committed.

5. *Vurimindi v. Att'y Gen. U.S.*, 46 F.4th 134 (3d Cir. 2022)

Crime of stalking. The Third Circuit concluded that title 18, section 2709.1(a)(1) of the Pennsylvania Consolidated Statutes is categorically overbroad relative to generic stalking under INA § 237(a)(2)(E)(i), because it reaches acts committed with the intent to cause substantial emotional distress, and the Board's definition of stalking in *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018), requires that stalking be committed with the intent to place the victim in fear of bodily injury or death.

6. *Cordero-Garcia v. Garland*, 44 F.4th 1181 (9th Cir. 2022)

Obstruction of justice. Granting the petition for review and disagreeing with the Board's precedential opinion in *Matter of Cordero-Garcia*, 27 I&N Dec. 652 (BIA 2019), the Ninth Circuit held that attempting to prevent or dissuade a victim or witness to a crime from making a report under section 136.1(b)(1) of the California Penal Code is not "an offense relating to obstruction of justice" aggravated felony under INA § 101(a)(43)(S) because it is missing the element of a nexus to an ongoing or pending proceeding or investigation.

the specific 'rights and privileges' prescribed in the [INA]." *Id.* at 479 (quoting INA § 240(b)(3)). For example, noncitizens "shall have the privilege of being represented" at no expense to the Government. INA §§ 240(b)(4)(A), 292. In addition, the INA requires that a noncitizen have a "reasonable opportunity" to examine and present evidence and to cross examine witnesses. INA § 240(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4).

Ultimately, the Board concluded that

> the test for determining whether [a noncitizen] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.

Id. at 479. In applying this test to assess competency, Immigration Judges should ask "very simple and direct" questions "about where the hearing is taking place, the nature of the proceedings, and the respondent's state of mind." *Id.* at 480. Immigration Judges may also ask whether the noncitizen "currently takes or has taken medication to treat a mental illness and what the purpose and effects of that medication are," and proceedings may be continued to allow the parties to submit evidence relating to these issues. *Id.* at 481. Additionally, Immigration Judges may "permit a family member or close friend to assist the respondent in providing information." *Id.* A mental competency evaluation, medical treatment reports, and other evidence may also be relevant.

After weighing the evidence regarding the respondent's competency, an Immigration Judge will apply the test discussed above and articulate his or her determination and reasoning regarding whether the respondent is sufficiently competent to proceed with the hearing without safeguards. *Id.* Because mental competency is "not a static condition" that can "vary over time," the Board emphasized that an Immigration Judge should consider a noncitizen's competency throughout proceedings to determine whether a noncitizen's "condition has deteriorated or, on the other hand, whether competency has been restored." *Id.* at 480 (citation omitted).

Procedural Safeguards

In the event a respondent is determined to lack competency, the INA requires an Immigration Judge to "prescribe safeguards to protect the rights and privileges of" the noncitizen to ensure procedural fairness. *Id.* at 481 (quoting section 240(b)(3) of the INA). Drawing on guidance from the regulations as well as precedents from the Board, the Attorney General, and the circuit courts, the Board concluded in *Matter of M-A-M-* that appropriate safeguards included, but were not limited to, declining to accept an admission of removability from an unrepresented

7. *Tinoco-Acevedo v. Garland*, 44 F.4th 241 (4th Cir. 2022)
Due process. The Fourth Circuit found that the Board erred in failing to address whether remand for a hearing before a new Immigration Judge was warranted pursuant to *Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015), and found that a remand pursuant to *Matter of Y-S-L-C-* is not contingent upon a finding that an Immigration Judge's behavior violated due process since that decision was silent regarding prejudice.

8. *Campos-Chaves v. Garland*, 43 F.4th 447 (5th Cir. 2022)
In absentia removal order. The Fifth Circuit held that a noncitizen forfeits his right to a remand based on a defective notice to appear pursuant to *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021), when the noncitizen in fact received a notice of hearing or does not dispute receiving the notice of hearing.

9. *Bastias v. U.S. Att'y Gen.*, 42 F.4th 1266 (11th Cir. 2022)
Crime of child abuse. The Eleventh Circuit concluded that the Board's interpretation of the statutory phrase "crime of child abuse" in INA § 237(a)(2)(E)(i), was entitled to *Chevron* deference and disagreed with the Tenth Circuit's approach in *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), which declined to defer to the Board's broad generic definition of child abuse.

10. *Dacostagomez-Aguilar v. U.S. Att'y Gen.*, 40 F.4th 1312 (11th Cir. 2022) **In absentia removal order.** In a substantially similar case to *Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022), the Eleventh Circuit held that the in absentia removal of an individual who does not attend removal proceedings is lawful so long as he or she was provided notice—in the form of either a notice to appear or a notice of hearing—of the missed hearing; reopening is only available if the notice for the hearing missed was not provided. The court disagreed with the Ninth Circuit's *continued on page 6*

noncitizen; allowing family members or a close friend to assist the noncitizen and provide information in proceedings; docketing the case so the noncitizen can obtain counsel or medical treatment aimed at restoring competency; permitting a guardian to participate in the proceedings; closing the hearing to the public; waiving the respondent's appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.

In highlighting these safeguards, the Board elected to develop a collaborative approach, in which the Immigration Judge and the parties work together to recognize and address competency issues, fully develop the record, including through the submission of relevant medical evidence, and propose safeguards to ensure procedural fairness. *See Matter of J-S-S-*, 26 I&N Dec. 679, 682 (BIA 2015) (stating that *Matter of M-A-M-*'s "collaborative approach enables both parties to work with the Immigration Judge to fully develop the record regarding a respondent's competency" and propose safeguards). The Board nevertheless recognized that, in some cases, even after the Immigration Judge and the parties "undertake their best efforts to ensure appropriate safeguards, concerns may remain," and, in such a case, "the Immigration Judge may pursue alternatives with the parties, such as administrative closure, while other options are explored, such as seeking treatment for the respondent." *Matter of M-A-M-, 25* I&N Dec. at 483.

Circuit Courts' Reception of the Board's Framework

Most circuit courts have favorably cited and applied the Board's framework in *Matter of M-A-M-* in published and unpublished cases involving competency issues. *See, e.g., Moscoso Mancia v. Garland*, No. 20-3839, 2022 WL 2840030, at *1 (2d Cir. July 21, 2022) (finding in an unpublished decision "no indicia of incompetency to prompt inquiry into . . . competence" where counsel did not raise any concerns regarding competency and a psychological evaluation did not provide a basis for concluding the noncitizen had difficulty understanding the nature and object of proceedings); *Hernandez Garmendia v. Att'y Gen. U.S.*, 28 F.4th 476, 487 (3d Cir. 2022) (concluding that there were "no indicia of mental incompetency" where the noncitizen "engaged in a responsive and appropriate colloquy with the judge, consulted with counsel, and presented evidence on his behalf"); *Takwi v. Garland*, 22 F.4th 1180, 1184–86 (10th Cir. 2022) (affirming a competency finding where the noncitizen did not show his diagnoses for post traumatic stress disorder and depression were linked "with an inability to have a rational and factual understanding of the nature and object of the proceedings"); *Benedicto v. Garland*, 12 F.4th 1049, 1058 (9th Cir. 2021) (concluding the appointment of a qualified representative, a continuance for filing applications and evidence, and the development of the record were sufficient to safeguard procedural fairness); *Yusuf v. Garland*, 8 F.4th 738, 742 (8th Cir. 2021) (finding no indicia of incompetency); *Pierre-Paul v. Barr*, 930 F.3d 684, 694–95 (5th Cir. 2019) (holding an Immigration Judge properly implemented and adhered to procedural safeguards after concluding that the noncitizen

lacked competency), abrogated on other grounds by *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021); *Lopez Barrios v. U.S. Att'y Gen.*, 783 F. App'x 985, 989 (11th Cir. 2019) (per curiam) (upholding Immigration Judge's decision not to conduct a further inquiry into competency or implement safeguards where counsel "rejected a competency hearing and any further safeguards"); *Diop v. Lynch*, 807 F.3d 70, 75–76 (4th Cir. 2015) (finding that a psychological assessment taken days after noncitizen's arrest, but 10 months before proceedings, was not "sufficient indicia of . . . incompetency" since the noncitizen "denied any history of mental health troubles" in proceedings, and his attorney had "'no reason to believe' that he suffered from 'an ongoing medical problem'" (citation omitted)).[2]

Burden and Standard of Proof

Although the Board's framework in *Matter of M-A-M-* provided critical procedural guidance to adjudicators and parties, it did not answer additional procedural questions that may arise in cases involving competency issues, including: (1) which party, if any, bears the burden of proof to establish competency or incompetency once indicia of incompetency are present; and (2) what standard of proof should be used to determine whether a noncitizen is incompetent. The Board answered these questions in *Matter of J-S-S-*, 26 I&N Dec. at 682–84. *See also Diop*, 807 F.3d at 75 (stating that *Matter of J-S-S-* clarified these issues).

In *Matter of J-S-S-*, the Board concluded—based on the structure of the INA, the regulations, and case law—that to safeguard a noncitizen's "rights and privileges in determining competency issues in immigration proceedings" neither party should bear a formal burden of proof to establish whether or not the respondent is mentally competent. 26 I&N Dec. at 683. This allocation of the burden of proof is consistent with that employed in Federal habeas proceedings, which are also civil in nature. *Id.* at 682–83 (citing *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1225 (9th Cir. 1993) ("Initially sufficient evidence must be prsented to cause the court to conduct an inquiry [in habeas corpus proceedings]. After that point it is no one's burden to sustain, rather it is for the court to determine by a preponderance of the evidence whether the petitioner is mentally competent . . . .")).

"[W]here indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Id.* at 683. The Board concluded that the preponderance of the evidence standard of proof should apply in this context because this "standard had been widely accepted nationally and was specifically endorsed by the Supreme Court for competency issues in criminal proceedings because of the significant interests at stake." *Id.* at 683 (citing *Cooper v. Oklahoma,* 517 U.S. 348, 355–62 (1996) (adopting a preponderance of the evidence standard for competency to stand trial)). The Board believed the preponderance of the evidence standard of proof would assist Immigration Judges "in bringing competency issues to the fore and identifying appropriate safeguards to allow the case to proceed." *Id.* at 683–84.

Proper Service of the Notice to Appear

Another issue that may arise in cases involving competency issues is the procedure for serving a mentally incompetent respondent with the charging document in removal proceedings—the notice to appear.[3] The regulations provide specific procedures for serving the notice to appear on incompetent individuals in confined and unconfined settings. *See* 8 C.F.R. § 103.8(c)(2)(i)–(ii). These regulations clearly govern service where the Department of Homeland Security ("DHS") "know[s] at the time that it issues the notice to appear whether the respondent's case involved potential mental competency issues," such as "where the respondent was transferred into DHS custody from a psychiatric hospital, or . . . where a detained respondent has a known history of mental illness." *Matter of E-S-I-*, 26 I&N Dec. 136, 144 (BIA 2013). However, the regulations do not address how DHS should effect proper service when it is "not able to determine at the time that it serves the notice to appear whether the respondent's case is a 'case of mental incompetency.'" *Id.* (quoting 8 C.F.R. § 103.8(c)(2)(ii)). Nor do the regulations address how service should be effected where incompetency becomes manifest *after* DHS serves the notice to appear. The Board addressed both issues in *Matter of E-S-I-*.

decision in *Singh v. Garland*, 24 F.4th 1315 (9th Cir. 2022), and declined to follow the Fifth Circuit's decision in *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021).

RECENT SUPREME COURT DECISIONS

Biden v. Texas, 142 S. Ct. 2528 (2022)

Migrant Protection Protocols. The Supreme Court upheld the rescission of the Migrant Protection Protocols ("MPP"), and it found the Department of Homeland Security's memorandum terminating the MPP constituted final agency action.

Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022)

Jurisdiction. The Supreme Court held that INA § 242(f)(1) deprives district courts of jurisdiction to entertain class-wide injunctive relief regarding the operation of certain INA provisions, including INA § 241(a)(6).

Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022)

Custody. The Supreme Court held that INA § 241(a)(6) does not require the Government to provide noncitizens detained for 6 months with bond hearings in which the Government bears the burden of proving, by clear and convincing evidence, that a noncitizen poses a flight risk or a danger to the community.

Patel v. Garland, 142 S. Ct. 1614 (2022)

Jurisdiction. The Supreme Court held that under INA § 242(a)(2)(B)(i), Federal courts lack jurisdiction to review facts—including adverse credibility determinations—found

Pursuant to the regulations, the Board first held that to properly serve a respondent "[w]here the indicia of a respondent's incompetency are manifest," DHS should serve two individuals in addition to the respondent:

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

Id. at 145.

Although the Board recognized that the ultimate determination regarding a respondent's competency is made by an Immigration Judge, not DHS, it found that "where the DHS is aware of indicia of incompetency"—which the Board alternatively described as a situation where "competency issues may be manifest"—when it serves the notice to appear, it should treat the case as "a case of mental incompetency," and should serve the respondent in accordance with 8 C.F.R. §§ 103.8(c)(2)(i) and (ii). *Id.* at 144. The Board additionally acknowledged that "[m]ental competency is a variable condition," and competency issues may become manifest *after* DHS effects service. *Id.* In such a case, whether the notice to appear should be re-served in accordance with the regulations would depend on the when the indicia arose.

The Board first considered a situation where indicia of incompetency either arose or manifested at a master calendar hearing conducted shortly after service of the notice to appear. In such a case, the Board held that "the Immigration Judge should grant a continuance to give the DHS time to effect proper service." *Id.* at 145. However, where indicia of incompetency manifest later in the proceedings and the Immigration Judge determines that safeguards are needed, the Immigration Judge may elect to continue proceedings for re-service after weighing whether re-serving the notice to appear in accordance with the regulations "would be among the safeguards needed for the case to proceed." *Id.*

Additional Procedural Safeguards

In addition to proper service of the notice to appear, the regulations address two other discrete situations where competency issues require the prescription of procedural safeguards. First, under 8 C.F.R. § 1240.43, when it is impractical for the respondent to be present because of incompetency, a guardian, near relative, or friend may appear in removal proceedings on behalf of the respondent. Additionally, under 8 C.F.R. § 1240.10(c), an Immigration Judge is prohibited from accepting an admission of removability from an incompetent respondent.

Nevertheless, the regulations do not limit the safeguards Immigration

as part of discretionary-relief under INA § 245, and the other provisions enumerated in INA § 242(a)(2)(B)(i).

REGULATORY UPDATE

87 Fed. Reg. 56,247 (Sept. 14, 2022)
8 C.F.R. Parts 1001 and 1003
This final rule permits practitioners to provide document assistance to pro se individuals by entering a limited appearance through new Forms EOIR-60 or EOIR-61, without requiring the practitioner to become the practitioner of record or to submit a motion to withdraw or substitute after completing the document assistance.

Judges may prescribe, and "there are a number of [other] safeguards available to Immigration Judges." *Matter of M-A-M-*, 25 I&N Dec. at 483; *see also Matter of M-J-K-*, 26 I&N Dec. 773, 775 (BIA 2016) (stating that the regulations do not "limit the alternatives available to ensure the procedural fairness of the hearing"). An Immigration Judge's determination that a particular safeguard is appropriate under the circumstances of a given case is an inherently discretionary one. *Matter of M-J-K-*, 26 I&N Dec. at 775–76.

In *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), the Board considered the appropriate safeguards an Immigration Judge should prescribe in two situations. First, where an incompetent applicant provides "highly implausible" testimony, despite "sincerely believ[ing] his account of events." *Id.* at 611. Second, where an applicant who is deemed competent, but "has been diagnosed with a mental illness or serious cognitive disability," exhibits "symptoms that affect his ability to provide testimony in a coherent, linear manner." *Id.* In such cases, the Board concluded that based on a case-by-case analysis, Immigration Judges "should, as a safeguard, generally accept that the applicant believes what he has presented, even though his

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BIA PRECEDENT DECISIONS

In Matter of V-A-K-, 28 I&N Dec. 630 (BIA 2022), the Board held that the respondent's conviction for **second degree burglary of a dwelling under section 140.25(2) of the New York Penal Law** is categorically a conviction for **aggravated felony burglary under INA § 101(a)(43)(G)**. The Board found that the New York statute requires burglary of a **structure or vehicle that has been adapted or is customarily used for overnight accommodation**, conduct falling within the definition of generic burglary as articulated in *United States v. Stitt*, 139 S. Ct. 399 (2018). Because the respondent had been convicted of an aggravated felony, the Board found that he was ineligible for cancellation of removal pursuant to INA § 240A(a)(3).

In Matter of Fernandes, 28 I&N Dec. 605 (BIA 2022), the Board concluded that INA § 239(a)(1) is a **claim-processing rule**, and the lack of time or place information on a notice to appear violates this rule. The Board further held that an objection to a violation of this claim-processing rule will be regarded as **timely** if it is r**aised prior to the closing of pleadings** before the Immigration Judge, and the respondent **need not show prejudice** to establish that a claim-processing violation has occurred. Finally, the Board held that Immigration Judges may allow the Department of Homeland Security to remedy a defective notice to appear **without terminating removal proceedings.** To determine what remedy is appropriate, the Board remanded for further proceedings.

In Matter of Ortega-Quezada, 28 I&N Dec. 598 (BIA 2022), the Board held that the respondent's conviction for unlawfully selling or otherwise disposing of a firearm or ammunition in violation of **18 U.S.C. § 922(d)** is **not categorically** a conviction for a "**firearms offense**" under INA § 237(a)(2)(C), and § 922(d) is **indivisible** relative to the generic definition of a firearm offense under the INA. Because the respondent was not removable as charged, the Board terminated the respondent's removal proceedings.

In Matter of E-F-N-, 28 I&N Dec. 591 (BIA 2022), the Board concluded that an Immigration Judge may rely on evidence that is being submitted to **impeach the testimony of a witness** as part of an adverse credibility finding, so long as the impeachment evidence is probative and its admission is fundamentally fair.

CIRCUIT COURT DECISIONS FOR JULY - SEPTEMBER 2022

by S. Kathleen Pepper, Temporary Appellate Immigration Judge

During the period of July through September 2022, the United States courts of appeal issued 636 decisions involving petitions for review of Board decisions based on electronic database reports of published and unpublished decisions. The courts affirmed or upheld 571 Board decisions and reversed or remanded 69 cases for an overall reversal rate of 10.2%. The Fifth and Ninth Circuits issued the most decisions (138 and 313 decisions respectively) with reversal rates of 5.1% and 10.5% respectively. The First, Seventh, Tenth, Sixth, and Eighth Circuits rendered relatively few decisions with no reversals or remands from the Seventh and Eighth Circuits.

Circuit	Affirmed	Reversed	Total	% Reversed
First	3	2	5	40.0
Second	55	7	62	11.3
Third	22	5	27	18.5
Fourth	16	4	20	20.0
Fifth	131	7	138	5.1
Sixth	10	2	12	16.7
Seventh	6	0	6	0.0
Eighth	15	0	15	0.0
Ninth	280	33	313	10.5
Tenth	8	2	10	20.0
Eleventh	25	3	28	10.7
All	571	65	636	10.2

These 636 decisions encompassed a range of topics with the majority (295) involving asylum, withholding of removal, and/or protection under the Convention Against Torture. The 31 reversals (10.5%) in this category primarily involved credibility, particular social group, nexus, past persecution, internal relocation, government acquiescence, and government unable or unwilling to control the persecutors/protect the noncitizen issues. The courts also rendered 124 decisions involving other relief, such as cancellation of removal, with only three reversed or remanded. The same number (124) of cases were issued which involved Board decisions denying motions to reopen or reconsider or which dismissed appeals of Immigration Judge decisions denying motions to reopen or reconsider with 10 cases involving motions being reversed or remanded. Remanded motions cases included issues involving ineffective assistance of counsel and country conditions.

The courts also rendered 62 cases on a variety of miscellaneous topics (62), including continuances, right to counsel, and fair hearings, with 5 cases reversed or remanded. Board decisions addressing criminal issues resulted in 31 decisions of which 16 were remanded and primarily concerned interpretation of criminal statutes under the categorical or modified categorical approach with a focus on whether the relevant statutes were overbroad or divisible.

	Affirmed	Reversed	Total	% Reversed
Asylum/W/CAT	264	31	295	10.5
Other relief	121	3	124	2.4
Criminal	15	16	31	51.6
Motions	114	10	124	8.1
Misc.	57	5	62	8.1
Total	571	65	636	10.2

In addition to rendering decisions, the courts also issued orders granting a party's motion to remand to the Board (referred to as "Stipulated" remands in the charts below). The number of stipulated remands is based upon the number of such orders about which the Board was notified during the relevant period. Information about these stipulated remand orders is shown below alongside the reversed decisions to provide additional data about cases which were remanded, via decision or order, to the Board.

During the July through September 2022 period, the Board was notified of 169 remands of which 104 were stipulated remand orders and 65 were reversed decisions. Just under half of the stipulated remand orders (49 or 47.1%) were from the Ninth Circuit. No stipulated remand orders were issued by the Seventh or Eighth Circuits

and relatively few stipulated remand orders were issued by the First, Third, Fifth, Tenth, and Eleventh Circuits.

3rd Qtr FY22	Reversed	Stipulated remands	TOTAL REMANDED (Rev & Stip)
First	2	6	8
Second	7	13	20
Third	5	5	10
Fourth	4	12	16
Fifth	7	1	8
Sixth	2	11	13
Seventh	0	0	0
Eighth	0	0	0
Ninth	33	49	82
Tenth	2	2	4
Eleventh	3	5	8
Total	65	104	169

Over half (66 or 63.5%) of the stipulated remand orders involved asylum, withholding of removal, and/or protection under the Convention Against Torture and covered the same range of issues as those remanded in the reversed decisions. The stipulated remand orders also included 11 cases involving other relief, primarily cancellation of removal. Few stipulated remand orders involved motions or criminal issues. An additional 12 cases were remanded on various miscellaneous topics.

	Affirmed	Reversed	Total	% Reversed
Asylum/W/ CAT	264	31	295	10.5
Other relief	121	3	124	2.4
Criminal	15	16	31	51.6
Motions	114	10	124	8.1
Misc.	57	5	62	8.1
Total	571	65	636	10.2

S. Kathleen Pepper, Temporary Appellate Immigration Judge.

Matter of M-A-M- **and Its Progeny** *continued*

account may not be believable to others or otherwise sufficient to support the claim." *Id*. at 612. After accepting such testimony, an "Immigration Judge should then focus on whether the applicant can meet his burden of proof based on the objective evidence of record and other relevant issues." *Id.* According to the Board, this safeguard enhances "the fairness of the proceedings by foreclosing the possibility that a claim is denied solely on testimony that is unreliable on account of the applicant's competency issues, rather than any deliberate fabrication." *Id.*

Relying on *Matter of J-R-R-A-*, the Board later clarified a key concept regarding the implementation of procedural safeguards: the goal of implementing procedural safeguards is not necessarily to restore a respondent's competency; rather, "when the respondent cannot participate in the proceedings because of a lack of competency, the question becomes whether sufficient relevant information can otherwise be obtained to allow challenges to removability and claims for relief to be presented in the absence of reliable testimony from the respondent." *Matter of M-J-K-*, 26 I&N Dec. at 776 (citing *Matter of J-R-R-A-*, 26 I&N Dec. at 612).

In *Matter of M-J-K-*, the Board concluded that it was improper for the Immigration Judge to terminate proceedings "without first attempting to take other steps that could allow the proceedings to continue." *Id.* at 777. In that case, the Immigration Judge had implemented multiple safeguards, "including obtaining mental health evaluations, changing venue to a mental health docket, and granting multiple continuances," but terminated proceedings without prejudice because, in the Immigration Judge's view, these safeguards were "insufficient to ensure [procedural] fairness" and "the additional safeguards of representation by counsel and administrative closure would not be effective." *Id.* at 774. After reviewing the record, the Board remanded for the Immigration Judge to reassess "the safeguard afforded by counsel and to consider" whether additional safeguards would be sufficient to glean the information necessary to adjudicate the case. *Id.* at 778.

The Board's decisions in *M-A-M-, E-S-I-*, *J-R-R-A-*, and *M-J-K-* highlight concrete alternative safeguards parties may explore, case-by-case, with an Immigration Judge to obtain the evidence needed to resolve removability and adjudicate applications for relief from removal when a noncitizen's testimony is compromised by mental health issues. These safeguards can be flexibly implemented and are not restricted

by the regulations, and the inapplicability of any one safeguard is not dispositive. As the United States Court of Appeals for the Fourth Circuit noted, "The [Board] does not tie the fact-finder to a list where one unchecked item could invalidate an otherwise fair removal proceeding. . . . It opts instead for an adaptable case-by-case approach." *Diop*, 807 F.3d at 75.

Standard of Review

The Board generally reviews Immigration Judges' findings of fact for clear error, but it reviews other issues, including legal questions and matters of discretion and judgment, de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii). Consistent with precedents from the Supreme Court and the Federal circuit courts of appeals outside the immigration context, the Board held in *Matter of J-S-S-* that "[a] finding of competency is a finding of fact that the Board reviews to determine if it is clearly erroneous." 26 I&N at 684 (citing *Thompson v. Keohane*, 516 U.S. 99, 111 (1995); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam); *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001) (per curiam)). However, the Board concluded in *Matter of M-J-K-* that it would apply a de novo standard to review an Immigration Judge's "discretionary determination" to implement a particular procedural safeguard because such a determination "involves making a judgment about the alternative options that may be applied" to ensure procedural fairness. 26 I&N Dec. at 776.

In a precedential decision in the immigration context, the Fourth Circuit has concluded that an Immigration Judge's competency finding is a finding of fact, and other circuits have cited the Fourth Circuit's conclusion favorably in unpublished decisions. *Diop*, 807 F.3d at 75 ("Competency has long been considered an issue of fact." (citing *Thompson*, 516 U.S. at 111)); *see also Fremont v. Barr*, 824 F. App'x 51, 52 (2d Cir. 2020) (treating competency as a factual determination). Pursuant to section 242(b)(4)(B) of the INA, a Federal circuit court reviews an Immigration Judge's findings of fact, including a finding of competency, under a substantial evidence standard, meaning the reviewing court treats those findings as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." The Ninth Circuit has stated that it will review for abuse of discretion an Immigration Judge's and the Board's handling of competency issues, including an Immigration Judge's and the Board's application of the framework in *Matter of M-A-M-*. *See Calderon Rodriguez v. Sessions*, 878 F.3d 1179, 1183 (9th Cir. 2018) ("[T]he [Board] abused its discretion by affirming the [Immigration Judge's] departure from the standards set forth in *Matter of M-A-M-*, [because the Immigration Judge] did not adequately ensure that DHS complied with its 'obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency' . . . ." (citation omitted)).

Conclusion

In *Matter of M-A-M-*, 25 I&N Dec. at 476, the Board acknowledged the reality that competency "is a difficult area of the law." It nevertheless crafted a framework "to ensure that proceedings are as fair as possible in an unavoidably imperfect situation." *Id.* Each of the Board's precedents that followed *Matter of M-A-M-* built upon its initial framework and on each other, like bricks interlocking over wooden framing, providing adjudicators and parties with a structured approach to navigating competency issues in proceedings. As noted, the Board's underlying goal for this line of cases was for the parties and adjudicators to work collaboratively to recognize indicia of incompetency and prescribe safeguards to ensure "procedural fairness." *Id.* at 479; *see also Matter of J-S-S-*, 26 I&N Dec. at 682. Taken together, these cases offer specific examples that help adjudicators and parties "go forward" in this "difficult area," which often involves cases requiring an additional investment of time and effort from both Immigration Judges and the parties. *Matter of M-A-M-*, 25 I&N Dec. at 476–77.

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1. A distinct set of procedural rules applies to certain individuals detained in California, Arizona, and Washington, who are members of the certified class in *Franco Gonzalez v. Holder*, No. CV 10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (order further implementing permanent injunction). Similar protections are provided to detainees outside those jurisdictions in locations designated by the Executive Office for Immigration Review's Nationwide Policy ("NWP"). The framework in *M-A-M-* covers individuals nationwide who are not covered by either *Franco Gonzalez* or the NWP. This article does not address the procedural rules in *Franco Gonzalez* and the NWP.

2. To date, the only circuit courts which have not addressed the Board's competency framework set out in *Matter of M-A-M-* are the First and Seventh Circuits.

3. In *Matter of Fernandes*, 28 I&N Dec. 605, 610–11 (BIA 2022), the Board recently held that a respondent must object to a noncompliant notice to appear after service but before the closing of pleadings before an Immigration Judge. However, the Board left open whether this timeframe applies to mentally incompetent respondents. *Id.* at 611 n.4 ("This case does not require us to address when a mentally incompetent respondent must raise an objection to a noncompliant notice to appear.").