AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]
July 6, 2009

Voluntary Departure: Automatic Termination and the Harsh Consequences of Failing to Depart

By AILF's Legal Action Center

There is a common perception that a "grant" of voluntary departure –an order allowing a respondent in removal proceedings to leave the United States by a date certain, without being subject to a removal order – is a benefit. It is true that departing voluntarily by the specified date can protect a respondent from the consequences of a removal order. However, even a timely voluntary departure does not protect him or her from other inadmissibility bars. For example, if a respondent accrued unlawful presence before the voluntary departure order, he or she may be inadmissible under INA § 212(a)(9)(B). Moreover, overstaying a voluntary departure period brings severe, unwaivable consequences. As described in this advisory, the results of failing to comply with a voluntary departure order may be harsher than the results of accepting a removal order. Respondents are well advised to accept a voluntary departure order only if they intend to and are able to timely depart and satisfy any other conditions imposed.

This Practice Advisory addresses when the voluntary departure period runs and the events that cause automatic termination of a voluntary departure order. The advisory also discusses the serious consequences that result from failing to depart, when these consequences apply, and importantly, when they do not apply. The Appendix provides background about the eligibility requirements for voluntary departure.

This Practice Advisory incorporates two significant recent developments in voluntary departure law: (1) the Supreme Court's decision *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), and (2) EOIR's subsequent voluntary departure regulations, which went into effect on January 20, 2009, *see* Department of Justice, Executive Office for Immigration Review, "Voluntary Departure:

[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

Effect of a Motion to Reopen or Reconsider or a Petition for Review," 73 Fed. Reg. 76927 (Dec. 18, 2008). AILF also has issued two other Practice Advisories that focus exclusively on these developments:

- "Voluntary Departure Q&A" (Dec. 22, 2008). This advisory provides an overview of EOIR's voluntary departure regulations that went into effect on January 20, 2009.

- "*Dada v. Mukasey* Q&A: Preliminary Analysis and Approaches to Consider" (June 17, 2008). This advisory discusses the Supreme Court's decision *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), which held that in order to protect the right to file a motion to reopen, a person must have the opportunity to unilaterally withdraw his voluntary departure before the voluntary departure period expires. (Note: aspects of the Supreme Court's decision were superseded by the subsequent EOIR regulations. Thus, practitioners are advised to read the *Dada* Practice Advisory in conjunction with the Practice Advisory addressing the regulations.)

I. When Does Voluntary Departure Begin to Run; Can the Departure Period Be Extended; and When Does the Order Terminate?

Typically, the voluntary departure period begins running on the date of the order. However, when a respondent appeals an immigration judge's (IJ) decision to the BIA, the filing of the appeal automatically stays execution of the IJ's order. *See Matter of A-M-*, 23 I&N Dec. 737, 744 (BIA 2005) (citing 8 C.F.R. § 1003.6(a)). Thus, while an appeal is pending, the voluntary departure period is not running and a respondent cannot be charged with failing to depart.[2] If the Board of Immigration Appeals (BIA) dismisses the appeal, the BIA's general policy is to reinstate the voluntary departure order for the same amount of time initially ordered by the immigration judge.[3] *See Matter of A-M-*, 23 I&N Dec. at 744.

Only DHS has jurisdiction to extend a final order of voluntary departure, and for individuals in removal proceedings, DHS only may extend the period up to "120 days or 60 days as set forth in section 240B of the Act." 8 C.F.R. § 1240.26(f). For many people, this makes seeking an extension impractical, given that the request often is not adjudicated within this short period of time. However, the pre-IIRIRA voluntary departure statute did not include a limit on the amount

[2] In fact, if a person departs while an appeal is pending, his or her departure will be deemed a withdrawal of the appeal. 8 C.F.R. § 1003.4.

[3] Pursuant to voluntary departure rules that went into effect on January 20, 2009, a voluntary departure applicant is required to provide the BIA with proof of having posted the voluntary departure bond within 30 days of filing the notice of appeal. 8 C.F.R. § 1240.26(c)(3)(ii). If the person does not provide proof, the BIA will not reinstate the voluntary departure order. Individuals who decide that they do not want voluntary departure should not provide proof of payment, thus indicating their intent to withdraw their request for voluntary departure. In the preamble to the regulation, EOIR rejected the suggestion that DHS provide proof that a person has posted bond on the basis that "such a process would assume that every alien granted voluntary departure by the immigration judge would request reinstatement by the Board." *See* 73 Fed. Reg. at 76934.

of time in which a respondent could be permitted to depart. *See* INA § 244(e) (1996). As a result, individuals in deportation proceedings (commenced before April 1, 1997) may seek an extension beyond 120 or 60 days and/or reinstatement of their voluntary departure order. *See* 8 C.F.R. § 1240.57.

A voluntary departure order will terminate automatically in certain situations:

Upon Filing a Petition for Review

Under regulations that took effect on January 20, 2009, an order of voluntary departure will terminate automatically upon the filing of a petition for review or other judicial challenge and the alternate order of removal will take effect.[4] 8 C.F.R. § 1240.26(i). However, if a person then departs within 30 days of filing the petition for review and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. *Id.* See 73 Fed. Reg. at 76933 for a discussion of what proof and evidence may be sufficient.

Prior to the issuance of this termination rule, most of the courts of appeals had held that they have authority to stay voluntary departure during the pendency of the petition for review. *Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006); *Vidal v. Gonzales*, 491 F.3d 250 (5th Cir. 2007); *Nwakanma v. Ashcroft*, 352 F.3d 325 (6th Cir. 2003); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650 (7th Cir. 2004); *Rife v. Ashcroft*, 374 F.3d 606 (8th Cir. 2004); *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003); *but see Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004) (finding that the court lacks authority to stay voluntary departure). EOIR's regulation attempts to bypass the courts' stay procedures by terminating the voluntary departure order upon filing the petition for review. However, individuals whose voluntary departure orders were reinstated by the BIA before the termination rule went into effect on January 20, 2009, may seek stays of the voluntary departure period according to the case law in their circuit.

Upon Filing a Motion to Reopen or Reconsider

Under regulations that went into effect on January 20, 2009, if a respondent files a motion to reopen or reconsider during his or her voluntary departure period, the filing automatically terminates the voluntary departure order and the alternate removal order takes effect.[5] 8 C.F.R. § 1240.26(e)(1). Immigration judges and the BIA may not toll, stay, or reinstate voluntary departure, except as allowed under current 8 C.F.R. § 1240.26(h). This rule does not apply to respondents who filed motions to reopen or reconsider after the voluntary departure period has expired. Such individuals are subject to the consequences of overstaying the voluntary departure period, and therefore may be ineligible for the very relief they are seeking in their motion (see discussion in Section II).

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[4] This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

[5] This rule applies prospectively only, and therefore does not apply to cases where the voluntary departure was ordered prior to January 20, 2009. *See* 73 Fed. Reg. at 76936.

Prior to this rule, EOIR had taken the position that the voluntary departure period continues to run during the pendency of the motion and that upon its expiration, individuals would become ineligible for the relief sought. *See Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996). Several circuits rejected *Shaar's* application to post-IIRIRA cases and held that the voluntary departure period should be tolled during the pendency of the motion to reopen period. *See Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006); *but see Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006); *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007).

In *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), the Supreme Court said that the voluntary departure period is not tolled when the motion to reopen is filed, but that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. When EOIR issued regulations a few months after the Supreme Court decided *Dada*, EOIR declined to adopt the Supreme Court's approach (i.e., allowing individuals to withdraw their requests for voluntary departure), and instead chose the automatic termination approach. 73 Fed. Reg. at 76930. According to EOIR, its approach is consistent with and relies on the Supreme Court's reasoning in *Dada*. *See* 73 Fed. Reg. at 76930.

Upon Failure to Post Bond

If an individual fails to post the required voluntary departure bond within five days of the IJ's order, an alternate order of removal goes into effect. 8 C.F.R. §§ 1340.26(c)(4) and 1241.1(f). Nonetheless, the regulation says that the failure to post bond does not terminate the obligation to depart or exempt a respondent from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4).[6] However, if a respondent does not post bond, but departs within 25 days of the failure to post bond and provides DHS with proof of departure and evidence that he or she remains outside of the United States, the departure will not be deemed a removal. 8 C.F.R. § 1240.26(c)(4). See 73 Fed. Reg. at 76935 for a discussion of what proof and evidence may be sufficient.

II. Consequences of Failing to Depart

Because the penalties for failing to depart are so severe, individuals who are eligible for voluntary departure should carefully consider the potential repercussions of a voluntary

[6] This rule purports to reverse EOIR's position in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). 73 Fed. Reg. at 76933-34, 76935. In this case, the BIA found that a person who does not post bond does not have a voluntary departure order and is not subject to the consequences of failing to depart. Arguably, the new position set forth in this rule is inconsistent with the voluntary departure statute, which suggests that Congress did not intend the privileges and consequences of voluntary departure to apply until the conditions of bond are met. *See Matter of Diaz-Ruacho*, 24 I&N Dec. at 50. See further discussion of this argument in Section III of this Practice Advisory.

departure order before deciding to apply for this relief. In many cases, a respondent who accepts a voluntary departure order may end up in a worse position than someone who is ordered removed.

Any respondent who is granted voluntary departure is subject to civil penalties if he or she "fails voluntarily to depart the United States within the time period specified…." INA § 240B(d). The respondent may be subject to a monetary fine of up to $5,000,[7] and he or she is barred, for ten years, from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure. *Id.* Individuals whose voluntary departure orders were issued under former INA § 244(e) (1995) are barred from these forms of relief for five years. INA § 242B(e)(2) (1995).

Thus, if a respondent is ordered to voluntarily depart and fails to do so, but later becomes eligible to adjust his or her status, the respondent almost certainly will be found ineligible for adjustment for ten years based on INA § 240B(d). However, if this same respondent had been ordered removed rather than granted voluntary departure, he or she would not be statutorily barred from adjustment and could file a motion to reopen his or her removal proceedings.[8]

Further, once a respondent fails to voluntarily depart, the voluntary departure order becomes a removal order, and any subsequent departure is considered a self-removal. 8 C.F.R. § 1240.26(d); 8 C.F.R. § 241.7; 8 C.F.R. § 1241.7. Additionally, a respondent who remains in the United States after the voluntary departure period expires begins to accrue unlawful presence, and may be subject to the three or ten year bar under INA § 212(a)(9)(B).[9] *See* USCIS Field

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[7] There is a rebuttable presumption that the penalty for failure to depart shall be set at $3000, unless the immigration judge specifies a different amount. 8 C.F.R. § 1240.26(j). The immigration judge must inform the individual of the amount of the penalty at the time of granting voluntary departure. *Id.*

[8] Motions to reopen generally must be filed within 90 days of the final order of removal unless the government agrees to join in the motion. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b). DHS has set forth guidelines for when it may join a motion to reopen removal proceedings. *See* Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel (Oct. 24, 2005), *available at* http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122; Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel (May 17, 2001), *available at* http://www.aila.org/Content/default.aspx?docid=16962. In addition, IJs and the BIA have *sua sponte* authority to reopen a case at any time, 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1), and most courts have held that the filing deadlines are subject to equitable tolling. *See*, *e.g.*, *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190 (9th Cir. 2001); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

[9] According to DHS, "Accrual of unlawful presence stops on the date an alien is granted voluntary departure and resumes on the day after voluntary departure expires, if the alien has not departed…." *See* USCIS Field Adjudicator's Manual, § 40.9.2(b)(3)(H), set forth in Memorandum on Consolidation of Guidance on Unlawful Presence from Donald Neufeld et al.,

Adjudicator's Manual, § 40.9.2(b)(3)(H), set forth in Memorandum on Consolidation of Guidance on Unlawful Presence from Donald Neufeld et al., U.S. Citizenship and Immigration Services, to Field Leadership (May 6, 2009), *available at* http://www.aila.org/Content/default.aspx?docid=28871.

III. When Do the Consequences of Failing to Timely Depart Not Apply?

Even individuals who have remained in the United States beyond the departure period may be able to establish that the civil penalties for failing to depart do not apply to them. The following is a checklist of situations where the consequences of overstaying may not apply. Note that there has been relatively little case law discussing the failure to depart and that the courts have not addressed some of the arguments discussed below.

The Voluntary Departure Period Was Stayed, Extended, or Terminated.

As discussed in the prior section (see section I), there are several situations where a voluntary departure order did not go into effect because it was stayed, extended, or terminated. In these situations, a respondent cannot be charged with overstaying the order. For example, if an individual filed a petition for review or a motion to reopen or reconsider before the voluntary departure period expired, the voluntary departure order terminated and therefore, the respondent did not overstay and is not subject to the consequences of overstaying. 8 C.F.R. §§ 1240.26(e)(1), (i).

Government Did Not Provide Proper Notice of the Voluntary Departure Order.

The applicable regulations provide that the IJ and the Board must serve its decision on the respondent. 8 C.F.R. §§ 1003.37 and 1003.1(f). If the individual is represented by counsel, the decision must be served on the attorney of record. 8 C.F.R. § 1292.5(a). If the respondent or counsel never received notice of the voluntary departure order, the respondent may argue that he or she is not subject to the consequences of overstaying. First, the consequences attach only when the respondent *voluntarily* fails to depart, which would not be the case when a respondent did not receive the notice ordering or reinstating voluntary departure. *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007) (see further discussion of this case below).[10] Second, due process require proper notice. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

U.S. Citizenship and Immigration Services, to Field Leadership (May 6, 2009), *available at* http://www.aila.org/Content/default.aspx?docid=28871. Thus, a voluntary departure order does not cure previously accrued unlawful presence.

[10] Although the regulations require only that the BIA or IJ properly serve the decision, under *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007), whether the respondent actually received the notice arguably is relevant in determining whether the failure to depart is voluntary. In addition, the fact that the respondent did not receive the decision is evidence that it was not served properly. *See Jahjaga v. AG of the United States*, 512 F.3d 80 (3d Cir. 2008); *Singh v. Gonzales*, 494 F.3d 1170 (9th Cir. 2007); *Ping Chen v. United States AG*, 502 F.3d 73 (2d Cir. 2007); *see also Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008).

Client Was Not Eligible for Voluntary Departure or Was Not Provided an Opportunity to Decline.

Applicants for voluntary departure must demonstrate they meet a number of statutory and regulatory requirements before an order of voluntary departure can issue (see Appendix). In addition, the 2009 regulations require IJs to advise the respondent of the conditions that will be imposed. 8 C.F.R. § 1003.26(c)(3). The respondent then must have an opportunity to decline voluntary departure if he or she is unwilling to accept the amount of bond or other conditions. *Id.* If the respondent did not request voluntary departure, did not have an opportunity to decline, or if there is not strict compliance with eligibility and notice requirements, then the voluntary departure order was invalid and the respondent may argue that the consequences of overstaying do not apply. *C.f. Tovar-Alvarez v. Attorney General*, 427 F.3d 1350, 1352 (11th Cir. 2005) (person who failed to take the oath of allegiance during a public ceremony as required under 8 U.S.C. § 1448(a) and 8 C.F.R. § 337.2 failed to meet the statutory prerequisite for citizenship and therefore was not a citizen).

Government Failed to Provide Proper Notice of the Consequences of Failing to Depart.

Section 240B(d) of the INA requires that the notice ordering voluntary departure inform the respondent of the consequences of failing to depart. The statute states, "The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection." INA § 240B(d); 8 C.F.R. § 240.25(b); *Matter of Arguelles*, 22 I&N Dec. 811, 818 (BIA 1999). If the respondent did not receive proper written notice in the order of removal, the statutory requirements were not met and the consequences should not apply.

Before the passage of IIRIRA, the notice requirement was somewhat different than it is under current law. *See* former INA § 242B(e)(2)(B) (1996). First, the language of the statute stated specifically that the consequences of failing to depart did not apply unless proper notice was provided. Second, the statute also required that both written and oral notice (in a language the person understands) be provided. *See Ordonez v. INS*, 345 F.3d 777, 783 (9th Cir. 2003) (inadequate notice when oral warning of ineligibility did not include specific forms of relief). If voluntary departure was ordered during deportation proceedings, and there is any doubt about whether the oral notice was provided, the respondent or counsel may review the transcript or request to listen to the recording of the hearing if no transcript is available.

Failure to Depart Was Not Voluntary.

The consequences of failing to depart only apply where a respondent *voluntarily* fails to depart. *See Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007). Thus, where a respondent "through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart" the consequences do not apply. *See id.* at 94.[11] In *Matter of Zmijweska*, the

[11] According to the BIA, being "physically unable to depart" does not include situations where departure within the period would involve exceptional hardships to the individual or his family or where the individual lacks funds to depart. *Matter of Zmijweska*, 24 I&N Dec. at 94.

BIA said that where a respondent's accredited representative failed to notify her of the voluntary departure order until she already had overstayed, she did not voluntarily fail to depart.[12]

"Exceptional Circumstances" in Deportation Proceedings.

Under the pre-IIRIRA statute, the consequences of failing to depart did not apply to any respondent whose failure to depart was because of "exceptional circumstances." *See* former INA § 242B(e)(2)(B) (1995). The INA defined exceptional circumstances as "exceptional circumstances (such as the serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien." *See* former INA § 242B(f)(2). Thus, any respondent who is or was granted voluntary departure in deportation proceedings (i.e., initiated prior to April 1, 1997) will not be subject to the consequences of overstaying if he or she establishes exceptional circumstances for the failure to depart.

There are several pre-IIRIRA cases that discuss what constitutes "exceptional circumstances" in the context of failure to depart. Courts have declined to find exceptional circumstances where an individual requests an extension of the voluntary departure period, but does not receive a response from the government. *See Rojas-Reynoso v. INS*, 235 F.3d 26 (1st Cir. 2000*)*; *Mardones v. McElroy*, 197 F.3d 619 (2d Cir. 1999). The Second Circuit has held that the enactment of INA § 245(i) was not an "exceptional circumstance" because the "change in the statute" did not constitute an "absence of physical or moral impossibility." *See Mardones*, 235 F.2d at 624.

Ineffective assistance of counsel has been found to constitute "exceptional circumstances." *See Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000); *see also Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (exceptional circumstances in context of failure to appear for deportation hearing); *Matter of Grijalva*, 21 I&N Dec. 472 (BIA 1996) (same). In *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999), however, the court refused to consider petitioner's claim that ineffective assistance was an exceptional circumstance because petitioner had not raised this claim as prescribed by the BIA in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *But see Varela*, 204 F.3d at 1240 (petitioner's failure to comply with *Lozada* requirements was not fatal).

VAWA Self Petitioner Exception.

Violence Against Women Act self-petitioners remain eligible for cancellation and adjustment of status if the extreme cruelty or battery was at least one central reason for overstaying the voluntary departure. INA § 240B(d)(2).

The IJ or BIA Reopened the Case.

Occasionally, the BIA or IJ will reopen a case and subsequently DHS will oppose the IJ's adjudication of the application for relief, asserting that the reopening was improper because the

[12] Zmijweska had complied with the requirements of bringing an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 639 (BIA 1988).

respondent was ineligible for relief because he or she failed to depart under an order of voluntary departure. The Seventh Circuit addressed this scenario in *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005). In that case, the petitioner timely filed a motion to reopen after the voluntary departure period expired. After reopening the case, the BIA reversed itself and held that the petitioner was barred from adjusting status because she overstayed her voluntary departure period. The Seventh Circuit held that the intermediate reopening by the BIA disposed of the § 240B(d) bar to relief. *Orichitch*, 421 F.3d at 598. The BIA order reopening the case "effectively vacated" the "voluntary departure order (a previously entrenched fixture of the underlying proceedings), disposing along with it all arguments contingent upon the continued validity of that order–namely, those predicated on Section 240B(d)." *Id*.[13]

However, at least two courts have disagreed with the Seventh Circuit's analysis. *See Chedad v. Gonzales*, 497 F.3d 57, 64-65 & n.9 (1st Cir. 2007); *Singh v. Gonzales*, 468 F.3d 135, 139-40 (2d Cir. 2006). Also, the Fifth Circuit, in *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), found that the petitioner was ineligible for relief for overstaying his voluntary departure even though the BIA had initially reopened the case. The court's decision, however, does not address the argument that the BIA's initial reopening effectively vacated the voluntary departure order. The Seventh Circuit has not considered whether the Supreme Court's decision in *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), compels revisiting *Orichitch*.

Failure to Post Bond Within Five Business Days.

If an individual fails to post the required voluntary departure bond within five business days, an alternate order of removal goes into effect. 8 C.F.R. §§ 1240.26(c)(4) and 1241.1(f). In 2006, the BIA held that a respondent who does not post bond does not have voluntary departure and is not subject to the consequences of failing to depart. *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006).[14] The BIA found that Congress' inclusion of a bond requirement for an individual

[13] Other courts have held that the grant of a motion to reopen vacates the previous order, but have not addressed whether it relieves the person of the consequences of overstaying the voluntary departure order. *See Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (the BIA's granting of the motion to reopen means there is no longer a final decision to review); *Excellent v. Ashcroft*, 359 F. Supp. 2d 333, 335 (S.D.N.Y. 2005) (same); *but see Wright v. Ouellette*, 171 F.3d 8, 12 (1st Cir. 1999) (filing a motion to reopen is more akin to starting a new proceeding).

[14] *See also Hegyi v. Gonzales*, 136 Fed. Appx. 777 (6th Cir. 2005) (unpublished) (remanded to BIA based on a "strong argument" that Heygi did not overstay her voluntary departure period at all because one did not exist); *Hernandez-Rodriguez v. Gonzales*, 118 Fed. Appx. 115 (9th Cir. 2005) (unpublished) (remanded to BIA based on a "strong argument" that Hernandez did not overstay the voluntary departure period at all since one did not exist); *but see Romero-Gamez v. Gonzales*, 104 Fed. Appx. 118 (9th Cir. 2005) (unpublished) (failure to post bond automatically vacated their voluntary departure order, but the ten-year bar to relief still applies); *Beshay v. Gonzales*, 76 Fed. Appx. 420 (3d Cir. 2005) (unpublished) (240B(d) still applies when no bond is posted).

granted voluntary departure at the conclusion of proceedings "strongly indicates that Congress intended that the privileges and penalties related to section 240B(b) voluntary departure do not apply until the statutory bond requirement is satisfied." *Id.* at 50. The BIA also found that prior BIA precedent and the statutory and regulatory scheme indicate that the posting of bond is a condition precedent to ensure timely departure. *Id.* Finally, the BIA noted that the then-current regulation stated that the failure to post bond results in the automatic termination of voluntary departure and therefore, a respondent who did not post a bond is not subject to the penalties.[15] *Id.* at 51.

EOIR's 2009 voluntary departure regulations purport to reverse *Matter of Diaz-Ruacho*. See 73 Fed. Reg. at 76933-34, 76935. The regulations provide that the failure to post bond does not terminate the obligation to depart or exempt a respondent from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4). In addition, EOIR removed the regulatory language saying that the voluntary departure order "shall vacate automatically" if a respondent fails to pay the bond, and replaced it with "the alien's failure to post the required voluntary departure bond within the period allowed means that the alternate order of removal takes effect immediately pursuant to 8 C.F.R. § 1241.1(f)."

EOIR's regulation providing that the penalties for overstaying voluntary departure apply where a respondent fails to post bond may be susceptible to challenge. First, to the extent that the BIA in *Matter of Diaz-Ruacho* relied on prior BIA precedent and Congressional intent, the BIA's reasoning remains persuasive.[16] Second, the removal of the regulatory language "shall vacate automatically" did not change the substance of the rule: the regulations still make it clear that when a respondent fails to post bond, the voluntary departure order no longer exist and is replaced by a removal order. *See* 8 C.F.R. § 1240.26(c)(4) (providing that the "alternate order of removal takes effect immediately").

Third, the statutory provision on overstaying voluntary departure indicates that the consequences apply only where a respondent stays beyond the period of time set by the immigration judge. It says, a respondent is subject to the consequences of overstaying "if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United *within the time period specified*…." INA § 240B(d)(1) (emphasis added). When a respondent does not post the bond within five days, the alternate order goes into effect and therefore, in many cases, there is no voluntary departure order on the date that the IJ initially set for departure. As a result, a respondent cannot be charged with failing to depart "within the time period specified" given that the order no longer exists.

Ten Years (or Five) Have Passed After Failing to Depart.

[15] Former 8 C.F.R. § 1240.26(c)(3) (2006) stated, "If the bond is not posted within 5 business days, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect the following day."

[16] For example, in *Diaz-Ruacho*, the BIA said, "Under the statutory and regulatory framework, voluntary departure granted at the conclusion of a hearing remains inchoate until the posting of a bond within 5 days of the order." 24 I&N Dec. at 50.

Individuals granted voluntary departure where ten years have passed from the expiration of the departure period should not be barred from applying relief by INA § 240B(d). This provision says that a respondent who fails to depart is ineligible for several forms of relief "for a period of ten years." The only other date referenced in INA § 240B(d) is "the time period specified" for voluntary departure, thus suggesting that the period of ten years begins to run on the day that the voluntary departure expired. Likewise, individuals granted voluntary departure under former INA § 244(e) (1995) where five years have passed should not be barred from relief. Under former INA § 242B(e)(2)(A) (1995), the five year penalty period began to run "after the scheduled date of departure or the date of unlawful reentry." There is no indication that the five or ten year period of ineligibility for relief only runs once a respondent departs the United States.

Regardless whether the voluntary departure order was issued under the current or former statute, most individuals still will face the problem that the only way to apply for adjustment of status or other relief now is to move to reopen deportation or removal proceedings. Typically, however, motions to reopen must be filed within 90 days of the final order of removal or deportation unless the government agrees to join in the motion. INA § 240(c)(7)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), (c)(3)(iii) and 8 C.F.R. §§ 1003.23(b)(1), (b)(4)(iv). DHS has set forth guidelines for when it may join a motion to reopen removal proceedings. *See* Memorandum on Prosecutorial Discretion from William J. Howard, U.S. Immigration and Customs Enforcement Principal Legal Advisor, to all Office of Principal Legal Advisor Chief Counsel (Oct. 24, 2005), *available at* http://www.aila.org/content/fileviewer.aspx?docid=19310&linkid=145122; Memorandum on Motions to Reopen for Consideration of Adjustment of Status from Bo Cooper, General Counsel for Immigration and Naturalization Service, to Regional Counsel (May 17, 2001), *available at* http://www.aila.org/Content/default.aspx?docid=16962. Another option is to request that the BIA or the immigration court exercise its *sua sponte* authority to reopen the case. *See* 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1).

APPENDIX

Requirements for an Order of Voluntary Departure

There are three different stages at which the Department of Homeland Security (DHS) or an Immigration Judge (IJ) may order voluntary departure: before removal proceedings are initiated, before completion of proceedings, and at the conclusion of proceedings. *See* INA §§ 240B(a), (b); 8 C.F.R. § 240.25(a); 8 C.F.R. §§ 1240.26(b), (c); *Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). The statutory and regulatory requirements for voluntary departure differ depending on when the order is imposed. In addition, if a respondent is in deportation proceedings (i.e., proceedings initiated before April 1, 1997), the pre-IIRIRA voluntary departure statute governs.

Removal Proceedings

Before Removal Proceedings are Initiated

In lieu of initiating removal proceedings, DHS may authorize voluntary departure for up to 120 days. INA § 240B(a)(1), (2)(A); 8 C.F.R. § 240.25(c). The person must request voluntary departure and agree to its terms and conditions. 8 C.F.R. § 240.25(c). The person must present DHS with a passport or travel document, which DHS may hold to investigate its authenticity. 8 C.F.R. § 240.25(b). In addition, DHS may set "any conditions it deems necessary to ensure the alien's timely departure from the United States including the posting of bond, continued detention pending departure, and removal under safeguards." 8 C.F.R. § 240.25(b). A voluntary departure applicant at this stage need not show good moral character nor establish any length of physical presence in the United States.

A person who is removable for an aggravated felony (INA § 237(a)(2)(A)(iii)) or certain security related grounds (INA § 237(a)(4)(B)) is not eligible for voluntary departure. INA § 240B(a)(1). Persons stopped at the border are not eligible for voluntary departure; however, they may request to withdraw their application for admission. INA § 240B(a)(4).

Prior to Completion of Removal Proceedings

Before completion of removal proceedings, an immigration judge may order voluntary departure for a period of up to 120 days. INA § 240B(a). The IJ may only order this form of voluntary departure if the respondent has requested it prior to or at the master calendar hearing at which the case is initially scheduled for a merits hearing or at any time before conclusion of the proceedings if DHS stipulates to the voluntary departure order. 8 C.F.R. § 1240.26(b)(1)(i). To receive voluntary departure, the respondent must: (1) withdraw any pending requests for relief, (2) make no additional requests for relief, (3) concede removability, (4) not have an aggravated felony conviction or be deportable under INA § 237(a)(4) (related to security grounds), and (5) waive appeal of all issues.[17] *Id*. The IJ may impose conditions that he or she deems necessary to

[17] Appealing a denial of voluntary departure based on ineligibility does not bar a person from seeking voluntary departure. *See Matter of Cordova*, 22 I&N Dec. 966, 969-70 (BIA 1999).

ensure the respondent's timely departure, and the respondent may be required to submit travel documents to DHS. 8 C.F.R. §1240.26(b)(3)(i). In addition, the applicant must merit a favorable exercise of discretion. *Matter of Arguelles,* 22 I&N Dec. 811, 816 (BIA 1999).

At the Conclusion of Removal Proceedings

At the conclusion of proceedings, the immigration judge may order up to 60 days of voluntary departure. INA § 240B(b)(2). The IJ must find that the respondent: (1) has been physically present in the United States for one year immediately preceding the issuance of the notice to appear, (2) is and has been a person of good moral character for the immediately preceding 5 years from the application for voluntary departure, (3) is not removable for an aggravated felony or certain security related grounds, and (4) has shown by clear and convincing evidence that he or she has the means and intent to depart the United States. INA § 240B(b)(1); 8 C.F.R. §§ 1240.26(c)(1) and (c)(2). In addition, the applicant must merit a favorable exercise of discretion, *Matter of Arguelles,* 22 I&N Dec. at 817, and post a voluntary departure bond of at least $500, INA § 240B(b)(3); 8 C.F.R. § 1240.26(c)(3)(i). The immigration judge has authority to order continued detention as a condition of voluntary departure, *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009), and may set other conditions as he or she deems necessary, 8 C.F.R. § 1240.26(c)(3).

Deportation Proceedings

Individuals who are in deportation proceedings (i.e., commenced before April 1, 1997) may apply for voluntary departure under former INA § 244(e) (1995). Under this section, in order to qualify for voluntary departure, a respondent must (1) be willing to depart voluntarily within the time period allowed, (2) currently have the financial means to depart, and (3) possess good moral character for the past five years. *See* former INA §244(e) (1995). Additionally, a respondent who has an aggravated felony conviction after November 18, 1988 is ineligible for voluntary departure in deportation proceedings. *See* 8 C.F.R. § 1240.56.