

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, VA 22203**

IN THE MATTER OF:

IN REMOVAL PROCEEDINGS

[REDACTED]

File No.:

[REDACTED]

Respondent

APPLICATION: Respondent’s request for a competency hearing.

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA” or “Act”), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at a time or place other than designated by the Attorney General.

APPEARANCES

FOR THE RESPONDENT:

Firooz T. Namei, Esq.
McKinney and Namei Co., LPA
15 East Eighth Street
Cincinnati, OH 45202

FOR THE DHS:

Veronica H. Cromwell, Esq.
Assistant Chief Counsel
Detroit District
550 Main Street, Room 4001
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INTERIM ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent is a native and citizen of Guatemala who entered the United States without inspection at Nogales, Arizona on February 6, 1988. On September 22, 2007, the Department of Homeland Security (“DHS”) issued a Notice to Appear (“NTA”) charging Respondent with removability under INA § 212(a)(6)(A)(i) of the Immigration and Nationality Act (“INA” or “Act”), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at a time or place other than designated by the Attorney General.

On December 10, 2008, Respondent appeared at his master calendar hearing and, through counsel, filed a motion to hold a competency hearing to determine whether he is competent to assist in preparing his asylum application and to testify on his own behalf. Respondent argues that his mental state is interfering with his counsel’s ability to prepare his application. The Court continued the

master calendar hearing until March 25, 2009. On February 12, 2009, the DHS filed an opposition to Respondent's motion, contending that Respondent failed to demonstrate that he is incompetent to testify.

For the following reasons, the Court denies Respondent's motion for a competency hearing.

II. DISCUSSION

A. Applicable Law

When a respondent's mental incompetence renders him unable to appear at his hearing, an Immigration Judge shall permit the respondent's attorney, legal representative, guardian, relative, or friend who was served with a copy of the NTA to appear on the respondent's behalf. 8 C.F.R. § 1240.4. If such an individual cannot appear or fails to appear, the court will request the respondent's custodian to appear on the respondent's behalf. *Id.*; *see also* 8 C.F.R. § 1240.43.

While the Constitution prohibits criminal proceedings against a mentally incompetent defendant, due process does not necessarily require a competency hearing for a respondent in immigration proceedings. *See e.g., Cooper v. Oklahoma*, 517 U.S. 348 (1996) (holding that requiring an incompetent criminal defendant to stand trial violates due process). Immigration hearings are civil proceedings, so a respondent is only entitled to "a reasonable opportunity to be present at [the] proceeding" *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding that "various protections that apply in the context of a criminal trial do not apply in a deportation hearing").

Even if there is reason to believe that a respondent is mentally incompetent, the court is not required to hold a competency hearing if the respondent is represented by counsel. In *Jaadan v. Gonzales*, the Sixth Circuit held that "[t]he only time a competency hearing may be required in the immigration context is to determine whether an *unrepresented* alien shows sufficient evidence of incompetency to require an attorney or guardian to represent the alien's interests at the proceedings." *Jaadan v. Gonzales*, 211 Fed.Appx. 422, 430 (6th Cir. 2006). If the respondent is determined to be incompetent, the Court shall then appoint an individual to represent him. 8 C.F.R. § 1240.4; *see also Mohamed v. TeBrake*, 371 F.Supp.2d 1043 (D.Minn. 2005) (holding that courts should conduct a competency hearing to determine whether to appoint counsel for an incompetent *pro se* respondent). However, if an incompetent respondent is already represented by counsel or another qualified individual, that is "all he [is] entitled to." *Jaadan v. Gonzales*, 211 Fed.Appx. at 431.

Rule 17(c) of the Federal Rules of Civil Procedure provides that in a civil proceeding, a court "shall appoint a guardian ad litem for an infant or incompetent person *not otherwise represented* in an action or shall make such other order as it deems proper . . ." Fed. R. Civ. P. 17(c) (emphasis added). This rule and 8 C.F.R. § 1240.4 are similar in that they both require a judge to determine whether it is necessary to appoint a guardian or other representative for an unrepresented, incompetent litigant or respondent. *See Mohamed v. TeBrake*, 371 F.Supp.2d at 1046-47. These rules are both designed to protect *unrepresented* individuals who are unable to assert their own rights due to mental incompetency and do not apply to respondents already represented by counsel. *See id.*; *see also Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003)

B. Respondent is Not Entitled to a Competency Hearing

Respondent is represented by counsel and the Court is therefore not required to hold a competency hearing under 8 C.F.R. § 1240.4. If Respondent is unable to appear at his hearing due to mental incompetency, the Court must only request that Respondent's counsel appear on his behalf. 8 C.F.R. § 1240.4. The presence of Respondent's counsel, who already appeared at Respondent's master calendar hearing and demonstrated concern for Respondent's procedural rights, is deemed sufficient to represent Respondent's interests during his individual merits hearing. *Jaadan v. Gonzales*, 211 Fed.Appx. at 431.

The due process concerns regarding incompetent criminal defendants do not apply to Respondent's civil immigration proceedings. *INS v. Lopez-Mendoza*, 468 U.S. at 1038. Therefore, a competency hearing is not constitutionally required in this case. *See id.* Similarly, Rule 17(c) of the Federal Rules of Civil Procedure, which applies only to unrepresented individuals, imposes no extra requirements in the case of Respondent, who is already represented by counsel. Fed. R. Civ. P. 17(c); *see also Mohamed*, 371 F.Supp.2d at 1046-47.

Accordingly, the Court enters the following order:

ORDER

It Is Ordered that:

Respondent's request for a competency hearing be **DENIED**.

It Is Further Ordered that:

The Master Calendar hearing currently set for March 25, 2009 remains scheduled for identification of any possible relief.

Date


United States Immigration Judge