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DUE PROCESS VIOLATIONS IN [CLIENT'S NAME]'S DEPORTATION HEARINGS EXCUSED HIM FROM THE ADMINISTRATIVE EXHAUSTION REQUIREMENT, DEPRIVED HIM OF JUDICIAL REVIEW, AND RENDERED THE DEPORTATION ORDER FUNDAMENTALLY UNFAIR

A. [CLIENT'S NAME]'s Deportation Was Fundamentally Unfair Because He Was Mentally Incompetent at the Time of the Hearing and the IJ Did Not Prescribe Appropriate Safeguards.

1. Introduction.

Mentally incompetent aliens in removal proceedings have a right to specific protections under the immigration laws. Matter of M-A-M, 25 I&N Dec.474 (BIA 2011). The Immigration and Nationality Act ("INA") specifically provides:

> If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceedings, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.

8 U.S.C. § 1229a(b)(3)(2006). The BIA has recognized the requirements of § 1229a(b)(3). M-A-M, 25 I&N Dec. at 477.

Although immigration proceedings are civil proceedings, the BIA looks to the law regarding mental competency of defendants in criminal proceedings for guidance in determining the standard for treatment of mentally incompetent aliens in removal proceedings. M-A-M, 25 I&N Dec. at 478-479. In the criminal context, the Supreme Court has held that a person is not competent to stand trial if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." Drape v. Missouri, 420 U.S. 162, 171 (1975). Relying on this rationale, the BIA concludes that the "test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can

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consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." M-A-M, 25 I&N Dec. at 479.

2. Both the Immigration Judge and the Department of Homeland Security Knew or Should Have Known That [Client's Name] Was Mentally Incompetent.

When Immigration and Customs Enforcement ("ICE") officers took custody of [Client's Name] in December 2009, they either knew or should have known that [Client's Name] was mentally incompetent. [Facts.]

The Department of Homeland Security ("DHS") will often be in possession of relevant evidence, particularly where the alien is detained. "The DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency." M-A-M, 25 I&N Dec. at 480 (citing 8 C.F.R. § 1240.2(a) (2010) ("[DHS] counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge.")). Therefore, DHS should have brought the issue of [Client's Name]'s mental incompetency to the attention to the immigration judge.

3. The IJ Should Have Prescribed Adequate Safeguards to Protect [Client's Name]'s Rights under the Immigration and Nationality Act and the Due Process Clause.

In order to protect an alien's rights under the Due Process Clause and the INA, in removal proceedings, the IJ must consider whether there is good cause to believe that an alien lacks sufficient competency to proceed without safeguards. M-A-M, 25 I&N Dec. at 480. "Where there are indicia of incompetency, an Immigration Judge must take measures to determine whether a respondent is competent to participate in proceedings." Id. at 479. IJs should consider a variety

of evidence to determine whether an alien is competent to proceed. "Indicia of incompetency include a wide variety of observations and evidence . . . such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction." Id. In addition, the DHS may be in possession of evidence bearing on the competency of an alien in removal proceedings because the record may contain medical reports from past criminal proceedings. If that is the case, DHS must make such evidence known to the IJ. "The DHS will often be in possession of relevant evidence, particularly where the alien is detained. The DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency." Id. at 480.

In M-A-M, the BIA sets forth what steps the IJ should take when there is an indicia of incompetency. 25 I&N Dec. at 480-481. Using simple and direct questions, the IJ should ask the alien about where the hearing is taking place, the nature of the proceedings, and the respondent's state of mind. Id. at 481. In addition, the IJ could ask the alien whether he currently takes or has taken medication in the past to treat mental illness. Id. The IJ can also order a mental competency evaluation. Id. The IJ must weigh the results of the measures taken and determine whether the alien is sufficiently competent to proceed without safeguards. Id. The IJ "must articulate that determination and his or her reasoning." Id.

If the IJ determines that the alien lacks sufficient competency to proceed with the hearing, the INA requires that the judge provide safeguards to protect the rights and privileges of the alien. 8 U.S.C. § 1229a(b)(3). The IJ should carefully determine the facts and circumstances of an alien's case to decide which safeguards to utilize to ensure that removal proceedings do not violate the due process rights of a mentally incompetent alien. Id. at 483. Examples of appropriate

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safeguards include, but are not limited to:

> [R]efusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist the respondent and provide the court with information; docketing or managing the case to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public, actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent.

Id.

In some cases, no matter what efforts the IJ undertakes to ensure appropriate safeguards, concerns remain. In those cases, the IJ could administratively close the case. Id. at 483. Administrative closure is a procedure by which an IJ removes a case from his docket as a matter of "administrative convenience." Diaz-Covarrubias v. Mukasey, 551 F.3d 1114, 1116 (9th Cir. 2009). Administrative closure does not result in a final order by the IJ. In re Gutierrez-Lopez, 21 I&N Dec. 479, 480. It is a administrative convenience which allows the removal of a case in appropriate circumstances. Id. Therefore, in certain cases involving mentally incompetent aliens, the IJ is empowered to remove the case from his docket and discontinue removal proceedings.

In this case, [facts of individual case].