

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK**

File No. [REDACTED]

In the Matter of

[REDACTED]
Respondent

REMOVAL PROCEEDINGS

CHARGE: INA § 212(a)(6)(A)(i)
INA § 212(a)(2)(A)(i)(I)

Present Without Being Admitted or
Paroled
Crime Involving Moral Turpitude

APPLICATION: Motion to Re-calendar

ON BEHALF OF THE RESPONDENT

Pro se

ON BEHALF OF THE SERVICE

Assistant District Counsel
26 Federal Plaza
New York, New York 10278

DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On September 22, 1999, the Immigration and Naturalization Service ("Service") issued the respondent a Notice to Appear ("NTA") alleging that: 1) he is not a citizen or national of the United States ("US"); 2) he is a native and citizen of "unknown;" 3) he entered the US at or near New Orleans, Louisiana on or about August 20, 1988; 4) he was not then admitted or paroled after inspection by an immigration officer; and 5) on May 2, 1995, he was convicted in Criminal Court of simple assault, reckless endangerment, and false imprisonment, in violation of law. On the basis of the foregoing, the Service charged the respondent with removability pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), as amended, in that, at any time after admission, he was convicted of a particularly serious crime. [Ex. 1].

On March 15, 2000, the respondent, through counsel, conceded service of the NTA and admitted the truth of allegations number 1 and numbers 3 through 5. The respondent denied the

truth of allegation number 2, alleging that he is a native and citizen of former Yugoslavia. He also denied removability as charged.

On October 6, 2000, the Service served the respondent with a Form I-261, additionally charging him with removability pursuant to section 212(a)(6)(A)(i) [present without being admitted or paroled] and section 212(a)(2)(A)(i)(I) [convicted of a crime involving moral turpitude]. The Service also replaced allegation number 3 on the NTA with the following allegation: On October 3, 1995, the respondent was convicted in Criminal Court of the offense of simple assault, reckless endangerment, and false imprisonment, in violation of law.

On October 11, 2000, the respondent, through counsel, conceded proper service of Form I-261 and admitted the truth of replaced allegation number 3. The respondent also conceded removability pursuant to section 212(a)(6)(A)(i), but denied removability pursuant to 212(a)(2)(A)(i)(I).

On November 9, 2000, the Service issued a second Form I-261, which supercedes the Form I-261 dated October 6, 2000. The second Form I-261 charges the respondent with removability pursuant to sections 212(a)(6)(A)(i) and 212(a)(2)(A)(i)(I) and withdraws the charge of removability under section 237(a)(2)(A)(iii). It also amends allegation number 5 to read as follows: On October 3, 1995, the respondent was convicted in Criminal Court for the offense of simple assault, reckless endangerment, and false imprisonment, in violation of law.

On January 7, 2002, the respondent represented to the Court that he no longer wanted to be represented by his counsel. The respondent's counsel similarly represented that he no longer wanted to represent the respondent and made a motion to withdraw. The Immigration Judge granted counsel's motion to withdraw as the respondent's attorney. The Immigration Judge explained to the respondent that it was very important that he be represented and provided him with a list of free legal service providers. Respondent indicated to the Court that he does not have an address and that he does not have friends or relatives who could receive mail on his behalf. The respondent was personally served with a notice of his next hearing.

On April 10, 2002, the respondent appeared before the Court, without counsel, for a master calendar hearing. The Court granted the respondent a continuance to allow him further time to secure legal representation.

On July 17, 2002, the respondent appeared before the Court, without counsel, for a master calendar hearing. The respondent represented that he does not have an address, but provided the Court with his friend's business address [Kenny Fellues, 6 East 42nd Street, New York, New York 10007] and telephone number [(212) 867-4966].

The Respondent addressed the Court at some length at the July 17, 2002 master calendar hearing, albeit not coherently. The Court determined that the respondent was incompetent to represent himself. The Court, therefore, administratively closed the instant immigration

proceedings. The Service did not oppose the Court's action.

On August 10, 2002, the respondent submitted an email message to the Court, which will be treated at a motion to recalendar. The Service opposed said motion, arguing that the respondent has failed to demonstrate his ability to proceed in a "orderly, coherent, efficient and effective manner" without legal counsel. The Service noted that if the respondent obtained legal counsel, it would reconsider its opposition to the re-calendaring the instant proceedings.

II. Legal Standard and Analysis:

At issue in this case is whether the respondent is competent to proceed pro se. The record does not contain any medical or psychiatric evidence deeming the respondent incompetent. However, throughout his proceedings, the respondent has demonstrated that he is not capable of representing himself in a orderly, coherent, efficient and effective manner. Key evidence of this fact is the email message the respondent submitted to the Court on November 19, 2002.

The Court notes that neither the Act, the regulations, nor case law define mental incompetency or establish a mechanism for deeming a respondent mentally incompetent. In fact, the treatment of mental incompetents in immigration proceedings is limited to three areas: (1) service of the notice to appear; (2) conduct of subsequent hearings; and (3) assignment of Service counsel. See 8 C.F.R. §§§§ 103.5a(c)(2)(ii), 240.4, 240.10(c), 240.2(b). Each of these regulations reflect a concern for the fairness of proceedings brought against incompetent aliens.

8 C.F.R. § 240.10(c) relates to the procedures governing the taking of pleadings following proper service of a NTA on a mentally incompetent alien. 8 C.F.R. § 240.10(c). *Id.* The relevant portion of this section provides as follows:

The immigration judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

This regulation is significant in two respects. First, it recognizes that an admission of removability, arguably an admission against interest, by an unrepresented, unaccompanied incompetent threatens the fairness of the proceeding. Second, this regulation suggests that while a representative's presence would be required in order to actually take pleadings from an incompetent, the absence of a representative will not necessarily prevent the hearing's progress.

Thus, an immigration judge faced with the absence of any competent representative of the alien is empowered to proceed with his own hearing on the issues of removability, that is, an inquiry into the facts and circumstances surrounding the matters about which the alien would

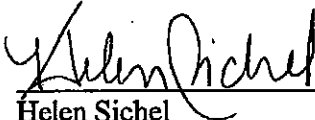
otherwise plead. However, if the respondent truly lacks capacity to understand the proceedings and remains unrepresented, the Court must query whether the conduct of a hearing under such circumstances can at all comport with basic notions of due process.

The Court concludes that the respondent has repeatedly demonstrated his inability to adequately represent himself before this Court. The Court believes that allowing the respondent to proceed unrepresented would not comport with basic notions of due process. Accordingly, the Court will exercise its discretion to deny the respondent's motion to re-calendar. However, should the respondent obtain legal counsel, the Court would be willing to reconsider its position with regard to re-calendaring the instant proceedings.

ORDER

IT IS HEREBY ORDERED that the respondent's motion to re-calendar be **DENIED**.

Date April 4, 2003



Helen Sichel
U.S. Immigration Judge