Step-by-step guide to competency as per *Matter of M-A-M-* :

"If there are no indicia of incompetency in an alien's case, no further inquiry regarding competency is required. 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 consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Matter of M-A-M-*, 25 I&N Dec. 474, 484 (BIA 2011). If there are indicia of incompetency, the Immigration Judge "should determine if a preponderance of the evidence establishes that the respondent is competent" for purposes of immigration proceedings. *Matter of J-S-S-*, 26 I&N Dec. 679, 683 (BIA 2015). "If the alien lacks sufficient competency to proceed, the Immigration Judge will evaluate and apply appropriate safeguards. The Immigration Judge must articulate the rationale for his or her decision." *Matter of M-A-M-*, 25 I&N Dec. at 484. Given that the Immigration Judge's determination of safeguards is discretionary, the Board of Immigration Appeals' review is de novo. *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016).

Truncated version of the boilerplate

As a threshold matter, "an alien is presumed to be competent to participate in removal proceedings." *See Matter of M-A-M-*, 25 I&N Dec. 474, 477 (BIA 2011). "Absent indicia of mental incompetency, an Immigration Judge ["IJ"] is under no obligation to analyze an alien's competency." *Matter of M-A-M-*, 25 I&N Dec. at 477. Neither party nor the Immigration Court "bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Matter of J-S-S-*, 26 I&N Dec. 679, 683 (BIA 2015). The Immigration Judge evaluates whether the respondent "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." *See Matter of M-A-M-*, 25 I&N Dec. at 479. A "diagnoses of mental illness does not automatically equate to a lack of competency." *Matter of M-A-M-*, 25 I&N Dec. at 480.

When indicia of competency are identified, the Immigration Judge must conduct a competency hearing or take another measure to determine whether a respondent is competent to participate in the proceedings. *Matter of M-A-M-*, 25 I&N Dec. at 480. If the Immigration Judge finds that the respondent lacks sufficient competency to proceed, the Immigration Judge will evaluate and apply appropriate safeguards. *Matter of M-A-M-*, 25 I&N Dec. at 484 (BIA 2011). Safeguards include, but are not limited to, the following: 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, and actively aiding in the development of the record, including the examination and cross-examination of witness. *Id.* at 483. The IJ has discretion to determine which safeguards are appropriate given the particular circumstances and must articulate the rationale for his decision. *Matter of M-A-M-*, 25 I&N Dec.

at 481-82. The safeguards must afford a respondent a "full and fair hearing." *Matter of M-A-M-*, 25 I&N Dec. at 479.

I. Threshold Issues

a. Competence

As a threshold matter, "an alien is presumed to be competent to participate in removal proceedings." *Matter of M-A-M-*, 25 I&N Dec. at 477. "Absent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency." *Matter of M-A-M-*, 25 I&N Dec. at 477. Neither party bears the burden to establish whether the respondent is mentally competent. *Matter of J-S-S-*, 26 I&N Dec. at 683. Once there are indicia of incompetency raised by either party or the Immigration Judge, the Court must evaluate competency. *See Matter of M-A-M-*, 25 I&N Dec. at 480. When there are indicia of mental incompetence, "the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Matter of J-S-S-*, 26 I&N Dec. at 683. The Immigration Judge determines whether a respondent is competent to participate in removal proceedings by evaluating 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." *See Matter of M-A-M-*, 25 I&N Dec. at 479. A "diagnoses of mental illness does not automatically equate to a lack of competency." *Matter of M-A-M-*, 25 I&N Dec. at 480.

The Board in *M-A-M-* established that mental incompetency itself does not preclude an alien from removal proceedings. 25 I&N Dec. at 477, 480. Rather, the purpose of a competency hearing is to assess the mental health of an individual, and, when necessary, to ensure that certain procedural safeguards are implemented. *Matter of M-A-M-*, 25 I&N Dec. at 481-82. Only when such safeguards are unavailable or futile, are other remedies to be considered. *Matter of M-A-M*, 25 I&N Dec. at 483.

b. Service

The Immigration Court makes the determination about whether a respondent is incompetent; however, if the Department "is aware of indicia of incompetency at the time it serves the notice to appear, the case should be handled as 'a case of mental incompetency. . . .'" *Matter of E-S-I-*, 26 I&N Dec. 136, 144 (BIA 2013). If the case is one of mental incompetency, then the respondent must be served in accordance with 8 C.F.R. §§103.8(c)(2)(i) and (ii).

A respondent lacking competence must be served a Notice to Appear ("NTA") in person. If the respondent is not confined to an institution, then service must be made on the person with whom the alien resides. 8 C.F.R. § 103.8(c)(2)(ii). "Whenever possible, service shall also be made on the near relative, guardian, committee, or friend." 8 C.F.R. § 103.8(c)(2)(ii). Service on counsel "does not obviate the need to also serve a responsible person with whom the respondent resides." *Matter of E-S-I-*, 26 I&N Dec. at 143. However, if the respondent is confined to an institution, service must be served on the person in charge of the institution or his

delegate, as well as personally served on the respondent. 8 C.F.R. § 103.8(c)(2)(i); *see also Matter of E-S-I-*, 26 I&N Dec. at 140-41. Confinement to an institution can pertain to a mental institution, penal facility, or civil detention. *See Matter of E-S-I-*, 26 I&N Dec. at 140-41.

c. *Representation*

A respondent lacking competency is not entitled to representation at the government's expense. INA § 204(b)(4)(A); INA § 292. However, an Immigration Judge may not accept an admission of removability from an unrepresented respondent who is incompetent and unaccompanied. 8 C.F.R. § 1240.10(c). If respondent is unable to appear because of his mental incompetency, an attorney, legal guardian, near relative, or friend who was served the NTA is permitted to appear on his behalf. 8 C.F.R. §§1240.4, 1240.43.

II. Indicia

"An alien is presumed to be competent to participate in removal proceedings." *Matter of M-A-M-*, 25 I&N Dec. at 477. "Neither party bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Matter of J-S-S-*, 26 I&N Dec. at 683. If the Immigration Judge has good cause to believe that the respondent "lacks sufficient competency to proceed without safeguards," then the Immigration Judge will evaluate and apply appropriate safeguards. *Matter of M-A-M-*, 25 I&N Dec. at 479.

An Immigration Judge may use the evidence in the record and observations made in the courtroom to determine whether respondent is incompetent. *See Matter of M-A-M-*, 25 I&N Dec. at 479. The Immigration Judge's observations may include whether the respondent was able to answer questions or remain on topic. *See Matter of M-A-M-*, 25 I&N Dec. at 479. The Immigration Judge may also consider how the respondent's condition has changed over time, and whether it has improved or deteriorated throughout the course of the proceedings. *See Matter of M-A-M-*, 25 I&N Dec. at 480. The Immigration Judge may also consider the evidence in the record, such as mental health evaluations, records of medical treatment, assessments from criminal proceedings, testimony from mental health professionals, as well as "evidence from other relevant sources, such as school records . . .; reports or letters from teachers, counselors, or social workers; evidence of participation in programs for persons with mental illness; evidence of applications for disability benefits; and affidavits or testimony from friends or family members." *Matter of M-A-M-*, 25 I&N Dec. at 479-80.

The Department "has an obligation to provide the Court with relevant materials in its possession that would inform the Court about the respondent's mental competency." *Matter of M-A-M-*, 25 I&N Dec. at 480; *see also* 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.").

III. Assessing Competency

When indicia of competency are identified, the Immigration Judge must conduct a competency hearing or take another measure to determine whether a respondent is competent to participate in the proceedings. *Matter of M-A-M-*, 25 I&N Dec. at 480. The test for determining whether the respondent is competent is whether he "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." *Matter of M-A-M-*, 25 I&N Dec. at 479. To make this determination, the Court is to ask the respondent questions regarding "where the hearing is taking place, the nature of the proceedings, and the respondent's state of mind." *See Matter of M-A-M-*, 25 I&N Dec. at 480. The Court may also ask the respondent about medications and request evidence from the parties regarding the respondent's mental health. *See M-A-M-*, 25 I&N Dec. at 481.

An Immigration Judge may require the respondent to undergo a mental competency evaluation. *Matter of M-A-M-*, 25 I&N Dec. at 481; *Matter of J-F-F-*, 23 I&N Dec. 912, 915 (AG 2006). In addition, the Immigration Judge may permit the case to be continued or grant a motion to change venue in order to permit the respondent to seek treatment or be closer to friends or relatives who may care for respondent.

After the Immigration Judge has taken necessary measure to determine competency, the Immigration Judge must determine whether respondent is competent to proceed with the hearing without safeguards. *Matter of M-A-M-*, 25 I&N Dec. at 481. In addition, the Immigration Judge must "articulate that determination and his or her reasoning." *Matter of M-A-M-*, 25 I&N Dec. at 481.

IV. Safeguards

a. If safeguards are present

Respondents who lack sufficient mental competency are entitled to additional procedural safeguards to protect their due process right to a full and fair hearing. *See M-A-M-*, 25 I&N Dec. at 479-82. Therefore, consistent with the Court's general authority to regulate the course of immigration proceedings,[1] an immigration judge presiding over the case of a respondent who lacks sufficient mental competency to proceed with the hearing has discretion to prescribe any safeguards necessary to protect the rights and privileges of the respondent. *See M-A-M-*, 25 I&N Dec. at 481-82. The Code of Federal Regulations identifies some necessary procedural safeguards, but the Immigration Judge also has a duty to ensure that the safeguards he or she implements are sufficient to afford the alien a fair hearing. *See Carlson v. Landon*, 342 U.S. 524, 537 (1952). Appropriate safeguards may include, "but are not limited to," the Court's

> refusal to accept an admission of removability from an unrepresented respondent; identification and appearance of a family member or close friend who can assist

[1] *See, e.g.*, 8 C.F.R. § 1240.1(c); *see also* 8 C.F.R. §§ 1240.2(a), 1240.32(c).

> 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; 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.

See M-A-M-, 25 I&N Dec. at 483. A respondent's "lack of competency in civil immigration proceedings does not mean that the hearing cannot go forward." *See M-A-M-*, 25 I&N Dec. at 479. An Immigration Judge has discretion "to determine which safeguards are appropriate, given the particular circumstances in a case before them." *Matter of M-A-M-*, 25 I&N Dec. at 482. The Immigration Judge must "articulate his or her reasoning for the decision." *Matter of M-A-M-*, 25 I. & N. Dec. at 483.

Accordingly, the Court finds that although the documentary evidence indicates that respondent has a history of mental illness, he has a rational and factual understanding of the nature and consequences of his removal proceedings. In addition, he has demonstrated an ability to examine and present evidence in support of his applications for relief. Therefore, the Court finds that he is "sufficiently competent to proceed" with his removal proceedings. *See M-A-M*, 24 I&N Dec. at 481.

b. If safeguards are not present

The Court finds that without proper safeguards, respondent's rights and privileges guaranteed by the INA are not protected. *See M-A-M*, 24 I&N Dec. at 478; *see also* INA § 240(b)(3); 8 C.F.R. § 1003.10(b). Therefore, the Court resolves to terminate the removal proceedings pending against respondent without prejudice until the respondent can seek psychiatric treatment to restore his competency or until additional safeguards can be provided to protect his due-process right to a full and fair hearing.[2] *See M-A-M-*, 25 I&N Dec. at 483.

V. Relief

a. Termination of proceedings- No Ability to Terminate

An Immigration Judge does not have the authority to grant non-statutory forms of relief and is bound to take action "consistent with applicable law and regulations as may be appropriate." 8 CFR §§ 1238.1(e), 1239.2(f), 1240.1(a)(1)(iv); *see Matter of G-K-*, 26 I&N Dec. 88, 93 (BIA 2013) (finding that the Board of Immigration Appeals and Immigration Courts cannot create relief that is not supported by the INA or the regulations). The Board has held that without specific statutory or regulatory authority to the contrary, the Immigration Judge may

[2] The Court finds convincing counsel's argument that the respondent's mental health needs require a termination, rather than administrative closure, of his case. Administrative closure leaves open the possibility of reactivating the respondent's case. The respondent appears to require mental health treatment to which he does not have access while in immigration custody.

only terminate proceedings where there is a dispute related to the charges contained in the NTA. *See* Jose Cortez Flores, A 017 165 644 (BIA Apr. 16, 2010) (unpublished) (finding termination is a legally inappropriate remedy where charges contained in the NTA are valid, notwithstanding the alleged mental incompetency of respondent); c*f. Matter of G-N-C-*, 22 I&N Dec. 281, 283-84 (BIA 1998); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Once removability is established, termination is only appropriate in specific circumstances. *See* 8 C.F.R. § 1239.2(f).

b. Termination of proceedings- Ability to Terminate

In the present matter, due to respondent's mental illness, he is unable to understand the nature and object of removal proceedings, is unable to consult with counsel, and cannot present evidence on his behalf. *See M-A-M-*, 24 I&N Dec. at 479. Accordingly, the Court finds that respondent's incompetence undermines his ability to exercise his rights and privileges guaranteed by the INA and Due Process Clause. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (finding that the Fifth Amendment entitles aliens to due process of law in immigration proceedings); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) (finding that the Due Process Clause requires a full and fair hearing in removal proceedings); *Matter of Beckford*, 22 I&N Dec. 1216, 1225 (BIA 2000) (finding that a removal hearing must satisfy principles of fundamental fairness). Having applied all necessary safeguards to no avail, the Court will terminate proceedings without prejudice.

c. Administrative closure

Administrative closure is a discretionary determination within the province of the Immigration Judge. 8 C.F.R. § 1003.29. "[A]n Immigration Judge or the Board has the authority to administratively close a case, even if a party opposes, if it is otherwise appropriate under the circumstances." *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012). An Immigration Judge may consider, but is not limited to, the following factors:

> (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of the removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings . . .) when the case is recalendared before the Immigration Judge. . . .

Id. at 696.

In *M-A-M-*, the Court found that administrative closure may be an appropriate remedy in instances where a respondent is found incompetent and there are insufficient safeguards available to protect him. 25 I&N Dec. at 483.

d. Other forms of relief

As long as safeguards are in place, the Immigration Court may adjudicate respondent's case and grant immigration relief as if the respondent was competent.

VI. Credibility Assessments in Mental Competency Cases

If the Immigration Judge finds that the respondent is incompetent but there are adequate safeguards in place to proceed or if the Immigration Judge finds that notwithstanding the respondent's mental illness he or she is competent to proceed with the hearing, the Immigration Judge must, on a case-by-case basis, weigh the respondent's credibility. "Where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim." *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015). In particular, an Immigration Judge may accept a respondent's fear as *subjectively* genuine where mental competency makes it difficult for the respondent to "provide testimony in a coherent linear manner." *Matter of J-R-R-A-*, 26 I&N Dec. at 611. After considering the reliability of respondent's testimony, "[t]he 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." *Matter of J-R-R-A-*, 26 I&N Dec. at 612.

VII. Mental Competency and Filing Deadlines

The regulations provide that a legal or mental disability can constitute an "extraordinary circumstance" for purposes of an exception to the one-year filing deadline for asylum cases. *See* 8 C.F.R. § 1208.4(5)(i), (ii). If the applicant files after the one-year deadline, he must show to the satisfaction of the Court that he qualifies for an exception to the filing deadline. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(2); *see also Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002). To qualify for an exception to the filing deadline, the applicant must demonstrate the existence of either (1) changed circumstances that materially affect his eligibility for asylum, or (2) extraordinary circumstances relating to the delay in filing an application within the filing period. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)-(5).

"Extraordinary circumstances" include, but are not limited to: (1) serious illness or mental or physical disability including effects of persecution; (2) legal disability; and (3) ineffective assistance of counsel, provided that the alien complies with the requirements set forth at 8 C.F.R. § 1208.4(5)(iii)(A)-(C). 8 C.F.R. § 1208.4(a)(5). The burden of proof is on the applicant to establish to the satisfaction of the Court that the circumstances were not intentionally created by him through his own action or inaction, that those circumstances were directly related to his failure to file the application within the one year period, and that the delay was reasonable under the circumstances. 8 C.F.R. § 1208.4(a)(5); *see also Barry v. Holder*, 361 F. App'x 268, 270 (2d Cir. 2010) (unpublished) (upholding the BIA's determination that a respondent failed to show that her post-traumatic stress disorder had a direct relationship to her failure to file a timely application).

Mental competency also may be relevant to other filing deadlines, such as what constitutes a reasonable period for filing a motion to reopen based on a claim of ineffective assistance of counsel.

VIII. Motions to Reopen under *Franco*

On September 25, 2015, U.S. District Court granted final approval of the *Franco* settlement, clearing the way for immigrants with serious mental disabilities to request to reopen their cases and, if approved, return to this country. *Franco-Gonzalez v. Holder*, No. 10-02211 (C.D. Cal. Apr. 24, 2013). For a Class Member to reopen his case under the *Franco* Reopening Agreement, the Class Member must be an individual who was detained by U.S. Immigration and Customs Enforcement ("ICE") in Arizona, California, or Washington[3] on or after November 21, 2011; remained detained and did not have legal representation at the time they were ordered removed by an immigration judge ("IJ"), *or* was released from detention following an IJ's determination that they were not competent to represent themselves and remained unrepresented at the time they were ordered removed; has a "serious mental disorder;" *and* did not receive certain procedures to determine whether they were competent to represent themselves in immigration proceedings.

IX. Other Considerations

a. Subpoenas

Under 8 C.F.R. § 1003.35(b), an Immigration Judge may "issue subpoenas requiring the attendance of witnesses." The subpoena may be issued to a witness if the Immigration Judge determines that otherwise a witness will not testify and that his testimony is "essential." 8 C.F.R. § 1003.10(b). The Court also may "take any action . . . that is necessary for the disposition" of cases, including subpoenaing witnesses. 8 C.F.R. § 1003.10(b). Furthermore, if the respondent's doctor is covered by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), he may testify pursuant to a subpoena so long as he receives satisfactory assurance that the respondent's attorney has made reasonable efforts to ensure that the respondent has been given notice of the request. *See* 45 C.F.R. § 164.512(e)(1)(ii)(A). If the doctor is not covered by HIPAA, he may testify in response to a subpoena without any additional safeguards.

[3] Any Class member who has entered ICE custody after November 21, 2011, and who is subsequently transferred outside of Arizona, California or Washington, **continues to be a Class Member** and entitled to all of the benefits of Class membership. *See Franco-Gonzalez v. Holder*, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).