

Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders¹

I. Foundational Principles

Commitment to Screen and Provide Protections

The Executive Office for Immigration Review (“EOIR”) is committed to identifying detained unrepresented respondents in immigration custody who are not competent to represent themselves in removal and custody redetermination proceedings.

EOIR will not proceed in the case of any detained unrepresented respondent determined to be incompetent to represent him- or herself in a removal or custody redetermination proceeding until appropriate procedural protections and safeguards are in place.

II. Determinations to Be Made by Immigration Judges²

A. Background

In *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals held that for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by law. *Id.* at 479.

On April 22, 2013, the Office of the Chief Immigration Judge announced a “Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions.” This policy makes a qualified legal representative available in removal and custody redetermination proceedings if it is determined that a respondent with a serious mental disorder or condition is detained, unrepresented, and incompetent to represent him- or herself.

Accordingly, for a detained, unrepresented respondent with a serious mental disorder or condition to be considered competent to represent him- or herself in a removal or custody redetermination proceeding, he or she must be able to meaningfully

¹ EOIR announced its nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents on April 22, 2013. On August 15, 2013, EOIR began Phase I of its nationwide plan, in order to test aspects of the plan. This document constitutes EOIR’s final guidance for Phase I of its nationwide plan. Based on observations made during Phase I, EOIR may issue revised guidance in conjunction with further roll-out of the plan.

² This guidance sets forth principles by which Immigration Judges should assess competency within the context of EOIR’s nationwide plan to provide enhanced procedural protections to unrepresented, detained respondents with mental disorders. As part of its ongoing commitment to provide such protections, EOIR also intends to issue a Notice of Proposed Rulemaking on this subject and, upon receipt and review of public comment, a Final Rule.

participate in the proceeding and perform the functions necessary for self-representation.

B. Competence to Represent Oneself

Immigration Judges should utilize the following guidance to determine if a respondent is competent to represent him- or herself:

A respondent is competent to represent him- or herself in a removal or custody redetermination proceeding if he or she has a:

1. rational and factual understanding of:
 - a. the nature and object of the proceeding;
 - b. the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
 - c. the right to present, examine, and object to evidence;
 - d. the right to cross-examine witnesses; and
 - e. the right to appeal.
2. reasonable ability to:
 - a. make decisions about asserting and waiving rights;
 - b. respond to the allegations and charges in the proceeding; and
 - c. present information and respond to questions relevant to eligibility for relief.

A respondent is incompetent to represent him- or herself in a removal or custody redetermination proceeding if he or she is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself. “Mental disorder” (including Intellectual Disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person that substantially interferes with the ability to meet the ordinary demands of living.

C. Presumption of Competence

A respondent is presumed to be competent to represent him- or herself in a removal and custody redetermination proceeding. *See, e.g., M-A-M-*, 25 I&N Dec. at 479.

The presumption of competence to represent oneself is rebutted if an Immigration Judge finds, by a preponderance of the evidence, that the respondent is unable because of a mental disorder to perform any of the functions listed in the definition of competence to represent oneself.

D. Provision of a Qualified Legal Representative

EOIR will provide a qualified legal representative to any detained, unrepresented alien in a removal or custody redetermination proceeding found to be incompetent to represent him- or herself.

III. Process to Identify & Determine Issues of Competence

There are three stages to screen for and decide issues of competence:

1. Detecting indicia – The judge remains attentive to any behaviors or other indicators that the respondent may have a mental disorder limiting his or her ability to represent him- or herself. Where there is a “bona fide doubt” about respondent’s competence to represent him- or herself, the judge should move to stage 2 and conduct a judicial inquiry.
2. Conducting a judicial inquiry – The judge asks a series of questions to determine whether there is “reasonable cause” to believe that the respondent may be incompetent to represent him- or herself. At the conclusion of the judicial inquiry, the judge may find that the respondent is competent or incompetent to represent him- or herself. Alternatively, if there is reasonable cause to believe the respondent may be incompetent to represent him- or herself, but the evidence is not sufficient to rebut the presumption of competence, the judge should move to stage 3 and conduct a more in-depth hearing on the issue of competence.
3. Conducting a competency review – The judge conducts an evidentiary hearing to determine whether the presumption of competence has been rebutted.

IV. Detection of Indicia

Competence is the ability to perform a function demanded in a particular situation at the defined level. Competence is neither a status nor a state. Competence cannot be observed. Rather, one may observe behavioral signs or indicia that a person may lack the ability to perform a task or function required in a particular situation.

Immigration Judges must be vigilant at all times for indicia of a mental disorder that significantly impairs the respondent’s ability to perform the functions listed in the definition of competence.

A. Examples of Indicia

Indicia of a mental disorder that can impair competence or reflect impaired competence include, but are not limited to:

Past or current evidence of interventions related to mental disorder—for example:

- Outpatient mental health treatment
- Psychiatric hospitalization
- Interventions for self-injurious behavior or suicide attempts
- Limited academic achievement
- Currently receiving mental health treatment

Current manifestations of behavior suggesting mental disorder—for example:

- Poor memory
- Poor attention/concentration
- Confused or disorganized thinking
- Paranoid thinking (unreasonable fears)
- Grandiose thinking (overestimating own ability)
- Seeing or hearing things not present
- Serious depression or anxiety
- Poor intellectual functioning
- Irrational behavior or speech in court
- Lack of responsiveness in court

B. Sources of Indicia

Indicia of the respondent's cognitive, emotional, or behavioral functioning may come from any reliable source including, but not limited to: family members, friends, legal service providers, health care providers, social service providers, caseworkers, clergy, detention personnel, or other collateral informants or third parties knowledgeable about the respondent.

C. Form of Indicia

Indicia of incompetence may appear in any form including, but not limited to, observed behaviors; letters; government, legal, educational, employment, or health care records; or other verbal or written accounts.

D. Timing of Indicia

Because competence is fluid and may change over time, indicia of incompetence may appear and must be considered throughout all stages of the proceeding.

E. Communication by the Department of Homeland Security (DHS) of Indicia to the Court

Role of DHS v. EOIR Examinations

DHS serves a custodial and prosecutorial role in immigration proceedings. EOIR serves as an impartial adjudicator in immigration proceedings.

In its custodial role, the Department of Homeland Security may, upon taking an individual into custody, perform a physical and mental health examination of the individual. The purpose of this examination is, in part, to ensure that the detained individual does not pose a danger to self or others and to address appropriate treatment during detention. The purpose of this examination is not to determine whether the detained individual is competent to represent him- or herself in an immigration proceeding. In fact, not all individuals detained by DHS are detained for the purpose of instituting an immigration proceeding.

The DHS intake examination may nonetheless reveal information relevant to understanding the respondent's cognitive, emotional, and behavioral functioning. 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.

The examination to inform the court's determination of the competence of the respondent will be prepared at the request of the court rather than during the custodial intake by DHS. This is because the judge is in a better position to inform the mental health professional in the referral for examination about the nature and object of the proceeding and the reasons why the court questions the competence of the respondent. Additionally, a competence examination prepared by an agent of the court is likely to have greater evidentiary weight and avoid potential conflicts of interest than a report prepared by an agent of the prosecuting component of the government. The process for an Immigration Judge to refer the respondent for a competency examination is set forth below.

V. Judicial Inquiry

A. When to Conduct a Judicial Inquiry

Where the evidence of record results in a "bona fide doubt" about the respondent's competency to represent him- or herself, the judge should conduct a judicial inquiry. A "bona fide doubt" exists if there is "substantial evidence of incompetence." Evidence suggestive of a "bona fide doubt" includes, but is not limited to, respondent's demeanor before the court, irrational behavior, and available health evaluations. *See, e.g., Amaya-Ruiz v. Stewart*, 121 F.3d 486 (9th Cir. 1997) (internal citations omitted).

B. Purpose of the Judicial Inquiry

The purpose of the judicial inquiry is to gather information so the judge can make an informed decision whether the respondent's competency is at issue and a more in-depth competency review is necessary.

C. Process for Conducting a Judicial Inquiry

The judge begins the judicial inquiry by explaining to the respondent the purpose and process for conducting the judicial inquiry. The judge then proceeds to ask the respondent questions designed to shed light on the respondent's ability to represent him- or herself and his or her cognitive, emotional, and behavioral functioning. An explanation of the process for conducting a judicial inquiry with a sample advisal and suggested questions is contained in Appendix A. When performing the judicial inquiry, it is important that the judge note for the record any relevant non-verbal as well as verbal response to the questions.

D. Possible Outcomes of the Judicial Inquiry

There are three possible outcomes of the judicial inquiry:

- Respondent is competent - There is no reasonable cause to believe that the respondent is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent him- or herself. In such case, the presumption that the respondent is competent is not rebutted and the court can proceed without any additional safeguards or protections.
- Respondent is incompetent - A preponderance of the evidence establishes that the respondent is not competent to represent him- or herself in the proceeding. In such case, the judge will find the presumption of competence has been rebutted, request provision of a qualified representative, and ensure appropriate safeguards and protections are put in place.
- Insufficient evidence to decide if respondent is competent - The evidence is not sufficient to rebut the presumption of competence but the judge has "reasonable cause" to believe that the respondent is suffering from a mental disorder that impairs his or her ability to represent him- or herself. In such cases, the judge should conduct a hearing to gather additional evidence needed to determine whether the respondent is competent.

VI. Competency Review

A. When to Conduct a More In-Depth Competency Review

Where, at the conclusion of the judicial inquiry, the judge has “reasonable cause” to believe that the respondent is suffering from a mental disorder but needs additional evidence to determine whether the presumption of competence is rebutted, the judge will schedule a hearing to collect and review evidence of competency. It is at this stage that the judge will consider whether to refer the respondent for a mental health examination to inform the court’s decision on competency.

B. Procedural Rules

A determination of competence to represent oneself encompasses issues of law and fact that are addressed, along with all other issues of law and fact, in the context of the immigration proceeding. No additional hearing type or separate record of proceeding will be generated.

VII. System of Referral for a Mental Health Examination

A. When to Refer a Respondent for a Mental Health Examination

The Immigration Judge is not required to refer the respondent for a mental health examination. However, the judge is required to consider whether a referral is necessary.

A referral for a mental health examination is appropriate where the judge is unable to determine, based upon existing evidence of record, whether the respondent is competent to represent him- or herself.

B. Process to Refer Respondent for a Mental Health Examination

To refer the respondent for a mental health examination, the judge should complete the mental health examination referral found in Appendix B.

The referral provides the mental health professional with information, if available, about the nature and object of the proceeding, including the type of proceeding, the projected length of the hearings, the anticipated complexity of issues, the allegations and charges against the respondent, and potential forms of relief. The referral provides the mental health professional with information relating to respondent’s current cognitive, emotional, and behavioral functioning such as the behavioral observations, statements, or other information that caused the judge to question the ability of the respondent to perform as required in the proceeding.

The referral also provides background and administrative information to the mental health professional, including the name of the respondent, alien registration number, language spoken, apparent country of origin, place of detention, next court date or other deadline for the examination or report, and the name of the judge.

The referral should also include the name of a contact the mental health professional can speak with, if any, who may be knowledgeable about the respondent's past or current cognitive, emotional, and behavioral functioning.

The referral should also be accompanied by other documents, records, or information relevant to the competence of the respondent.

C. Use of an Interpreter in the Mental Health Examination

Where it is indicated in the mental health examination referral that the language the respondent speaks and understands best is a language other than English and the mental health professional is not fluent in the respondent's language, the Language Services Unit of the Office of the Chief Immigration Judge should be notified so that arrangements can be made to secure the services of a qualified interpreter for the mental health examination.

D. Qualifications of Examining Professionals

Upon receipt of the mental health examination referral, EOIR will procure the services of a qualified mental health professional.

At a minimum, mental health professionals assigned to serve as examiners for purposes of immigration proceedings must:

- be licensed to practice psychology or medicine in the jurisdiction where the examination will be conducted;
- have specialty training in psychiatry, clinical psychology, or counseling psychology;
- have completed an EOIR-approved training in conducting mental health examinations of respondents in immigration proceedings; and
- be able to document successful completion of a minimum of 100 hours of approved continuing education in conducting forensic examinations.

Whenever feasible, psychologists and psychiatrists appointed to conduct mental health examinations shall:

- be certified by the American Board of Psychiatry and Neurology (with added qualifications in forensic psychiatry) or the American Board of Forensic Psychology or other comparable organization; or

- have experience and completed training on conducting competence examinations.

Other relevant considerations when assigning a mental health professional in immigration proceedings include the quantity and level of training completed by the mental health professional, experience conducting competency examinations (especially experience conducting examinations of respondents in immigration proceedings), the complexity of examination required, the mental health professional's familiarity with and knowledge of the respondent's language, culture and possible disorder(s), and other factors relevant to the case at hand.

Mental health professionals should use structured and standardized assessment tools and methods whenever possible. Any tools or methods used must be reliable and valid, taking into consideration the respondent's background and culture.

Mental health professionals meeting the above qualifications presumptively qualify as having expertise in conducting an examination of a respondent's competence to represent him- or herself in an immigration proceeding.

E. EOIR-Approved Training of Mental Health Professionals

The EOIR-approved training program required to be qualified to conduct mental health examinations in immigration proceedings will cover:

- introduction to immigration law and procedure;
- determinations of competence in immigration proceedings;
- conducting mental health evaluations for immigration proceedings;
- report writing for the immigration court;
- ethics and professionalism;
- working with a foreign language interpreter; and
- cultural competence in forensic examinations.

Any mental health professional conducting an examination by tele-health or other electronic technology shall also have completed training in conducting an examination via that modality.

F. Role of the Mental Health Professional v. Role of the Judge

The role of the mental health professional is to identify and describe for the court any cognitive, emotional, or behavioral impairments the respondent has and their effects, if any, on the respondent's ability to perform the functions required to be competent to represent him- or herself in an immigration proceeding.

The role of the Immigration Judge is to determine whether any limitations on the respondent to perform the functions as reported by the mental health professional and established by any other relevant evidence of record fall with the defined range of ability (*i.e.*, rationally able to... , factually able to..., or reasonably able to...) necessary to represent him- or herself.

G. Fiduciary Duty and Notification of the Mental Health Professional

The purpose of the mental health examination ordered by the immigration court is to provide information to the court about the mental health of the respondent so the court can make an informed decision about the respondent's competence to represent him- or herself. The purpose of the mental health professional is not to treat or assist the respondent. Although the examining mental health professional may owe the respondent some legal duties, the fiduciary duty of the mental health professional is owed to the court. No relationship or privilege exists or is created between the respondent and the examining mental health professional assigned to conduct the examination by the immigration court.

There is no requirement that the examining mental health professional obtain informed consent from the respondent when the examination has been ordered by the court. The mental health professional, however, must notify the respondent of the purpose of the mental health examination, the examination procedure to be utilized, the lack of privilege and confidentiality between the mental health professional and the respondent, possible uses of the examination report, how information obtained during the examination and the report may be shared, and any other matter required by professional or ethical rules of behavior.

Any record, report, or work product prepared by the examining mental health professional belongs to the immigration court. There is no right or privilege of privacy or confidentiality between the examining mental health professional and the respondent. A mental health professional assigned by the court shall be deemed a court witness whether called by the court or either party, and may be examined as such by either party.

H. Refusal of the Respondent to Cooperate in the Mental Health Examination

Where the respondent refuses to cooperate in or attend the mental health examination ordered by the court, the examining mental health professional shall use any available data or information to assess the competency of the respondent to represent him- or herself and, to the extent possible, prepare the report ordered by the court. The examining mental health professional can rely on information such as personal observation of the respondent, health care records, information provided by family, friends, or others familiar with the respondent, information from detention personnel, educational records, court records, records of law enforcement agencies, or any other information relevant to the respondent's ability to represent him- or herself and assist a qualified representative if one is provided.

I. Format of the Examination

The mental health examination should be conducted in person in the facility where the respondent is detained unless there is a medical, administrative, or security justification for not doing so.

Subject to reasonable security and administrative considerations, the mental health examination must be conducted in a location such as a pro bono room or room designated for detainees to meet with legal counsel that provides, as determined by the mental health professional, a sufficient degree of uninterrupted quiet and privacy to conduct the examination. The examining mental health professional and respondent should have access to a table and two chairs. Where possible, common visitation and consultation areas and areas with glass or other dividers separating the respondent from the mental health professional should be avoided.

In rare circumstances, for instance where no qualified mental health professional can be located near the place of respondent's detention, an immediate examination is needed, or a distant examining mental health professional with special skill or knowledge is required, the examination may be conducted using tele-health technology. In the event that tele-health technologies are employed, the resolution of electronic images must be medically appropriate as determined by the mental health professional performing the examination.

Examining mental health professionals must comply with the laws regulating his or her profession in the jurisdiction in which the examination is performed and any other professional or ethical obligations that apply.

J. Scope of the Examination

Upon assignment by the court, the mental health professional shall examine the respondent's cognitive, emotional, and behavioral functioning and competence to represent him- or herself, as specified by the court in its order appointing the mental health professional to evaluate the respondent.

1. Assessment of Respondent's Cognitive, Emotional, and Behavioral Functioning

When conducting the evaluation the mental health professional shall assess:

- a. relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other histories if necessary; and
- b. the respondent's presentation and behavior during the evaluation, including reported or observed signs or symptoms of a mental disorder and the respondent's response style (*i.e.*, approach to the evaluation).

2. Assessment of Respondent's Competence

When conducting the evaluation, the mental health professional shall consider factors related to the issue of whether the respondent meets the criteria for competence in an immigration proceeding (*i.e.*, whether the respondent has present ability to represent him- or herself).

In considering the issue of competence, the mental health professional shall assess all of the following:

a. Respondent's rational and factual understanding of:

- 1) the nature and object of the proceeding, including its adversarial nature;
- 2) the allegations and charge(s);
- 3) possible outcomes of the proceeding; and
- 4) the roles of participants in the proceeding.

b. Respondent's rational and factual understanding of:

- 1) the privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
- 2) the right to present, examine, and object to evidence;
- 3) the right to cross-examine witnesses; and
- 4) the right to appeal.

c. Respondent's ability to:

- 1) make decisions about asserting and waiving rights;
- 2) respond to the allegations and charges in the proceeding; and
- 3) present information and respond to questions relevant to eligibility for relief.

d. Any other factors the mental health professional deems relevant to the respondent's competence to represent him- or herself.

If the mental health professional will recommend that the respondent be adjudicated incompetent to represent him- or herself, the mental health professional shall:

- 1) identify the impairments and mental disorder that are the cause of the incompetence; and
- 2) assess the respondent's ability to:
 - a) make a rational decision about being represented by counsel; and
 - b) assist counsel.

K. Payment for Services Rendered

The examining mental health professional will receive a flat rate to conduct the mental health examination and prepare a report of the examination for submission to the immigration court.

No other fees, costs or expenses will be reimbursed, including but not limited to: costs incurred for travel, parking, or testimony; fees associated with administration of tests; or costs of instruments.

L. Report Standards

The examining mental health professional must file with the court a written report summarizing the evaluation with copies for the respondent and the attorney for the Government.

In the written report, the mental health professional must:

1. identify the specific matters referred for evaluation;
2. list any evaluation procedures, techniques, and tests used in the examination;
3. list all sources of information considered by the mental health professional;
4. describe relevant aspects of the respondent's social, educational, vocational, medical, and mental health histories, and other factors as necessary;
5. describe the respondent's presentation and behavior during the evaluation (including reports or exhibition of signs or symptoms of mental disorder) and response style;
6. provide opinions on each issue referred for evaluation and identify any issues about which the mental health professional could not give an opinion;
7. provide a factual basis for any opinions offered in the report; and

8. identify the mental disorder that is the cause of the incompetence (if indicated).

M. Quality Control of Reports

The first time that a mental health professional is assigned by EOIR to conduct a competency evaluation, he or she must submit a copy of his or her report of examination to the point of contact designated by EOIR. The report will be reviewed to ensure that the examination and report comply with the directives of the agency.

Payment for services rendered by a mental health professional will not be released until the report of the mental health professional is received by the immigration court and deemed acceptable by the Immigration Judge.

Where the report of the examination fails to address matters required by the order of the court, payment for services rendered by the mental health professional may be withheld and the mental health professional may be ordered to supplement the report as necessary or appear in court without additional remuneration to provide information missing from the report.

N. Use of the Report of the Mental Health Examination

Upon receipt of the mental health examination report, the Immigration Judge will schedule a hearing to address the contents of the report, resolve the issue of competency, and determine whether additional safeguards or protections are necessary.

The Immigration Judge shall weigh the totality of the evidence including, but not limited to, the report summarizing the mental health evaluation, and the Immigration Judge shall determine whether the presumption that the respondent is competent to represent him- or herself has been rebutted by a preponderance of the evidence.

O. Protection of Mental Health Information

“Mental Health Information” includes any information expressly contained in or directly obtained from a request for a mental competence review, an Immigration Court’s administrative inquiry into mental competence, a portion of a hearing in which mental competence is addressed, a mental health examination of an alien, and a report of such examination.

Except as otherwise noted below, Mental Health Information shall only be used to determine an alien’s mental competency to participate or represent oneself in an immigration proceeding, and may not be used to establish the truth of allegations or charges against the alien, or to establish ineligibility for relief.

The paragraph above shall not apply to DHS' use of Mental Health Information if such information is independently submitted by, obtained by, or in the possession of DHS. If a respondent uses Mental Health Information in any proceeding for any purpose other than to inform his or her mental competency to participate in an immigration proceeding, the paragraph above shall not apply, and disclosure and use of the Mental Health Information shall be governed by rules of evidence and procedures applicable in immigration proceedings. If the alien uses a part of a document or report, DHS may request the production of any other portion of that document or report. Such request shall be granted at the Immigration Judge's discretion upon consideration of all relevant factors.

VIII. Procedural Protections & Safeguards

A. Obligation to Prescribe Appropriate Safeguards and Protections

Where the Immigration Judge finds the respondent is not competent to represent him- or herself in an immigration proceeding, the Immigration Judge shall consider the totality of the facts and circumstances and prescribe appropriate safeguards and protections to ensure the fundamental fairness of the immigration proceeding.

B. Provision of a Qualified Representative

EOIR will provide a qualified representative to an unrepresented, detained respondent where the judge has found the respondent incompetent to represent him- or herself.

The court should consider the examining mental health professional's assessment of the respondent's ability to consult with and assist counsel when deciding whether provision of a qualified representative is an effective safeguard and protection in a case.

C. Waiver of Counsel

As the provision of a qualified representative is a safeguard or protection deemed necessary by the court to guarantee the fairness of the proceeding rather than pursuant to a legal right owed to the respondent, the respondent does not have the right to waive the presence of the qualified representative.

D. Refusal to Cooperate with the Qualified Representative

The refusal of a respondent who has been determined by the mental health professional to be able to consult with and assist counsel, to cooperate with the qualified representative provided by the court, does not negate the efforts of the government to provide an appropriate safeguard or protection.

IX. Format of IJ Decision

A. On the Record

All portions of an immigration proceeding addressing the issue of competence must be on the record.

B. Decision of the Judge

The Immigration Judge must articulate the rationale for his or her decision regarding the competency of the respondent to represent him- or herself. The decision should set forth all findings of fact and conclusions of law, and give the reasoning and analyses therefor. Specifically, the decision should discuss the presence of indicia of incompetence, the results of the judicial inquiry and the basis for any finding that there was or was not reasonable cause to believe competence was in issue, and the evidence offered in the competency review hearing, and ultimately whether the evidence was or was not sufficient to rebut the presumption of competence.

Where the Immigration Judge determines that the respondent is not competent to represent him- or herself, the decision should discuss the function required in the definition of competence that the respondent was found unable to perform, the safeguards and protections considered, the appropriateness and adequacy of any safeguards provided, and articulate the reasoning.

X. Tracking Cases

Data Entry

As soon as is reasonably practicable, the database used to track cases pending before the immigration court shall be amended to track the following events and dates:

- Indicia – whether the judge found indicia resulting in a “bona fide doubt” that respondent has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
- Judicial inquiry – the date the judicial inquiry was conducted and whether the judge found “reasonable cause” to believe the respondent has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.
- Mental Health Examination – whether the respondent was referred for a mental health examination and, if so, the date of the referral.
- Competence Determination – whether the judge found the respondent competent or incompetent to represent him- or herself and the date of such finding.
- Qualified Representative – whether a qualified representative was provided and, if so, the date of the assignment.

XI. Impact on Franco v. Holder

Nothing in this document is intended to negate or alter the obligations of EOIR under the orders of the Court in *Franco v. Holder*.

Process for Conducting a Judicial Inquiry

I. Purpose of the Judicial Inquiry - The purpose of the judicial inquiry is to determine whether respondent's competence is in issue and a more in-depth competency review is warranted.

II. Mandatory Advisals – The judicial inquiry should generally occur after explaining to the respondent the nature and purpose of the proceeding and providing the advisals required in 8 C.F.R. § 1240.10(a).

III. Suggested Advisal - The judicial inquiry should begin by explaining to the respondent the purpose and process for conducting the judicial inquiry. A sample advisal follows:

I am an Immigration Judge. My job is to decide whether you will be allowed to stay in the United States. I am going to hold a hearing to gather information from you and the representative of the Government to help me decide whether you will be allowed to stay in the United States.

It is important that you understand what is happening in court. It is important that you understand what is being said about you. It is also important that you are able to tell your side of the story.

To make sure that you are able to understand and tell your story, I am going to ask some questions about you and your case. I will use this information to decide whether you will need any special help in the hearing.

Can you explain to me what I just said in your own words?

Do you have any questions before we begin today?

IV. Suggested Questions

A. **Areas of Inquiry** - When conducting the judicial inquiry, the Immigration Judge must ask questions to assess respondent's:

1. understanding of the nature and object of the proceeding,
2. understanding of and ability to exercise core rights and privileges,
3. ability to respond to the allegations and charges,
4. ability to present information and respond to questions relevant to eligibility for relief, and
5. cognitive, emotional, and behavioral functioning.

- B. **Suggested Questions** – The following list of questions is designed to shed light on the respondent's: 1) cognitive, emotional, and behavioral functioning; and 2) ability to represent him- or herself. This list is not exhaustive. The judge may ask other questions relevant to the respondent's mental health and ability to function as required in the hearing (*e.g.*, ability to communicate, subjective reality, memory, and interest in self). It is important for a judge to observe respondent's non-verbal as well as verbal responses to questions posed.

1. Cognitive, Emotional, and Behavioral Functioning

- a. How are you today?
- b. What is your name?
- c. What is today's date (including year)?
- d. What state and country are we in today?
- e. How did you get to the United States?
- f. When did you come to the United States? About how long have you been in the United States?
- g. Do you want to stay in the United States?
- h. Where do you live?
- i. What is the highest level of school that you completed?
- j. Are you seeing a doctor or taking any medications?
 - 1) If yes, what condition or problems are you being treated for?
 - 2) If yes, what medications are you taking?
- k. Are you currently being treated for a mental health (psychological/psychiatric) or emotional problem?
 - 1) If yes, what is the problem for which you are being treated?
 - 2) If yes, how often do you see the doctor?
 - 3) If yes, what medications, if any, are you receiving for this problem?
- l. Have you been treated for a mental health (psychological/psychiatric) or emotional problem in the past?
 - 1) If yes, when and for what problem?

2. Ability to Respond to the Allegations and Charges

- a. Why were you arrested? (Why did the immigration officers pick you up?)
- b. Where were you arrested?
- c. When were you arrested? (What was the date and time of your arrest?)
- d. Can you explain to me the immigration charges against you? (Can you explain to me what the government says you did wrong?)
- e. Is there anything important that you think I should know about what they say you did wrong? (Do you agree with what the government is saying about you?)

- f. What does _____ (e.g., alien smuggling, controlled substance, conviction, firearm) mean?
- g. How do you plan to proceed in court? (What do you plan to do next?)
- h. What do you want me to know about you and/or why you are here?
- i. What do you hope happens in court?

3. Understanding and Ability to Exercise Rights and Privileges

- a. What are your rights in immigration proceedings?
- b. What is a legal representative? What does a legal representative do in court?
- c. How do you find an attorney or legal representative?
- d. Is there anyone who can help you with your case?
- e. What is “evidence”?
- f. Can you give me an example of “evidence” that may be offered in your proceeding?
- g. What is an “appeal”?
- h. Why and how would you file an appeal?

4. Ability to Present Information and Respond to Questions Relevant to Relief

- a. What does “relief from removal” mean?
- b. What forms of relief from removal may be available in these proceedings?
- c. How long have you been in the United States?
- d. Do you have any family in the United States?
- e. Have you or your family ever had papers or permission to be in the United States?
- f. Has someone hurt you or tried to hurt you in your country?
- g. Are you afraid to go back to your country? Why?
- h. What does _____ (e.g., asylum, cancellation of removal, withholding of removal) mean?
- i. I am going to show you a relief application. Please take a moment to review the application. Can you explain to me how you would fill the application out or bring it back to me completed?
- j. Who do you know who might be able to help you with your case?

5. Other appropriate questions

- a. Is there anything else you would like to tell me?
- b. Are there any other questions you would like to ask?

Mental Health Examination Referral

Respondent: _____ Date: _____

Case No.: _____ Best Language: _____

Apparent Country of Origin: _____ Ethnicity (if known): _____

Judge: _____ Hearing Location: _____

Place of Detention: _____

Next Scheduled Hearing Date or Requested Due Date: _____

Type of Proceeding: _____ Estimated Length of Hearing: _____

Likely Forms of Relief:

- | | | |
|---|--|---|
| <input type="checkbox"/> Asylum | <input type="checkbox"/> Adjustment of status | <input type="checkbox"/> Temporary Protected Status |
| <input type="checkbox"/> Withholding of removal | <input type="checkbox"/> Cancellation of removal (LPR) | <input type="checkbox"/> Waiver(s) |
| <input type="checkbox"/> Convention Against Torture | <input type="checkbox"/> Cancellation of removal (non-LPR) | <input type="checkbox"/> Voluntary Departure |
| <input type="checkbox"/> Other: _____ | | |

Estimated Complexity of Issues (Circle one: 1 is least and 10 is most complex): 1 2 3 4 5 6 7 8 9 10

Indicia of a mental disorder:

- | | | |
|--|---|---|
| <input type="checkbox"/> History of outpatient mental health treatment | <input type="checkbox"/> Poor memory | <input type="checkbox"/> Severe depression or anxiety |
| <input type="checkbox"/> History of psychiatric hospitalization | <input type="checkbox"/> Poor attention/concentration | <input type="checkbox"/> Poor intellectual functioning |
| <input type="checkbox"/> History of self-injurious behavior | <input type="checkbox"/> Confused or disorganized thinking | <input type="checkbox"/> Irrational behavior or speech in court |
| <input type="checkbox"/> History of suicide attempts | <input type="checkbox"/> Paranoid thinking | <input type="checkbox"/> Lack of responsiveness in court |
| <input type="checkbox"/> History of limited academic achievement | <input type="checkbox"/> Grandiose thinking | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Currently receiving mental health treatment | <input type="checkbox"/> Seeing or hearing things not present | |

Other Relevant Documents or Health Information: _____

Other Relevant Information: _____

Contact with Information about Respondent's Health: _____

Attachments:

- | | |
|---|---|
| <input type="checkbox"/> Notice to Appear (Form I-862) or other charging document | <input type="checkbox"/> Record of Deportable/Inadmissible Alien (Form I-213) |
| <input type="checkbox"/> Additional Charges of Deportability/Inadmissibility (Form I-261) | <input type="checkbox"/> Other: _____ |