



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**Fishkin, Ilya
206 Avenue U 2nd Floor
Brooklyn, NY 11223-0000**

**DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402**

Name: [REDACTED] [REDACTED]

Date of this notice: 6/26/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

fg



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3400 Concord Road
York, PA 17402

Name: [REDACTED]

Date of this notice: 6/26/2009

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:

Guendelsberger, John

Falls Church, Virginia 22041

File: [REDACTED] - York, PA

Date: JUN 26 2009

In re: [REDACTED] a.k.a. [REDACTED] a.k.a. [REDACTED] a.k.a. [REDACTED]
a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ilya Fishkin, Esquire

CHARGE:

- Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony
- Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony
- Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Termination

The respondent, a native and citizen of the Dominican Republic, and a lawful permanent resident of the United States since July 1985, has filed a timely appeal of an Immigration Judge's March 2, 2009 decision. In that decision, the Immigration Judge found the respondent to be removable as charged, and statutorily ineligible for relief and ordered that she removed to the Dominican Republic. The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2009); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment and all other issues raised in an appeal of an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2009); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The principal argument raised by the respondent on appeal concerns the fairness of the proceedings. She alleges that she is mentally incompetent and was unable to understand the nature and consequence of these proceedings.

It is well established that an alien who is mentally incompetent is entitled to procedural safeguards to ensure that his or her due process rights are protected. *See, e.g., Colindres-Aguilar v. INS*, 819 F.2d 259 (9th Cir. 1987); section 240(b)(3) of the Act, 8 U.S.C. § 1229a(b)(3) (“If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceedings, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”); 8 C.F.R. § 1240.4 (“When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, near relative, or friend who was served with a copy of the Notice to Appear shall be permitted to appear on behalf of the respondent.”). These procedural safeguards include the right to be represented by counsel at no expense to the government. *See* 8 C.F.R. § 1240.3.

In this instance, however, the respondent’s counsel failed to request that an evaluation of the respondent’s competency be undertaken. The failure to raise the competency issue in a timely manner renders an ensuing appellate claim of error on this basis particularly weak. *See, e.g., Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (where as here a petitioner fails to bring the possibility of incompetence to the attention of the immigration court, an Immigration Judge is not normally expected to initiate evaluative proceedings *sua sponte*). Moreover, contrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled, removal proceedings may go forward against incompetent aliens. *See Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977); *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006); 8 C.F.R. § 1240.4. *See also Matter of H-*, 6 I&N Dec. 358 (BIA 1954) (requirements of fair hearing have not been violated in deportation proceedings involving an alien of unsound mind, where notice of hearing has been served on the alien and his wife, arrangements were made to protect alien’s interests by having a doctor in attendance at the hearing, and alien was represented by legal counsel who was given the privilege of introducing evidence and cross-examining witnesses.). The respondent was thus afforded the procedural safeguards provided by 8 C.F.R. § 1240.4, and her statutory and constitutional rights were not violated. *See Matter of Santos* 19 I&N Dec. 105 (BIA 1984).

Additionally, we reject the respondent’s remaining denial of due process arguments. In the first instance, as to the appellate challenge to the service of the Notice to Appear (Form I-862), we note that the record does not reflect that the respondent ever raised the issue before the Immigration Judge, and we therefore find that it is not properly before us for consideration. *See Matter of Jimenez-Santillano*, 21 I&N Dec. 567, 570 n. 2 (BIA 1996) (holding that an issue not raised before the Immigration Judge or ruled on by the Immigration Judge was not properly before the BIA). Moreover, the respondent has failed to demonstrate how she was prejudiced by the alleged violation of this procedural rule. *Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980) (an alien must demonstrate that he has been prejudiced by a violation of a procedural rule or regulation before his deportation proceeding will be invalidated). The respondent has not challenged the Immigration Judge finding that she is removable from the United States based on her 1999 New York drug

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trafficking aggravated felony conviction. Moreover, the respondent has failed to establish her eligibility for any relief from removal.¹ *See* 8 C.F.R. § 1240.8(d).

Furthermore, we reject the respondent's appellate contention that she was denied due process because the Immigration Judge failed to "develop the record." To the contrary, upon our *de novo* review of the record, we find that the record was fully developed. Whether or not the respondent clearly understood the burdens of proof assigned to the parties, we consider that the respondent was represented by legal counsel, and that the Immigration Judge properly applied the burdens to determine that the removal charges had been established by clear and convincing evidence in accordance with 8 C.F.R. § 1240.8(a), and that the respondent had failed to demonstrate that she was not statutorily precluded from establishing her eligibility for cancellation of removal pursuant to section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3), on account of her 1999 New York drug trafficking aggravated felony conviction.²

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.


FOR THE BOARD

¹ Contrary to her appellate arguments, the Immigration Judge afforded the respondent the opportunity to apply for protection under the Convention Against Torture (Tr. at 35) and continued the proceedings for that purpose (Tr. at 35). However, at the next hearing, the respondent, through counsel, indicated that she would not be pursuing any applications for relief (Tr. at 38).

² We consider that the respondent bears the exclusive burden of proving all requisite facts pertinent to her eligibility for relief from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). Furthermore, where the evidence indicates that a ground for mandatory denial of an application for relief *may* apply, the alien has the burden of demonstrating by a preponderance of the evidence that such grounds do not apply. *Id.*

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
York, Pennsylvania

File No.:

[REDACTED]

March 2, 2009

In the Matter of

[REDACTED]

Respondent

)
)
)
)
)

IN REMOVAL PROCEEDINGS

CHARGE: Drug trafficking offense.

APPLICATION: None.

ON BEHALF OF RESPONDENT:

ON BEHALF OF DHS:

Robert Balaban, Esquire

William Lore, Senior Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 41-year-old, apparently single, female, alien, native and citizen of the Dominican Republic, who was admitted as a permanent resident at the age of 17, in July of 1985. She was placed into these removal proceedings by issuance of Form I-862, which is dated July 29, 2008. At prior proceedings, the respondent, through counsel, conceded and denied the allegations, mixed pleas. The Court has found all allegations to be sustained as well as all Immigration charges against her.

The respondent appeared in court today. There is voluminous

medical records in here. I believe the respondent is suffering perhaps from some mental incapacity to some extent. The Court has explained to the respondent that the Court is unable, because of the respondent's aggravated felony conviction for drugs as defined in INA 101(a)(43)(B), to consider any discretionary factors that would include any physical or mental maladies that she has. Certainly there is inpatient care in this record that shows prior hospitalization for mental infirmities.

Based upon the foregoing the following orders are hereby entered.

ORDERS

The respondent is hereby ordered removed from the United States to the Dominican Republic.

WALTER A. DURLING
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before
JUDGE WALTER A. DURLING, in the matter of:

[REDACTED]

[REDACTED]

York, Pennsylvania

is an accurate, verbatim transcript of the recording as provided by
the Executive Office for Immigration Review and that this is the
original transcript thereof for the file of the Executive Office
for Immigration Review.

Linda Dock
Linda Dock, Transcriber
Free State Reporting, Inc.

April 18, 2009
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies
that a Sony BEC/T-147, 4-channel transcriber or equivalent and/or
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paragraph.