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POST-DEPORTATION HUMAN RIGHTS PROJECT

Boston College Law School, 885 Centre Street, Newton, MA 02459
Tel 617.552.9261 Fax 617.552.9295 Email pdhrp@bc.edu
www.bc.edu/postdeportation

Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States¹ (September 2015)

by Aimee Mayer-Salins²

(I) INTRODUCTION

Mental illness can prevent an individual from effectively presenting his or her case in removal proceedings.³ Yet, due process requires that proceedings be fundamentally fair.⁴ As a

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³ See, e.g., Molly Bowen, Note, *Avoiding an “Unavoidably Imperfect Situation”*: *Searching for Strategies to Divert Mentally Ill People Out of Immigration Removal Proceedings*, 90 Wash. U. L. Rev. 473, 480 (2012) (discussing multiple cases in which U.S. citizens with serious mental illnesses were unlawfully removed from the United States); Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. Pa. J. Const. L. 511, 511 (2011) (discussing cases in which the respondents did not have the wherewithal to communicate with the immigration judge or were so catatonic during immigration proceedings that they were unable to answer basic questions).

⁴ Bowen, *supra* note 3 (citing *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) and *Demore v. Kim*, 538 U.S. 510, 523 (2003)).

result, certain safeguards are available to mentally incompetent⁵ non-citizens in removal proceedings. This Practice Advisory begins by discussing the practical difficulties for deportees suffering from mental illness. It then surveys the legal protections available to mentally incompetent non-citizens facing removal proceedings, and explores how individuals who have been removed or deported from the United States might benefit from these protections. The Practice Advisory concludes by providing suggestions to advocates working with individuals with mental illnesses who have been deported or removed from the United States.

(II) PRACTICAL DIFFICULTIES

Deportees who suffer from mental illness face significant practical obstacles to successfully reopening their cases and returning to the United States. These difficulties are connected to both having a mental illness and being outside of the United States due to a removal or deportation. People who suffer from mental illnesses often also suffer from homelessness, poverty, substance abuse issues, and isolation from family or friends.⁶ These issues, in combination with the mental illness itself, can make finding and working with an attorney difficult⁷ and can make it nearly impossible to effectively represent oneself. These problems are only exacerbated when the individual is outside the United States, where he or she may lack friends and relatives or other social safety nets that were available in the United States. Psychiatric care and substance abuse treatment may also be difficult to obtain and/or unaffordable.⁸ Moreover, there are few legal services providers who have the capacity to provide representation to people who are outside the United States. Therefore, despite the importance of the legal protections described

⁵ The term mentally incompetent is a legal term used in the case law and regulations discussed below. It refers to an individual's inability to participate in immigration proceedings due to a mental illness or disability. The author acknowledges that the term lacks appropriate cultural and linguistic sensitivity and may further stigmatize and harm those suffering from mental illnesses. See, e.g., Bruce J. Winnick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 Psychol. Pub. Pol'y & L. 6 (1995). The use of the term in this practice advisory is not intended to further stigmatize or harm those suffering from mental illness; rather, it is used to avoid confusion where this term describes the applicable legal standard.

⁶ Amelia Wilson & Natalie H. Prokopa, *Applying Method to Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. Pa. J. L. & Soc. Change 1, 6 (2013); see also Kalina Brabeck, Katherine Porterfield, & Maryanne Loughry, *Immigrants Facing Detention and Deportation: Psychosocial and Mental Health Issues, Assessment, and Intervention for Individuals and Families in The New Deportations Delirium: Interdisciplinary Responses* (Dan Kanstroom & M. Brinton Lykes, eds., forthcoming Nov. 2015).

⁷ See Capital Area Immigrant Rights ("CAIR") Coal. & Cooley, Godward, Kronish, LLP, Practice Manual for Pro Bono Attorneys Representing Detained Clients with Mental Disabilities in the Immigration Detention & Removal System (2d Ed.), at 21-26 (2009), available at <http://www.caircoalition.org/pro-bono-resources/pro-bono-mental-health-manual/> (discussing challenges facing attorneys working with non-citizens with mental illnesses and surveying an attorney's ethical obligations in this situation).

⁸ Attorneys may be able to obtain a mental healthcare referral for an individual living outside the United States by using the American Psychological Association's Directory of National Associations of Psychology, which provides contact information for psychology associations in numerous countries around the world. *Directory of National Associations of Psychology*, American Psychological Association, <http://www.apa.org/international/networks/organizations/national-orgs.aspx> (last visited Aug. 25, 2015, 9:21 AM). Where it is not possible to find a mental health care provider in the country of deportation, it may be possible for a psychologist in the United States to provide an assessment and/or care remotely. However, mental healthcare professionals must comply with all ethical guidelines and licensing requirements. For more information, see *Guidelines for the Practice of Telepsychology*, American Psychological Association, <http://www.apa.org/practice/guidelines/telepsychology.aspx> (last visited August 31, 2015, 2:54 PM).

later in this Practice Advisory, advocates must be sensitive to the barriers that may prevent an individual who has been removed from the United States from accessing the protections he or she is due. It may be necessary to work cooperatively with mental health professionals,⁹ social workers,¹⁰ friends, and family members to successfully reopen proceedings and help the individual to return to the United States.

(III) PROTECTIONS FOR MENTALLY INCOMPETENT RESPONDENTS IN REMOVAL PROCEEDINGS

Non-citizens who exhibit indicia of mental incompetence are afforded certain protections in removal proceedings. These protections, which are intended to ensure that these individuals receive due process, are outlined in the statute and regulations and in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).¹¹

a. Statutory and Regulatory Framework

The statute and regulations provide certain protections to mentally incompetent¹² respondents both before and during their hearings. These protections are described below.

i. Notice

The regulations provide special procedures for providing notice to non-citizens who lack mental competency. Under 8 C.F.R. § 103.8(c)(2), an incompetent individual must be served with the Notice to Appear in person. If the non-citizen is confined in a penal or mental institution or hospital, the government generally must serve the non-citizen, as well as the person in charge of the institution, but if the non-citizen is incompetent, the government may serve only the person in charge of the institution where the individual is confined.¹³ If the non-citizen is not confined, service must be made on the person with whom the individual resides.¹⁴ Additionally,

⁹ In working with a mental health professional, it may be helpful for an attorney to orient the mental health professional to the salient legal issues, define any relevant technical terms, and explain how the mental health professional's testimony or assessment will be helpful in addressing the relevant legal issues.

¹⁰ See Jessica Chicco & Elaine Congress, *Legal and Social Work Responses to the Detained and Deported: Interdisciplinary Reflections and Actions* in *The New Deportations Delirium: Interdisciplinary Responses* (Dan Kanstroom & M. Brinton Lykes, eds., forthcoming Nov. 2015) (discussing models for successful collaborations between attorneys and social workers).

¹¹ Additional protections are available to some individuals detained in California, Washington, or Arizona under the settlement agreement reached in *Franco-Gonzalez v. Holder*, CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). These protections will not be discussed in this practice advisory, but may be discussed in a subsequent practice advisory.

¹² A finding of mental incompetency is a legal determination that is made by an Immigration Judge. It is not a diagnosis and is not made by a mental health professional (although the input of a mental health professional certainly may aid an Immigration Judge in making this determination). 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. See *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

¹³ 8 C.F.R. § 103.8(c)(2)(i).

¹⁴ 8 C.F.R. § 103.8(c)(2)(ii).

“whenever possible, service shall also be made on the near relative, guardian, committee, or friend.”¹⁵

The Board interpreted these notice requirements in *Matter of E-S-I*, 26 I&N Dec. 136 (BIA 2013). In that case, the Board clarified that where indicia of incompetency are manifest, the Department of Homeland Security (DHS) generally should serve the notice to appear on three people: first, a person with whom the respondent resides; second, a relative, guardian, or person similarly close to the respondent; and third, the respondent.¹⁶ In interpreting the text of 8 C.F.R. § 103.8(c)(2)(ii), the Board explained that if an individual is detained, then “a person with whom the incompetent . . . resides” means someone in a position of demonstrated authority in the institution or his or her delegate.¹⁷ Where the respondent is not detained, “a person with whom the incompetent . . . resides” means a responsible party in the household.¹⁸ If the DHS did not properly serve the respondent in compliance with the regulations described above, and indicia of incompetency were either manifest or arose at a master calendar hearing, the Immigration Judge should grant DHS a continuance so that it may effect proper service.¹⁹ In addition, if indicia of incompetency become apparent later in the proceedings, the Immigration Judge should evaluate whether re-serving the notice to appear in accordance with 8 C.F.R. §§ 103.8(c)(2)(i) and (ii) (2013) would be a beneficial safeguard.²⁰

ii. Procedural Protections at the Hearing

The regulations also include additional requirements to ensure that an incompetent individual is given an adequate opportunity to present his or her case during a hearing. An Immigration Judge may not accept an admission of removability from an unrepresented respondent who is incompetent and unaccompanied.²¹ When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative or guardian, near relative, or friend who was served with a copy of the Notice to Appear may appear on the respondent’s behalf.²² If such a person cannot be found or will not appear, the regulations permit an Immigration Judge to request that the respondent’s custodian appear on his or her behalf.²³ Moreover, if an Immigration Judge concludes that a respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge “shall prescribe safeguards to protect the rights and privileges of the alien.”²⁴

¹⁵ *Id.*

¹⁶ *Matter of E-S-I*, 26 I&N Dec. 136 (BIA 2013).

¹⁷ *Id.* at 141-42.

¹⁸ *Id.* at 143.

¹⁹ *Id.* at 144.

²⁰ *Id.* at 145.

²¹ 8 C.F.R. § 1240.10(c) (2010).

²² 8 C.F.R. §§ 1240.4, 1240.43 (2010); Section 240(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(3) (2006) (“If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”).

²³ 8 C.F.R. §§ 1240.4, 1240.43 (2010).

²⁴ Section 240(b)(3) of the Immigration and Nationality Act; see also 8 C.F.R. § 1003.10(b) (2010).

b. Safeguards Under *Matter of M-A-M-*

The Board of Immigration Appeals further explained the statutory and regulatory provisions discussed above in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). In that case, a Jamaican man proceeding pro se showed multiple indicia of mental illness: he had difficulty answering basic biographical questions; he told the Immigration Judge that he had been diagnosed with schizophrenia; and he indicated that he needed medication and had a history of mental illness. The man represented himself in his hearings before the Immigration Judge.²⁵ The Immigration Judge found him removable, and denied his applications for asylum, withholding of removal, and relief under the Convention Against Torture.²⁶ While the Immigration Judge's decision did summarize the respondent's mental health history, it did not contain an explicit finding regarding the respondent's mental competency.²⁷

The Board's decision in *Matter of M-A-M-* addressed three questions: (1) When should Immigration Judges make competency determinations? (2) What factors should Immigration Judges consider and what procedures should they use to make those determinations? (3) What safeguards should Immigration Judges employ to ensure that proceedings are fair when competency is not established?

The Board began by stating that a non-citizen is presumed to be competent to participate in removal proceedings, and absent indicia of mental incompetency, an Immigration Judge has no duty to assess an alien's competency.²⁸ However, where there are indicia of incompetency,²⁹ the Immigration Judge must evaluate whether a respondent is competent to participate in proceedings.³⁰ 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."³¹

If an Immigration Judge determines that a respondent is not competent to proceed, then the Immigration Judge must prescribe safeguards to protect the respondent's rights and privileges.³²

²⁵ *Matter of M-A-M-*, 25 I&N Dec. 474, 475 (BIA 2011).

²⁶ *Id.* at 476.

²⁷ *Id.*

²⁸ *Id.* at 477.

²⁹ Indicia of mental incompetency include a broad range of observations and evidence. Evidence in the record might include mental health assessments, such as medical reports or assessments from past medical treatment or from criminal proceedings, and testimony from medical health professionals. The record may also contain evidence such as school records regarding special education classes or individualized education plans; reports or letters from teachers, social workers, or counselors; evidence of participation in programs for people with mental illness; evidence of applications for disability benefits; and affidavits or testimony from family members or friends. Additionally, the Immigration Judge or the parties may directly observe certain behaviors, such as the inability to understand and appropriately respond to questions, the inability to stay on topic, or a great deal of distraction. *Id.* at 479-80.

³⁰ *Id.* at 480.

³¹ *Matter of M-A-M-*, 25 I&N Dec. at 479. Notably, this test fails to explicitly account for cultural differences that may impact the Immigration Judge's competency determination. See, e.g., Helen Y. Kim, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 Elder L.J. 265, 270-71 (2007).

³² *Matter of M-A-M-*, 25 I&N Dec. at 482; section 240(b)(3) of the Act.

These safeguards should be tailored to the needs of the individual, and may include (but are not limited to): refusal to accept an admission of removability from an unrepresented respondent; appearance of a family member or friend who can help the respondent and provide information to the court; docketing or managing the case to facilitate the respondent's ability to attain legal representation and/or medical treatment; 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.³³ Additionally, where a mental illness may be affecting the reliability of an individual's testimony, as a safeguard, the Immigration Judge should generally accept his or her fear of harm as subjectively genuine based on the individual's perception of events.³⁴ In other words, the Immigration Judge should accept that the individual believes what he or she has stated, even though this account may not be believable to others.³⁵ The Immigration Judge should then concentrate on whether the noncitizen can satisfy his or her burden of proof based on the objective evidence of record.³⁶

(IV) AFTER REMOVAL: PROTECTIONS FOR MENTALLY INCOMPETENT DEPORTEES

Individuals with mental illnesses who have been removed from the United States may have avenues for reopening proceedings and returning to the United States. These options are discussed below.³⁷

a. Motions to Reopen or Reconsider

A person with a mental illness who did not receive the protections set forth in the INA, its implementing regulations, or *Matter of M-A-M-* may file a motion to reopen or a motion to reconsider. A motion to reopen may be appropriate if new evidence of mental illness comes to light and this evidence suggests that the individual would have been entitled to these protections.³⁸ A motion to reopen is based on new facts and circumstances, and must be

³³ *Matter of M-A-M-*, 25 I&N Dec. at 483.

³⁴ *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015).

³⁵ *Id.*

³⁶ *Id.*

³⁷ This practice advisory does not discuss the important protections available to class members under the Agreement Regarding Procedures for Notifying and Reopening Cases of Franco Class Members Who Have Received Final Orders of Removal, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), *15-16 (C.D. Cal February 27, 2015), available at <http://www.justice.gov/sites/default/files/pages/attachments/2015/07/22/settlement-agreement-20150722.pdf>. Individuals who may be class members should review this settlement agreement for more information.

³⁸ Advocates may argue that a new diagnosis made by a mental health professional abroad constitutes new relevant evidence that was not available and could not have been presented earlier. In making such an argument, advocates should explain why the individual was not able to obtain a diagnosis during his or her immigration proceedings. Additionally, it will be important for the mental health professional to indicate whether the individual may have been suffering from the mental illness during the time period in which he or she was in immigration proceedings.

supported by evidence that is material and was not available and could not have been discovered or presented at the prior hearing.³⁹

In contrast, a motion to reconsider may be appropriate if there were indicia of mental illness, but the individual did not receive appropriate safeguards. A motion to reconsider asks that a decision be reexamined due to errors of law or fact in the previous order.⁴⁰

Previous Practice Advisories have discussed post-departure motions to reopen and reconsider in depth.⁴¹ Accordingly, this Practice Advisory will not delve into the obstacles normally attendant to post-departure motions, although these obstacles are equally applicable to post-departure motions filed on behalf of individuals who lack mental competency. Rather, this Practice Advisory will only discuss two special legal considerations relevant to post-departure motions filed on behalf of individuals who lack mental competency: rescinding in absentia orders and equitable tolling.

i. Rescinding In Absentia Orders

Removal orders entered in absentia may be rescinded if a noncitizen demonstrates that his or her failure to appear was due to lack of proper notice or exceptional circumstances. Mental illness may figure into the analysis regarding both proper notice and exceptional circumstances.

An in absentia removal order may be rescinded if the noncitizen demonstrates that he or she was not afforded proper notice of the proceedings under section 239 of the INA.⁴² A motion to reopen based on lack of proper notice can be filed at any time, and may be filed even after a person has left the United States.⁴³

As previously explained, the regulations provide special procedures for providing notice to non-citizens who lack mental competency. An incompetent individual must be served with the Notice to Appear in person.⁴⁴ If the non-citizen is not confined, service must be made on the person with whom the individual resides.⁴⁵ Additionally, “whenever possible, service shall also be made on the near relative, guardian, committee, or friend.”⁴⁶ If the non-citizen is confined in a penal or mental institution or hospital, the government generally must serve the non-citizen, as well as the person in charge of the institution, but if the non-citizen is incompetent, the government may serve only the person in charge of the institution where the individual is confined.⁴⁷ If these notice procedures were not followed, an advocate for a noncitizen who is

³⁹ 8 C.F.R. §§ 1003.2(c), 1003.23 (b)(3).

⁴⁰ 8 C.F.R. §§ 1003.2(b), 1003.23 (b)(2).

⁴¹ “Post-Departure Motions to Reopen or Reconsider,” Center for Human Rights and International Justice, Post-Departure Human Rights Project Practice Advisory (March 2014), *available at* <http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Post-Departure%20Motions%20to%20Reopen%20&%20Reconsider%203.2014.pdf>.

⁴² 8 C.F.R. § 1003.23(b)(4)(ii).

⁴³ INA §240(b)(5)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(ii); *Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009).

⁴⁴ 8 C.F.R. § 103.8(c)(2).

⁴⁵ 8 C.F.R. § 103.8(c)(2)(ii).

⁴⁶ *Id.*

⁴⁷ 8 C.F.R. § 103.8(c)(2)(i).

mentally incompetent should argue that proceedings should be reopened and the in absentia removal order rescinded. While these regulatory protections are not found at section 239 of the INA, advocates may argue that the regulations were promulgated to implement section 239 of the INA, and the in absentia order should therefore be rescinded.

An in absentia removal order may also be rescinded if a noncitizen demonstrates that the failure to appear was due to exceptional circumstances.⁴⁸ The term “exceptional circumstances” is defined in the INA to mean extreme situations beyond the noncitizen’s control “such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances.”⁴⁹ Arguably, a serious mental illness would fit into this definition.

A motion to reopen and rescind the in absentia order based on exceptional circumstances must be filed within 180 days.⁵⁰ This 180 day deadline may be subject to equitable tolling.⁵¹

ii. Equitable Tolling & Mental Illness

Earlier Practice Advisories have also discussed equitable tolling of motions to reopen before the Immigration Courts and the Board of Immigration Appeals.⁵² However, mental illness may present a unique argument for equitable tolling,⁵³ so this Practice Advisory will revisit that topic with a special focus on mental illness.

With limited exceptions, a noncitizen is only entitled to file one motion to reopen and it must be filed within 90 days of the entry of final administrative order.⁵⁴ Similarly, a noncitizen may only file one motion to reconsider and it must be filed within 30 days of the entry of final administrative order.⁵⁵ A motion that does not satisfy these numerical and time limitations may nonetheless be deemed timely and not number-barred if the Board of Immigration Appeals or the Immigration Judge equitably tolls these filing requirements.

Equitable tolling is generally available where (1) some extraordinary circumstance prevented timely filing, and (2) the noncitizen has been diligently pursuing his or her rights.⁵⁶ Numerous

⁴⁸ INA § 240(b)(5)(C)(i).

⁴⁹ INA § 240(e)(1).

⁵⁰ INA §240(b)(5)(C)(i); 8 CFR §§1003.23 (b)(4)(ii), (iii)(A)(1).

⁵¹ See *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005) (finding that the 180 deadline can be equitably tolled); *Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005) (same); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); see also *Avila-Santoy v. U.S. Att’y Gen.*, 713 F.3d 1357 (11th Cir. 2013) (finding 90 day deadline for general motion to reopen subject to equitable tolling); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (same); *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002) (same); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (same).

⁵² “Equitable Tolling of Motions to Reopen,” Center for Human Rights and International Justice, Post-Deportation Human Rights Project Practice Advisory (December 2013), available at http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Equitable%20tolling%20of%20motions%20to%20reopen_FINAL.pdf

⁵³ See generally Claire M. Wheeler, Note, *Leave the Door Open: Mental Incompetency and the Case for a Clear Standard of Equitable Tolling in Immigration Cases*, 5 U. Miami Race & Soc. Just. L. Rev. 227 (2015).

⁵⁴ INA § 240(c)(7); 8 CFR § 1003.23(b) and 1003.2(c)(3).

⁵⁵ INA § 240(c)(6)(A), (B).

⁵⁶ *Holland v. Florida*, 560 U.S. 631, 632 (2010).

cases outside the immigration context have held that mental illness may be a basis for equitable tolling.⁵⁷ Many of these cases state that mental illness may itself constitute an extraordinary circumstance, depending on the severity of the mental illness.⁵⁸ Similarly, the mental illness may impact the due diligence analysis. Courts have explained that the individual “must diligently seek assistance and exploit whatever assistance is reasonably available,” but the adjudicator should assess whether the individual’s mental impairment prevented him from finding assistance or communicating with or adequately supervising any assistance actually found.⁵⁹ Mental health professionals may be helpful in explaining why a mental illness prevented an individual from seeking or utilizing legal assistance, and explaining the barriers that an individual with mental illnesses may face in accessing treatment that would allow him or her to more effectively or diligently pursue the legal claim.

b. Returning to the United States

Previous Practice Advisories have also provided a detailed discussion of return to the United States after prevailing on a motion to reopen and reconsider.⁶⁰ Therefore, this Practice Advisory will not delve into the obstacles normally involved with returning to the United States after prevailing on a motion to reopen or reconsider, except to note that these obstacles are equally applicable to the return of an individual who lacks mental competency. Indeed, effectuating a return after succeeding on a motion to reopen or reconsider may be especially difficult because of the practical challenges inherent in working with deportees suffering from mental illnesses.⁶¹

(V) CONCLUSION

Advocates working with individuals with mental illnesses who have been deported or removed from the United States should be aware of the special protections afforded to noncitizens who may lack mental competency. Where an individual was denied these protections, the person may have a pathway for returning to the United States, despite the significant obstacles. Triumphant on any motion to reopen and reconsider and then helping a

⁵⁷ *Davis v. Humphreys*, 747 F.3d 497 (7th Cir. 2014); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Zerilli–Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003) (“Equitable tolling is generally considered appropriate where ... a plaintiff’s medical condition or mental impairment prevented her from proceeding in a timely fashion.”) (citations omitted); *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 60 (2d Cir. 2002) (finding that plaintiff proffered sufficient evidence to warrant a hearing on whether her mental incapacity required tolling); *Meléndez–Arroyo v. Cutler–Hammer de P.R., Co.*, 273 F.3d 30, 39 (1st Cir. 2001) (remanding for factual inquiry into whether plaintiff’s mental state warranted equitable tolling); *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996) (finding equitable tolling lies “if the plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time”); *Nunnally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993) (holding that 5 U.S.C. § 7703(b)(2) can be tolled due to mental incapacity).

⁵⁸ See, e.g., *Forbess v. Franke*, 749 F.3d 837 (9th Cir. 2014); *Bills v. Clark*, 628 F.3d 1092 (9th Cir. 2010); *Stoll v. Runyan*, 165 F.3d 1238, 1242 (9th Cir. 1999); see also *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011).

⁵⁹ *Bills v. Clark*, 628 F.3d 1092, 1101 (9th Cir. 2010).

⁶⁰ “Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider,” National Immigration Project of the National Lawyers Guild, Immigrant Rights Clinic at NYU School of Law, & American Immigration Counsel Practice Advisory (April 27, 2015), available at http://nationalimmigrationproject.org/legalresources/practice_advisories/2015%20Return%20Advisory.pdf

⁶¹ See discussion, *supra*, part II.

mentally incompetent client successfully return to the United States will likely require that an attorney work cooperatively with mental health professionals, social workers, friends, and family members.