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ESSAY

NONCITIZENS, MENTAL HEALTH, AND IMMIGRATION ADJUDICATION

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When a noncitizen commits a crime in the United States, they become vulnerable to the possibility of the government instigating removal proceedings against them. According to the Immigration and Nationality Act, the noncitizen can argue in their defense that the crime they committed was not particularly serious. In this "particularly serious crime" determination, immigration judges are allowed to consider a variety of factors to determine the danger of the noncitizen to the community of the United States. However, prior to May of 2022, immigration judges were categorically barred from considering mental health evidence in their analysis. In Matter of B-Z-R-*, this changed. The new ruling by Attorney General Merrick Garland presents itself as a potential sea change in the consideration of mental health in immigration adjudications, ridding the complete bar on mental health evidence in deportation relief proceedings. This Essay argues, however, that the full effects of the ruling will only be realized if more guidance and resources are provided to immigration judges. The Board of Immigration Appeals should set clear guidelines pertaining to the consideration of mental health evidence, and the Executive Office for*

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Immigration Review should provide funding for forensic mental health evaluations and psychiatric support in removal proceedings. The three proposed guidelines in this Essay will ensure that the mental health of noncitizens is being adequately and fairly considered by judges when respondents are seeking relief from deportation.

INTRODUCTION

Refugees are at a higher risk of developing mental health symptoms or already having undiagnosed mental health disorders. The American Psychological Association has pointed to factors—like migration-related stress, trauma suffered in their countries of origin, language barriers, fear of deportation and family separation, rising detention rates, barriers to healthcare access, financial instability, and a lack of work opportunities and education—that make it more likely for immigrants to suffer from a mental illness.[1] These factors are linked to post-traumatic stress disorder, depression, anxiety, and emotional distress for migrants.[2] The immigration system in our country addresses some of these factors while noncitizens are pushed through the system, such as providing procedural safeguards when respondents are deemed incompetent or providing mental health services while a noncitizen is in detention.[3] But should the immigration courts be considering these factors when deciding whether to deport noncitizens with mental health disorders that arise from prior to the immigration process?

On May 9, 2022, Attorney General Merrick Garland decided "yes" in the context of a noncitizen having committed a crime leading to their deportation, resulting in the overruling of *Matter of G-G-S-*.[4] Immigration

[1] See Virginia Barber-Rioja & Alexandra Garcia-Mansilla, Special Considerations When Conducting Forensic Psychological Evaluations for Immigration Court, 75 J. Clinical Psych. 2049, 2051 (2019) (canvassing the various circumstances resulting in greater mental health risks for immigrants).

[2] See Irina Verhülsdonk, Mona Shahab & Marc Molendijk, Prevalence of Psychiatric Disorders Among Refugees and Migrants in Immigration Detention: Systematic Review with Meta-Analysis, 7 BJPsych Open 1, 1, 5 (2021) (reporting that among adult migrants, prevalence rates were 68% for depression, 54% for anxiety, and 42% for post-traumatic stress disorder).

[3] See Matter of M-J-K-, 26 I. & N. Dec. 773, 773 (B.I.A. 2016); ICE Health Service Corps, U.S. Immigr. & Customs Enf't (June 9, 2023), https://www.ice.gov/detain/ice-health-service-corps [https://perma.cc/2SJ3-MLJB].

[4] Matter of B-Z-R-, 28 I. & N. Dec. 563, 563, 567 (A.G. 2022) (overruling the Board of Immigration Appeals' holding in *Matter of G-G-S-*, 26 I. & N. Dec. 339 (B.I.A. 2014), that

judges may now consider a respondent's mental health in determining whether an individual, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."[5] If so, withholding of removal relief will be denied, and the respondent will be removed to their country of origin.[6]

This Essay argues that the new ruling by the Attorney General in *Matter of B-Z-R-* has presented itself as a potential sea change in the consideration of mental health in immigration adjudications, but the full effects of the ruling will only be realized if clear operative guidelines and resources are provided to immigration judges. For noncitizens seeking deportation relief, this decision presents a pivotal opportunity to explain why their past criminal conduct does not make them a danger to the community of the United States at present. For immigration judges, this decision provides just another factor of many that can be considered in the deportation determination. However, with a backlog of cases,[7] a lack of expertise about mental health,[8] and an insufficient amount of resources and guidance to aid in their determination,[9] it is unlikely immigration judges will be motivated to adequately and fairly consider the noncitizen's mental health at the time of the crime.

Noncitizens with mental illnesses are left vulnerable when navigating the immigration court system given the stigmatization and lack of understanding by those without expertise in mental health.[10] To better ensure the consideration of mental health in the particularly serious crime analysis, the Board of Immigration Appeals ("BIA") should set clear operative guidelines pertaining to the consideration of mental health evidence, and the Executive Office for Immigration Review should

adjudicators may not consider the mental health of a respondent in determining whether a respondent was convicted of a particularly serious crime).

[5] Id. at 563 (quoting 8 U.S.C. § 1158(b)(2)(A)(ii)).

[6] 8 U.S.C. § 1158(c)(2)–(3).

[7] Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47077, U.S. Immigration Courts and the Pending Cases Backlog 1, 31 (2022) (noting that at the end of the first quarter of fiscal year ("FY") 2022, the backlog reached an all-time high of 1.5 million cases, with 578 immigration judges on staff to adjudicate them).

[8] See Amelia Wilson, *Franco* I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants, 97 Wash. L. Rev. Online 21, 48–49 (2022) (discussing challenges in training immigration judges to evaluate mental health concerns).

[9] See id. at 50 (discussing shortfalls in funding and immigration judge training).

[10] Ayala Danzig & Marina Nakic, Appellate Court Clarifies That Immigration Judges Cannot Disregard Mental Health Professional Guidelines, 50 J. Am. Acad. Psychiatry & L. 158, 161 (2022).

provide funding for forensic mental health evaluations and psychiatric support in removal proceedings.

Part I explains the "particularly serious crime" analysis in Section 241(b)(3) of the Immigration and Nationality Act. Part II discusses current issues that plague immigration adjudication when it comes to the consideration of mental health. Part III outlines three concrete guidelines the Board of Immigration Appeals should provide for immigration judges considering mental health in the particularly serious crime determination.

I. THE PARTICULARLY SERIOUS CRIME ANALYSIS

A. Overview of the Immigration Process

The immigration adjudication process is overseen by the Department of Justice under the executive branch, and the immigration court system is located within the Executive Office for Immigration Review.[11] A noncitizen's path through the immigration system can begin by having to appear before an immigration judge in a removal proceeding. Removal proceedings are hearings to determine whether an individual—known as a respondent—may remain in the United States, and they are triggered when the government alleges an individual does not have a valid immigration status or an individual has done something to end a valid immigration status.[12]

If the immigration judge finds the respondent to be removable, the respondent will often apply for relief from removal at the "individual calendar hearing" or the "merits hearing."[13] At the merits hearing, both the government and the respondent may present witness testimony and other evidence, including testimony by the respondent themself.[14] The

[11] About the Office, Exec. Off. for Immigr. Rev., U.S. Dep't of Just. (Apr. 25, 2023), https://www.justice.gov/eoir/about-office [https://perma.cc/V5CT-TNPW].

[12] See Plan., Analysis & Stat. Div., Exec. Off. for Immigr. Rev., U.S. Dep't of Just., Statistics Yearbook: Fiscal Year 2018, at 4 (2018) [hereinafter 2018 Statistics Yearbook]; see also 8 C.F.R. §§ 1003.13–1003.15 (2022) (providing that removal proceedings are triggered when a Notice to Appear is filed with the immigration court, and the Notice to Appear contains notice about the location and time of the court proceeding and the reasons a person is alleged to be in violation of immigration law).

[13] Exec. Off. for Immigr. Rev., U.S. Dep't of Just., Immigration Court Practice Manual § 4.16 (2023) [hereinafter Immigration Court Practice Manual].

[14] See Immigration and Nationality Act ("INA") § 240(b) (codified at 8 U.S.C. § 1229a(b)) (prescribing the form of these proceedings); see also Immigration Court Practice Manual, supra note 13, § 4.16 (describing the procedures, requirements, and recommendations for parties that appear before immigration courts).

respondent can raise various defenses to removal, including "asylum, withholding of removal, protection under the Convention Against Torture, adjustment of status, cancellation of removal for lawful permanent residents, cancellation of removal for certain non-permanent residents, and certain waivers provided by the Immigration and Nationality Act."[15] Once the immigration judge makes a determination about whether the individual will be deported, the respondent may appeal their decision to the Board of Immigration Appeals.[16]

If an appeal is filed, a decision by the BIA to affirm a removal order constitutes the final order of removal.[17] At this point, the BIA may publish its decision as precedential, meaning it is legally binding on other immigration adjudications,[18] but more often, BIA decisions are unpublished and thus nonprecedential.[19] The Attorney General can certify a decision and issue a new binding decision, thus overruling the BIA.[20] Respondents can challenge final removal decisions from the BIA or the Attorney General by filing a petition for review in a federal circuit court.[21]

B. Section 241(b)(3)(A) of the Immigration and Nationality Act

Section 241(b)(3)(A) of the Immigration and Nationality Act states that "the Attorney General may not remove an alien [from the United States] if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[22] However, the protections provided in subparagraph (A) do not apply if the Attorney

[15] 2018 Statistics Yearbook, supra note 12, at 4; see also INA § 240(c)(7)(C) (codified at 8 U.S.C. § 1229a(c)(7)(C)) (governing deadline exceptions for asylum seekers and battered spouses, children, and parents in motions to reopen).

[16] See Board of Immigration Appeals, Exec. Off. for Immigr. Rev, U.S. Dep't of Just. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/F6G8-JYMF].

[17] 8 C.F.R. § 1241.1 (2022).

[18] 8 C.F.R. § 103.10(b) (2022) ("Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security . . . shall serve as precedents in all proceedings involving the same issue or issues.").

[19] Of the 29,788 cases completed by the BIA in 2018, only 23 resulted in precedential opinions. Compare 2018 Statistics Yearbook, supra note 12, at 35 fig.27 (indicating the number of cases completed in 2018), with Volume 27, Exec. Off. for Immigr. Rev, U.S. Dep't of Just. (Jan. 25, 2023), https://www.justice.gov/eoir/volume-27 [https://perma.cc/LXS2-9PVV] (listing precedential opinions).

[20] 8 C.F.R. § 103.10(b)–(c) (2022).

[21] INA § 242(a)(2) (codified at 8 U.S.C. § 1252(a)(2)).

[22] 8 U.S.C. § 1231(b)(3)(A).

General decides that "the alien, having been convicted by a final judgment of a *particularly serious crime* is a danger to the community of the United States."[23] The statute elaborates on the particularly serious crime analysis by clearly defining "an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years" as having committed a particularly serious crime.[24] This definition does not preclude the Attorney General from determining that aliens, who have been sentenced to an aggregate term of imprisonment of *less than five years*, have committed a particularly serious crime.[25] The ambiguity in the definition of a particularly serious crime committed by noncitizens who have been sentenced to an aggregate term of imprisonment of less than five years has left circuit courts grappling with the BIA's construction of the term.[26]

The key determination in the particularly serious crime analysis is whether the nature of the crime indicates that the noncitizen poses a danger to the community.[27] The BIA first articulated the framework for the particularly serious crime determination in *Matter of Frentescu*.[28] The court considered factors such as the "nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community."[29] Subsequent decisions held that once a noncitizen is found to have committed a particularly serious crime, there is no need for a separate

[23] Id. § 1231(b)(3)(B)(ii) (emphasis added).

[24] Id. § 1231(b)(3)(B).

[25] Id.

[26] See, e.g., Shazi v. Wilkinson, 988 F.3d 441, 448 (8th Cir. 2021) ("[T]he statute and accompanying regulations merely define a category of per se particularly serious crimes but are otherwise silent as to the definition of 'particularly serious crime.' The statute provides no further guidance as to how the Attorney General should view other convictions outside of this per se category, stating generally that the Attorney General otherwise has the power to determine that convictions are particularly serious crimes." (citations omitted)); Gomez-Sanchez v. Sessions, 892 F.3d 985, 991–94 (9th Cir. 2018) (conducting a *Chevron* analysis of the BIA's construction of the term in *Matter of G-G-S-*); Birhanu v. Wilkinson, 990 F.3d 1242, 1259 (10th Cir. 2021) (determining that the statute is "ambiguous or silent" under the *Chevron* analysis), *vacated and remanded sub nom*. Wolie Birhanu v. Garland, 142 S. Ct. 2862 (2022) (mem.).

[27] See Matter of Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986) (holding that once a finding is made that a noncitizen has been convicted of a particularly serious crime, it necessarily follows that the noncitizen is a danger to the community of the United States).

[28] 18 I. & N. Dec. 244, 246 (B.I.A. 1982).

[29] Id. at 247.

determination of whether they are a danger to the community.[30] The BIA, in *In re N-A-M-*, found no reason to exclude reliable information in the particularly serious crime analysis once the nature of the crime brought it within the range of a particularly serious offense.[31] Thus, immigration judges have wide discretion and are equipped with a number of factors to determine whether the respondent's past criminal act indicate that they are a danger to the community.

C. Consideration of a Noncitizen's Mental Health

In *Matter of G-G-S-*, the BIA held that a noncitizen's mental health at the time he or she committed a crime should not be considered in determining whether the noncitizen was convicted of a particularly serious crime for withholding the removal of the respondent.[32] The respondent in *Matter of G-G-S-* was a lawful permanent resident of the United States who suffered from chronic paranoid schizophrenia from an early age.[33] The respondent was sentenced to two years' imprisonment for violating the California Penal Code after physically assaulting the victim by "swinging a weightlifting bell and grazing the side of [the victim's] head."[34] The immigration judge determined that the respondent's offense was a crime of violence aggravated felony, and that it was a particularly serious crime, which barred the respondent's eligibility for withholding of removal.[35] On appeal, the respondent argued that his mental condition should have been considered because "his mental illness prevented him from solving a complex social situation such as being aggressively challenged by a stranger," which prompted his use of violence.[36] The BIA affirmed the immigration judge's determination, based on the "nature of the respondent's conviction, the prison sentence imposed, and the circumstances of his offense," and further held that the

[30] See In re N-A-M-, 24 I. & N. Dec. 336 (B.I.A. 2007), *aff'd*, N-A-M v. Holder, 587 F.3d 1052 (10th Cir. 2009) (per curiam); In re Q-T-M-T-, 21 I. & N. Dec. 639, 646–47 (B.I.A. 1996); Matter of K-, 20 I. & N. Dec. 418, 423–24 (B.I.A. 1991); Matter of Carballe, 19 I. & N. Dec. 357, 360 (B.I.A. 1986); see also 8 C.F.R. § 1208.16(d)(2) (2011) (providing that "an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community").

[31] 24 I. & N. Dec. 336, 344 (B.I.A. 2007).

[32] 26 I. & N. Dec. 339, 339 (B.I.A. 2014).

[33] Id. at 340.

[34] Id. at 340, 344.

[35] Id. at 340.

[36] Id. at 345.

consideration of a noncitizen's mental health "falls within the province of the criminal courts and is not a factor to be considered in a particularly serious crime analysis."[37]

The BIA's determination rested on two rationales. First, the BIA reasoned that consideration of mental health is best left to the fact finders in criminal proceedings because they "have expertise in the applicable . . . criminal law, are informed by the evidence presented by [both sides], and have the benefit of weighing all the factors firsthand."[38] Further, the defendant's mental health at the time of the crime can be raised at different stages during the criminal court proceeding, such as to question the competency of the defendant to stand trial, to establish an affirmative defense of insanity, to show the absence of the required mental state, to serve as a mitigating factor in the sentencing, or to be raised in post-conviction motions.[39] The BIA was concerned about reevaluating a ruling of criminal culpability by a criminal judge.[40] Second, the BIA concluded that a noncitizen's mental health does not affect the key focus in the particularly serious crime determination, which is "whether the nature of his conviction, the sentence imposed, and the circumstances and underlying facts indicate that [the noncitizen] posed a danger to the community."[41]

After the BIA's holding in *Matter of G-G-S-*, a circuit split formed on the issue of whether to consider the mental health of the noncitizen at the time the crime was committed. The Eighth and Ninth Circuits did not defer to the BIA's decision and instead held that the mental health of the noncitizen could be considered by the immigration judge.[42] In contrast,

[37] Id. at 344–45.

[38] Id. at 345.

[39] Id.

[40] Id.

[41] Id. at 346 (reasoning that a "violent act [resulting from a] mental illness does not lessen the danger that [the] action pose[s] to others," thus making it irrelevant to the determination of whether the offense was a particularly serious crime).

[42] Shazi v. Wilkinson, 988 F.3d 441, 445–46, 453 (8th Cir. 2021) (remanding to the BIA after the immigration judge barred the respondent's withholding of removal without considering the respondent's mental health conditions, which included post-traumatic stress disorder, anxiety, and depression from his time in Iraq as a member of the National Iraqi Democrats); Gomez-Sanchez v. Sessions, 892 F.3d 985, 988 (9th Cir. 2018) (remanding to the BIA after the immigration judge denied the respondent relief from removal without considering the respondent's mental disabilities or schizophrenia).

the Tenth Circuit agreed with the decision of the BIA and barred the consideration of mental health, in accordance with *Matter of G-G-S-*.[43]

D. Matter of B-Z-R-

In May of 2022, the Attorney General overruled *Matter of G-G-S-* and its prohibition on the consideration of the respondent's mental health in determining whether the respondent, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."[44] The Attorney General provided three reasons for his ruling.

First, the noncitizen's mental health condition does have bearing on whether they pose a danger to the community.[45] In fact, in some circumstances, a noncitizen's mental health condition may indicate that they are not a danger to the community—such as a noncitizen's post-traumatic stress disorder, resulting from intimate partner violence, playing a "substantial motivating role in the assault."[46] The particularly serious crime bar to asylum and withholding of removal will still apply to individuals who "pose a danger to the community notwithstanding a mental health condition," but ultimately, mental health evidence "should not be categorically disregarded."[47]

Second, the Attorney General reasoned that considering mental health evidence would not require immigration judges to reassess criminal court findings because immigration judges are assessing a separate determination of dangerousness, not criminal culpability, and because the mental health evidence the individual wishes to offer in the immigration proceeding may "never have been raised in the underlying criminal proceeding."[48] For example, mental health evidence may not have been raised by the respondent in the criminal proceeding because a specific mental state is not required for strict liability offenses or because mental illness is not a defense to crimes that only require negligence.[49]

[43] Birhanu v. Wilkinson, 990 F.3d 1242, 1262 (10th Cir. 2021) (deferring to the BIA's bar on the consideration of mental health and reasoning that it is not arbitrary or capricious).

[44] Matter of B-Z-R-, 28 I. & N. Dec. 563, 563, 565–66 (A.G. 2022) (quoting 8 U.S.C. § 1158(b)(2)(A)(ii)).

[45] Id. at 565–66.

[46] Id.

[47] Id. at 566.

[48] Id.

[49] See id.

Third, the BIA in *Matter of G-G-S-* provided no reasoning for why mental health evidence should be categorically barred while other evidence relevant to the noncitizen's mental state, such as their motivation and intent, was not.[50] The BIA stated that the noncitizen's mental state is "not necessarily dispositive,"[51] but "the standard for determining whether evidence should be considered is whether that evidence is probative, not whether it is dispositive."[52] Because evidence of the mental health of the respondent at the time of the crime is probative in the particularly serious crime analysis, immigration judges should be allowed to consider it.[53]

Accordingly, immigration judges may now consider a noncitizen's mental health in the particularly serious crime determination.

II. CURRENT OBSTACLES TO THE CONSIDERATION OF MENTAL HEALTH BY IMMIGRATION JUDGES

The *Matter of B-Z-R-* ruling appears to be a step in the right direction, but it will do little to improve providing fair and just legal proceedings for noncitizens with mental disorders at the current level of resources and guidance provided to immigration judges. This is for two reasons: (A) immigration judges are making diagnostic assessments of the respondent's mental health without medical expertise, and (B) there is a lack of trained psychiatrists and medical professionals to aid immigration judges in their proceedings.

A. Immigration Judges Making Diagnostic Assessments of the Respondent's Mental Health Without Medical Expertise

Immigration judges are granted broad discretion to consider mental health generally in immigration proceedings, particularly in determining deportation relief and the competency of respondents. Due to the recency of the *Matter of B-Z-R-* decision, the consideration of the respondent's mental health at the time of their conviction in the particularly serious crime analysis has not been well established. However, competency hearings are a well-established procedure that shed light on issues that

[50] Id. at 566–67.

[51] Matter of G-G-S-, 26 I. & N. Dec. 339, 347 (B.I.A. 2014).

[52] *Matter of B-Z-R-*, 28 I. & N. Dec. at 567 (citing Matter of Y-S-L-C-, 26 I. & N. Dec. 688, 690 (B.I.A. 2015)).

[53] See id.

arise when immigration judges are provided broad discretion when considering mental health.

Competency determinations are conducted to ensure that respondents are able to "understand and meaningfully participate in" removal proceedings and are thus capable of demonstrating eligibility for relief and challenging their removability.[54] If an immigration judge concludes that a respondent lacks sufficient competency to proceed with the hearing, the Immigration and Nationality Act dictates that the immigration judge "shall prescribe safeguards to protect the rights and privileges of the alien."[55] *Matter of M-A-M-* was the first guidance provided by the BIA on the issue of competency in removal proceedings.[56] First, the judge must decide whether to make a competency determination based on certain indicia of mental incompetency.[57] Second, if the judge decides a competency determination is required, the test for determining whether a respondent is competent is whether they have "a rational and factual understanding of the nature and object of the proceedings, can consult with [their] attorney or representative if [they have] one, and [have] a reasonable opportunity to examine and present evidence and cross-examine witnesses."[58] Third, if the noncitizen is found to lack that competency, the judge must evaluate appropriate safeguards.[59] Although

[54] See Aimee L. Mayer-Salins, Fast Track to Injustice: Rapidly Deporting the Mentally Ill, 14 Cardozo Pub. L., Pol'y & Ethics J. 545, 562–63 (2016).

[55] INA § 240(b)(3) (codified at 8 U.S.C. § 1129a(b)(3)).

[56] See 25 I. & N. Dec. 474, 474–75 (B.I.A. 2011).

[57] Id. at 479–80 (stating indicia of mental incompetency may include behavioral observations, "such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction"; mental health assessments or medical reports "from past medical treatment or from criminal proceedings"; "testimony from medical health professionals"; "school records regarding special education classes or individualized education plans; 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").

[58] Id. at 479. Neither party bears the burden of proving whether the noncitizen is competent. Instead, the BIA has instructed that a "collaborative approach enables both parties to work with the Immigration Judge to fully develop the record regarding a respondent's competency." Matter of J-S-S-, 26 I. & N. Dec. 679, 682 (B.I.A. 2015).

[59] *Matter of M-A-M-*, 25 I. & N. Dec. at 483 (listing examples of appropriate safeguards, such as "refusal to accept an admission of removability from an unrepresented respondent; 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; 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;

Matter of M-A-M- articulated competency standards, it still provided a great deal of discretion to immigration judges to determine appropriate safeguards on a case-by-case basis, and it established a presumption of competency on the part of noncitizens.[60]

A key concern arising from immigration judges considering the mental health of noncitizens is judges making discretionary diagnostic assessments without the aid of medical expertise, especially when based solely on courtroom observations.[61] The case of Mr. Acevedo demonstrates this concern.[62] Mr. Acevedo applied for relief from removal "based on his fear that, if returned to El Salvador, he would face persecution or torture on account of his membership in a particular social group, which he defined as 'El Salvadoran men with intellectual disabilities who exhibit erratic behavior.'"[63] The immigration judge refused to recognize this proposed social group and decided that Mr. Acevedo did not exhibit "erratic behavior" because the judge only observed "nervous smiling and laughter" in the courtroom, which the judge did not consider "'out of the ordinary,' let alone 'erratic.'"[64] This was despite six different psychological and psychiatric assessments confirming his intellectual disability.[65]

Immigration judges evaluating a noncitizen's mental health solely based on their observations of the noncitizen in the courtroom and with complete disregard of mental health evaluations in the record demonstrates the amount of discretion judges are afforded, and how that discretion can be abused at the expense of noncitizens. In determining the noncitizen's competency, the BIA allows judges to make assessments by posing "questions about where the hearing is taking place, the nature of the proceedings, and the [noncitizen's] state of mind."[66] The BIA does not require the judge to take any particular measures to obtain the aid of

actively aiding in the development of the record; including the examination and cross-examination of witnesses; and reserving appeal rights for the respondent").

[60] Id. at 477, 484.

[61] See Matter of M-J-K-, 26 I. & N. Dec. 773, 776 (B.I.A. 2016) ("[T]he ultimate determination of which safeguards to implement and whether they are adequate to ensure the fairness of proceedings is discretionary.").

[62] Acevedo Granados v. Garland, 992 F.3d 755 (9th Cir. 2021).

[63] Id. at 760.

[64] Id. at 762.

[65] Id. at 759–60.

[66] Matter of M-A-M-, 25 I. & N. Dec. 474, 480 (B.I.A. 2011).

someone with medical expertise, such as requiring a mental health competency evaluation by a psychiatrist.[67]

The concerns that arise from immigration judges generally analyzing the noncitizen's competency translate to concerns about judges not adequately considering mental health in the particularly serious crime determination. While *Matter of B-Z-R- allows* immigration judges to consider the mental health of the noncitizen at the time of the crime, it does not *require* judges to consider the mental health assessments in the record or request a forensic mental health assessment to be conducted at present. Noncitizens who appear *pro se* may not have the wherewithal to provide this type of evidence to the judge, and even noncitizens with representation may not have the financial resources to provide a mental health evaluation.[68] Further, immigration judges making mental health determinations without medical expertise serves as a disadvantage to the respondent. In fact, studies have shown that forensic medical evaluations have proven to decrease deportation rates in immigration relief cases.[69] Forensic mental health assessments are an important component in "scientifically documenting evidence of [the noncitizen's claims and] can significantly bolster [a respondent's] immigration relief claim."[70]

The amount of discretion afforded to judges in conducting competency hearings parallels the wide discretion they have in considering the respondent's mental health at the time of the crime in the particularly serious crime analysis. This unbounded discretion, without any further

[67] See id.

[68] See Esmy Jimenez, How a Mental Health Evaluation Can Change the Course of an Immigrant's Life, Seattle Times (Oct. 11, 2021, 10:32 AM), https://www.seattletimes.com/seattle-news/mental-health/how-a-mental-health-evaluation-can-change-the-course-of-an-immigrants-life/ [https://perma.cc/ZZ9Z-GUXZ] ("They can cost from $500 on the low end to more than $2,000 for more complex cases.").

[69] See, e.g., Holly G. Atkinson et al., Impact of Forensic Medical Evaluations on Immigration Relief Grant Rates and Correlates of Outcomes in the United States, 84 J. Forensic & Legal Med. 1, 12 (2021) ("In our analysis of 2584 cases initiated by PHR between 2008 and 2018 with forensic medical evaluations and known outcomes, we found that 81.6% of applicants seeking various forms of immigrant relief were granted relief compared to the national asylum grant rate of 42.4%. Almost three-quarters of positive outcomes were asylum grants."); Stuart L. Lustig, Sarah Kureshi, Kevin L. Delucchi, Vincent Iacopino & Samantha C. Morse, Asylum Grant Rates Following Medical Evaluations of Maltreatment Among Political Asylum Applicants in the United States, 10 J. Immigrant & Minority Health 7, 7 (2008) (stating that asylum cases with psychological evaluations were 89% successful in contrast to the 37.5% national average without one).

[70] Atkinson et al., supra note 69, at 12.

guidance by the BIA, is to the detriment of noncitizens in deportation proceedings.

B. Lack of Trained Psychiatrists and Medical Professionals to Aid Immigration Judges

Even if judges intend to rely on forensic medical health assessments, there are a lack of psychiatrists and medical professionals to aid immigration judges in assessing the noncitizen's risk of danger to the community within the particularly serious crime analysis. Psychiatrists play a pivotal role in immigration proceedings as judges often rely on objective psychiatric evaluations and testimony to provide context and to corroborate a noncitizen's claims.[71] For discretion-based relief applications, psychiatrists can evaluate the hardship that will be suffered by the noncitizen or their family if deported, the risk of dangerousness posed by allowing the noncitizen to remain in the United States, and the role the mental health of the noncitizen played in their prior criminal conduct.[72] However, access to psychiatric support is difficult to obtain for those who are marginalized and lack resources.[73] Multiple issues arise pertaining to the use of psychiatrists in immigration proceedings: (1) the lack of psychiatrists available, (2) the lack of guidance for psychiatrists within the immigration context, and (3) psychiatrists lacking cultural competency.

First, the lack of psychiatrists available severely limits the benefit their expertise can provide immigration proceedings. Physicians for Human Rights, the largest source of referrals for *pro bono* forensic medical evaluations in the United States, conducts approximately 700 forensic medical evaluations annually, but asylum applications far outnumber with 287,000 applications submitted by asylum seekers in fiscal year ("FY") 2020 alone.[74]

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[71] Nikhil "Sunny" A. Patel & Nina Sreshta, The Role of Psychiatrists in the Growing Migrant and Refugee Crises, Am. J. Psychiatry Residents' J. 6, 6 (2017).

[72] See Joshua D. Carroll & John R. Chamberlain, Mental Health Factors in Immigration Court, 47 J. Am. Acad. Psychiatry & L. 243, 245 (2019) (explaining the valuable role psychiatrics can play in immigration proceedings).

[73] Patel & Sreshta, supra note 71, at 7.

[74] Press Release, Immigrants Who Obtained Forensic Medical Evaluations Much More Likely to Be Granted Asylum or Other Relief in United States: Study, Physicians for Hum. Rts. (Nov. 30, 2021), https://phr.org/news/immigrants-who-obtained-forensic-medical-evaluations-much-more-likely-to-be-granted-asylum-or-other-relief-in-united-states-study/#:~:text

Second, there is a lack of guidance for psychiatrists within the immigration context. Most of the guidance available to forensic psychiatrists pertains to the criminal field, and any information relevant to the context of immigration is limited.[75] For example, training programs for psychiatrists, even ones that concentrate on forensic work, tend to not include recommended practices when participating in the immigration court system.[76] Specifically, guidelines have not been developed for how to treat mental health evaluations in the particularly serious crime analysis.[77]

Third, many psychiatrists lack cultural competency. Cultural competency involves incorporating "the importance of culture, assessment of cross-cultural relations, vigilance toward the dynamics that result from cultural differences, expansion of cultural knowledge, and adaptation of services to meet culturally unique needs."[78] It is important for psychiatrists to consider their level of familiarity with the culture and language of the respondent and the use of interpreters or translators when communicating with the respondent.[79]

Many difficulties can surface in the assessment of a noncitizen with a different cultural background than the evaluator.[80] Linguistic mismatches require the use of an interpreter,[81] and evaluees may hesitate to elaborate fully on their mental health condition if they feel ashamed or embarrassed, especially if the interpreter is a family member.[82] Even when an official

=Asylum%20seekers%20and%20other%20immigrants,period%2C%20a%20new%20study%20by [https://perma.cc/294F-K52Y].

[75] Barber-Rioja & Garcia-Mansilla, supra note 1, at 2052; see also Vanesa Disla de Jesus & Jacob M. Appel, A Call for Asylum Evaluation and Advocacy in Forensic Psychiatry, 50 J. Am. Acad. Psychiatry & L. 342, 343 (2022) ("[A]sylum assessment is not a core component of forensic psychiatry fellowships, and most programs do not require or even offer such training.").

[76] See Barber-Rioja & Garcia-Mansilla, supra note 1, at 2052.

[77] See id. (explaining that the EOIR has only published guidelines regarding training and expertise requirements for mental health professionals conducting competency evaluations but "no guidelines for any other types of evaluations" in immigration proceedings).

[78] Joseph R. Betancourt, Alexander R. Green, J. Emilio Carrillo, Owusu Ananeh-Firempong, Defining Cultural Competence: A Practical Framework for Addressing Racial/Ethnic Disparities in Health and Health Care, 118 Pub. Health Reps. 293, 294 (2003).

[79] Susan M. Meffert, Karen Musalo, Dale E. McNiel & Renée L. Binder, The Role of Mental Health Professionals in Political Asylum Processing, 38 J. Am. Acad. Psychiatry & L. 479, 484 (2010) (describing the role of mental health professionals in political asylee evaluations but providing research relevant to noncitizens more broadly).

[80] Id. at 483.

[81] Id.

[82] See id.

translator is used, there is always the possibility of a misunderstanding or missed nuance by the translator.[83]

Another challenge is developing a familiarity with "euphemisms or mechanisms of collective avoidance" for traumas that a noncitizen may use in their speech.[84] For example, when Darfur asylum seekers reported the trauma they faced in their home countries to asylum officiants, some of the women were unwilling to acknowledge that they had been raped because of the consequences of publicly recognizing the rapes and because articulating such events was contrary to their cultural norms.[85]

Lastly, psychiatrists face the challenge of maintaining objectivity. Countertransference is "a psychological phenomenon that occurs when a clinician lets their own feelings shape the way they interact with or react to their client in therapy."[86] When psychiatrists evaluate asylum seekers who have undergone horrific life events, they can develop a desire to advocate for the asylum seeker.[87] However, the forensic psychiatric evaluator should aim for objectivity when conducting evaluations.[88]

III. THE PRESUMPTION IN FAVOR OF CONSIDERING MENTAL HEALTH EVIDENCE MUST BE STRENGTHENED THROUGH GUIDELINES AND RESOURCES

Consider a real-life example. Thewodros Wolie Birhanu is an Ethiopian citizen with a history of paranoid schizophrenia.[89] After gaining lawful permanent residence in the United States, Mr. Birhanu visited Ethiopia on two separate occasions, where, both times, his family sent him to a church for "holy water treatment" to address his mental illness and where he underwent mental and physical abuse, including by police.[90] In the United States, Mr. Birhanu treated his illness with prescription medicine, but he could not receive similar care in Ethiopia

[83] Id.
[84] Id.
[85] Id.
[86] Erin Heaning, Countertransference in Therapy: Types, Examples, and How to Deal, SimplyPsych. (Aug. 9, 2023), https://www.simplypsychology.org/countertransference.html#:~:text=Countertransference%20is%20a%20psychological%20phenomenon,client%20realizes%20it%20is%20happening [https://perma.cc/U39Q-Y79W].
[87] Viki Katsetos & J. Richard Ciccone, Use of Mental Health Evidence in Immigration Court, 50 J. Am. Acad. Psychiatry & L. 316, 318 (2022).
[88] Id.
[89] Birhanu v. Wilkinson, 990 F.3d 1242, 1250 (10th Cir. 2021).
[90] Id.

because of the lack of mental hospitals and access to his prescription medication.[91] In 2016, Mr. Birhanu suffered from a psychotic episode in which he made threatening statements on his university's campus, and to university personnel, in the United States.[92] He pled "guilty but mentally ill" to two counts of terrorist threats.[93]

After release from custody, the Department of Homeland Security ("DHS") launched removal proceedings against him, and Mr. Birhanu appeared *pro se* before the immigration judge.[94] The judge held a competency hearing, during which the judge questioned him "but did not appoint counsel or order an expert psychiatric evaluation."[95] The judge found him to be competent to proceed and ordered him removable.[96] Further, the judge denied his request for asylum and withholding of removal because the judge ruled that his prior criminal conviction was a particularly serious crime, and the criminal court had previously concluded that Mr. Birhanu's "mental health did not exculpate him."[97]

In theory, applying *Matter of B-Z-R-* to the immigration judge's decision in Mr. Birhanu's case could have changed the outcome because the judge would have been allowed to independently consider his paranoid schizophrenia at the time of the crime. However, in reality, the new decision will do little to change the outcome of cases like Mr. Birhanu's because the Attorney General's ruling that "[g]oing forward, immigration adjudicators *may* consider a respondent's mental health"[98] still leaves room for judges to choose not to consider mental health evidence.

In order to strengthen the presumption in favor of considering mental health evidence, the BIA should publish an *en banc* opinion that clarifies *Matter of B-Z-R-* by providing operative guidelines for immigration judges to follow, and the EOIR should provide funding to allow immigration judges to comply with these guidelines. To be sure, the BIA publishing a precedential opinion will be binding on all immigration judges across the nation, and it is regular practice for the BIA to publish practice advisories setting forth a framework for how immigration judges

[91] Id.
[92] Id. at 1251.
[93] Id. at 1250–51.
[94] Id. at 1251.
[95] Id.
[96] Id.
[97] Id. at 1250–51.
[98] Matter of B-Z-R-, 28 I. & N. Dec. 563, 567 (A.G. 2022) (emphasis added).

should handle certain issues.[99] A key example is the BIA creating a framework for immigration judges to establish "whether a respondent is sufficiently competent to proceed and whether the application of safeguards is warranted."[100] The BIA outlined a step-by-step guide to competency findings that immigration judges are bound to adhere to.[101] Similarly, if the BIA publishes clear operative guidelines for how immigration judges should treat mental health evidence in the particularly serious crime determination, judges will be bound to follow them, and their decisions will be subject to reversal by the BIA if they do not.

If the BIA were to publish an *en banc* opinion that clarifies *Matter of B-Z-R-*, I suggest three operative guidelines to direct immigration judges on how to consider the mental health of the noncitizen in a particularly serious crime determination.

A. Guideline #1: Judges Must Fully and Adequately Consider Mental Health Evidence in the Record

If a respondent has a diagnosis or a prior mental health evaluation in the record, and the judge provided additional safeguards for the respondent after conducting a competency hearing, the judge must fully and adequately consider the prior mental health evidence in the record. Evidence of the respondent's mental health in the record can include

[99] See 8 C.F.R. § 1003.1(g)(1) (2022); id. § 1003.1(g)(3) ("By majority vote of the permanent Board members, or as directed by the Attorney General or his designee, selected decisions of the Board issued by a three-member panel or by the Board *en banc* may be designated to be published and to serve as precedents in all proceedings involving the same issue or issues."); see Executive Office for Immigration Review Agency Decisions, U.S. Dep't Just. Exec. Off. for Immigr. Rev. (July 19, 2023), https://www.justice.gov/eoir/ag-bia-decisions [https://perma.cc/MMZ9-73DC] (showing that the BIA issued 25 precedential decisions in 2020, 16 in 2019, 23 in 2018, 27 in 2017, 26 in 2016, 28 in 2015, 29 in 2014, and 19 in 2013).

[100] Matter of M-A-M-, 25 I. & N. Dec. 474, 474–75 (B.I.A. 2011).

[101] Id. at 474 ("(1) Aliens in immigration proceedings are presumed to be competent and, if there are no indicia of incompetency in a case, no further inquiry regarding competency is required. (2) 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. (3) If there are indicia of incompetency, the Immigration Judge must make further inquiry to determine whether the alien is competent for purposes of immigration proceedings. (4) If the alien lacks sufficient competency to proceed, the Immigration Judge will evaluate appropriate safeguards. (5) Immigration Judges must articulate the rationale for their decisions regarding competency issues.").

"direct assessments of the respondent's mental health, such as medical reports or assessments from past medical treatment or from criminal proceedings, as well as testimony from medical health professionals."[102] Other relevant sources include: "school records regarding special education classes or individualized education plans; 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."[103]

The BIA applies mixed standards of review to an immigration judge's decision. The BIA reviews a judge's factual findings for clear error, and it may review all other issues *de novo*, including "questions of law, discretion, and judgment."[104] This results in a more deferential standard of review for factual findings. A finding of fact is considered to be "clearly erroneous" when the court has reviewed the entire evidence and is "left with the definite and firm conviction that a mistake has been committed."[105] Examples of questions of fact subject to clear error review include: "[c]redibility determinations; [d]eterminations regarding dates, places, and manner of entry; [b]iographical information and personal characteristics . . . ; and [p]redictions of future events."[106] Thus, the consideration or lack of consideration of mental health evidence in the record would also be reviewed for clear error, and the decision could be remanded back to the immigration judge by the BIA.

However, there is always the possibility that the immigration judge will claim that they considered the evidence but concluded that the diagnosis did not affect the crime committed, even though they did not adequately or fully consider the mental health evidence in the record. Thus, the BIA may not be able to remand for clear error because the judge's "account of the evidence is plausible in light of the record viewed in its entirety," and the BIA "may not reverse [] even though [it is] convinced that had it been

[102] Id. at 479.

[103] Id. at 479–80.

[104] 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (2022).

[105] United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); In re R-S-H, 23 I. & N. Dec. 629, 637 (B.I.A. 2003) (quoting *U.S. Gypsum Co.*, 333 U.S. at 395).

[106] Andrew Patterson, Kristin Macleod-Ball & Trina Realmuto, Am. Immigr. Council, Standards of Review Applied by the Board of Immigration Appeals Practice Advisory 3 (Apr. 22, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/standards_of_review_applied_by_the_board_of_immigration_appeals.pdf [https://perma.cc/NPP3-AKJW].

sitting as the trier of fact, it would have weighed the evidence differently."[107] In order to ensure that mental health evidence that does already exist in the record is adequately and fully considered by immigration judges, some of whom may be less inclined to consider it, the BIA can implement this requirement and thus broaden their discretion to remand for clear error. Further, the proposed prerequisite to this requirement—that the judge provided additional safeguards for the respondent after conducting a competency hearing—would still allow the immigration judges some discretion traditionally afforded to them by limiting the application of this rule.

B. Guideline #2: Judges Must Require Mental Health Evaluations to be Conducted if Not in the Record

If a noncitizen does not have any evidence of prior evaluations, the judge must require that a forensic mental health evaluation be conducted by a psychiatrist, funded by EOIR.[108] There are many reasons that a noncitizen may not have had a forensic mental health evaluation conducted, such as appearing *pro se* and not knowing to have one conducted; being unable to afford one, even with attorney representation; or not having access to the mental health services provided by Immigration and Customs Enforcement due to not being detained.[109]

In fact, many immigrants in removal proceedings are unable to access or afford representation and often must navigate the adjudicative process alone.[110] Researchers have found that noncitizens who have legal representation are more likely to win asylum or other forms of deportation

[107] Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985); see Patterson et al., supra note 106, at 3.

[108] See, e.g., In re J-F-F-, 23 I. & N. Dec. 912, 915 (A.G. 2006) (noting that at the immigration judge's request, the DHS arranged for a psychiatric evaluation of a respondent).

[109] Immigration Judge Benchbook, Exec. Off. for Immigr. Rev., U.S. Dep't of Just. (Feb. 6, 2015), https://web.archive.org/web/20170429183441/https:/www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues [https://perma.cc/AW8N-Z3GP] (quoting Dep't of Homeland Sec., U.S. Immigr. & Customs Enf't, Off. of Det. & Removal Operations, National Detainee Handbook 4 (Feb. 2009) (All detainees "will undergo a thorough medical examination conducted by approved medical examiners within 14 days after [their] arrival. Medical staff or trained officers will also conduct a pre-screening interview to assess [detainees'] physical and mental health as part of the intake process.")).

[110] Straut-Eppsteiner, supra note 7, at 1, 14 (citation omitted) (noting that "47% of pending cases were unrepresented by counsel as of the first quarter of FY2022").

relief.[111] Over the past two decades, 81% of "asylum decisions occurred in cases where the asylum seeker was represented," and in FY 2021, 89% of asylum seekers were represented.[112] Specifically in defensive cases, where the Department of Homeland Security initiates removal proceedings in immigration court, FY 2021 denial rates were 66% for represented noncitizens and 82% for those without representation.[113] These numbers could become even more skewed in favor of noncitizens with representation now that mental health evidence is allowed to be considered because *pro se* respondents may not know about the recent change in law or how to best argue their case in light of this change.

Even if a respondent does have representation, forensic mental health evaluations can cost from $500 to over $2,000, which is a cost many respondents may not be able to afford.[114] Thus, requiring that a forensic mental health evaluation is provided for by the government, if that evidence is not in the record, evens the playing field for respondents with varying access to representation and resources.

However, requiring that these evaluations be funded by the government will be a challenge. Despite EOIR funding increasing from around $304 million in FY 2013 to $760 million in FY 2022, the EOIR still navigates obstacles with immigration judge hiring and case backlog.[115] In order for this guideline to be effectively implemented, the EOIR should apportion a part of their budget to mental health resources, and Congress may have to allocate more funding toward the EOIR in order for this to be accomplished.

C. Guideline #3: Judges Must Adhere to Standards Governing the Weight Given to Mental Health Evidence

Standards must be implemented governing how much weight should be given to the mental health evaluations and what factors can be

[111] Asylum Grant Rates Climb Under Biden, TRAC Immigr. (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667/ [https://perma.cc/82FK-NK74]; Straut-Eppsteiner, supra note 7, at 13 ("A 2015 study of access to counsel in immigration courts, which analyzed data from more than 1.2 million removal cases from 2007 through 2012, showed that respondents with counsel were more likely to have their cases terminated or be granted relief from removal . . . .").

[112] Asylum Grant Rates Climb Under Biden, TRAC Immigr. (Nov. 10, 2021), https://trac.syr.edu/immigration/reports/667/ [https://perma.cc/82FK-NK74].

[113] Id.

[114] Jimenez, supra note 68.

[115] Straut-Eppsteiner, supra note 7, at 20–22 (citations omitted).

considered to discredit past assessments. Immigration judges may be more inclined to discredit prior mental health evaluations that do not meet the standards of assessments conducted currently. Common arguments used by opposing counsel and immigration judges to challenge evaluations or testimony include:

> any language suggesting that a client may be "malingering"[;] a clinician's conclusions regarding a noncitizen's need for medication or the need for psychiatric treatment if the clinician is not a licensed psychiatrist[;] a clinician's ability to render a fair and accurate assessment where the mental health professional has been engaged in advocacy work in the past or even based on their posts on social media; statements regarding the prospective likelihood of an individual's ability to function, hold a job, obtain treatment, and take care of themselves if deported; and statements made regarding any country conditions or possibility of treatment in the noncitizen's country of origin.[116]

Instead of allowing judges such wide discretion when considering mental health evidence in the record, standards developed by the BIA about how such evidence should be weighed will better guide judges in their analysis and promote the proper consideration of mental health evidence.

Immigration judges are not bound by strict rules of evidence, and the general rule favors admissibility of evidence as long as it is probative of relevant matters and its use is fundamentally fair so as not to deprive the respondent of due process.[117] Thus, the pertinent question becomes what weight the fact finder should accord evidence in the record. In the particularly serious crime determination, the BIA can set the following standards: (1) mental health evidence in the record is presumed to be relevant and credible; (2) factors used to discredit mental health evidence in the record are limited, e.g., evidence of a clinician's past advocacy work and social media posts should not be considered; and (3) the

[116] Aimee Mayer-Salins & Ann Garcia, Cath. Legal Immigr. Network, Inc., Practice Advisory: Representing Noncitizens with Mental Illness 28 (May 2020).

[117] See Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 505 (B.I.A. 1980) (citations omitted); Matter of Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (citations omitted); Matter of Lam, 14 I. & N. Dec. 168, 172 (B.I.A. 1972) (citations omitted); Baliza v. INS, 709 F.2d 1231, 1233 (9th Cir. 1983) (citations omitted); Tashnizi v. INS, 585 F.2d 781, 782–83 (5th Cir. 1978) (footnote omitted) (citation omitted); Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975) (citation omitted); Marlowe v. INS, 457 F.2d 1314, 1315 (9th Cir. 1972).

immigration judge must articulate the rationale for their decision regarding how mental health evidence was considered.[118]

CONCLUSION

An increasing number of studies and data demonstrate that mental health issues are prevalent among noncitizens subject to immigration adjudication. With that comes concerns about whether the immigration system is adequately considering a noncitizen's mental health—whether it be while the noncitizen is detained, while standing in front of an immigration judge, or while pleading for relief from removal in a particularly serious crime determination. This Essay argues that while *Matter of B-Z-R-* is a step in the right direction for improving due process for noncitizens, it will not guarantee that the respondent's mental health is adequately considered. The BIA and the EOIR must provide immigration courts guidance and resources for the consideration of mental health in the particularly serious crime determination to better guarantee our immigration system provides fair and just legal proceedings for noncitizens with mental disorders.

[118] See 8 C.F.R. § 1003.37(a) (2022) ("A decision of the immigration judge may be rendered orally or in writing. If the decision is oral, it shall be stated by the immigration judge in the presence of the parties and a memorandum summarizing the oral decision shall be served on the parties. If the decision is in writing, it shall be served on the parties by personal service, mail, or electronic notification.").