



PRACTICE ADVISORY¹
Updated December 21, 2017

Voluntary Departure: When the Consequences of Failing to Depart Should and Should Not Apply

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 order²—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 1) when the voluntary departure period runs and the events that cause automatic termination of a voluntary departure order; 2) the serious consequences that result from failing to depart; 3) and when these consequences do not apply. The Appendix provides background about the eligibility requirements for voluntary departure.

I. Starting, Extending and Terminating the Voluntary Departure Period

When Does Voluntary Departure Begin to Run?

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 Board of Immigration Appeals (BIA), the filing of the appeal automatically stays execution of the IJ’s order.³ Thus, while an appeal is pending, the voluntary departure period is not running and a respondent

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² See INA § 240B.

³ See *Matter of A-M-*, 23 I&N Dec. 737, 744 (BIA 2005) (citing 8 C.F.R. § 1003.6(a)).

cannot be charged with failing to depart.⁴ If the 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.⁵

Can the Departure Period be Extended?

Only DHS has jurisdiction to extend a final order of voluntary departure. A request to extend the departure period should be addressed to the District Director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs.⁶ 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."⁷ For many people, this makes seeking an extension impractical, given that the request often is not adjudicated within this short period of time.⁸

When Does the Voluntary Departure Period Terminate?

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.⁹ However, if a person then departs within 30 days of

⁴ 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.

⁵ See *Matter of A-M-*, 23 I&N Dec. at 744. 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 following an unsuccessful appeal. See *Matter of Velasco*, 25 I&N Dec. 143 (BIA 2009) (holding that the requirement in 8 C.F.R. § 1240.26(c)(3)(ii) applies to all voluntary departure orders entered after January 20, 2009). 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.

⁶ 8 C.F.R. § 1240.26(f).

⁷ *Id.* For an explanation of when the 60- and 120-day limits apply, see the Appendix.

⁸ The pre-IIRIRA voluntary departure statute did not include a limit on the amount of time in which a respondent could be permitted to depart. See INA § 244(e) (1996). As a result, individuals in deportation proceedings that 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.

⁹ 8 C.F.R. § 1240.26(i); see also *Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review*, 73 Fed. Reg. 76927. This rule applies only to cases where the voluntary departure was ordered after January 20, 2009. See *Matter of Velasco*, 25 I&N Dec. at 146-147. Prior to this termination rule, a majority of Courts of Appeal had held that they had

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.¹⁰

Upon Filing a Motion to Reopen or Reconsider

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.¹¹ Immigration judges and the BIA may not toll, stay, or reinstate voluntary departure, except as allowed under 8 C.F.R. § 1240.26(h). The regulation permits an immigration judge or the BIA to reinstate voluntary departure in cases where respondents successfully reopen their cases “prior to the expiration of the original period of voluntary departure.”¹² The total voluntary departure time, however, cannot exceed 120 days or 60 days.¹³ 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).

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.¹⁴ According to EOIR, its approach is consistent with and relies on the Supreme Court’s reasoning in *Dada*.¹⁵

Upon Failure to Post Bond

authority to stay voluntary departure during the pendency of the petition for review. *See, e.g., Bocova v. Gonzales*, 412 F.3d 257 (1st Cir. 2005); *Obale v. Attorney General*, 453 F.3d 151 (3d Cir. 2006); *El Himri v. Ashcroft*, 344 F.3d 1261 (9th Cir. 2003). Following the 2009 regulations, several U.S. Courts of Appeals have found that, because under the 2009 regulation voluntary departure is terminated by the filing of a petition for review, courts do not have the authority to stay voluntary departure. *See, e.g., Garfias-Rodriguez v. Holder*, 702 F.3d 504, 524-25 (9th Cir. 2012) (citing decisions from the First, Third and Sixth Circuits and holding that the 2009 regulation “effectively abrogates” the Ninth Circuit’s earlier *El Himri* decision).

¹⁰ 8 C.F.R. § 1240.26(i). *See* 73 Fed. Reg. at 76933, for a discussion of what proof and evidence may be sufficient.

¹¹ 8 C.F.R. § 1240.26(e)(1).

¹² 8 C.F.R. § 1240.26(h).

¹³ *Id.*

¹⁴ 73 Fed. Reg. at 76930.

¹⁵ *See id.*

Individuals granted voluntary departure by an immigration judge are required to post a bond within five days of the order.¹⁶ If an individual fails to post the required voluntary departure bond within five days, an alternate order of removal goes into effect.¹⁷ Nonetheless, 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).¹⁸ 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.¹⁹

II. Consequences of Failing to Depart

Because the penalties for failing to depart are severe, individuals who are eligible for voluntary departure should carefully consider the potential repercussions of a voluntary 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....”²⁰ The respondent may be subject to a monetary fine of up to \$5,000 and will be barred for ten years from being granted cancellation of removal, adjustment of status, change of status, registry, and voluntary departure.²¹

¹⁶ 8 C.F.R. § 1240.26(c)(4).

¹⁷ *Id.* (failure to post the voluntary departure bond within five days automatically triggers the alternate order of removal); 8 C.F.R. § 1241.1(f) (an alternate order of removal becomes final “upon the failure to post a required voluntary departure bond within 5 business days”).

¹⁸ 8 C.F.R. § 1240.26(c)(4). This rule superseded *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006), under which a person who failed to post a departure bond would not be subject to the consequences of failing to depart. *See Bachynskyy v. Holder*, 668 F.3d 412, 418 (7th Cir. 2011) (noting that *Matter of Diaz-Ruacho* was superseded by regulation). Arguably, the 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.

¹⁹ 8 C.F.R. § 1240.26(c)(4). *See also* 73 Fed. Reg. at 76935 (noting that “[e]vidence sufficient to meet these requirements may include proof of the alien’s intended departure and itinerary, and prompt presentation by the alien to a United States consulate, along with such evidence necessary to prove his or her timely departure.”).

²⁰ INA § 240B(d).

²¹ *Id.* There is a rebuttable presumption that the penalty for failure to depart shall be set at \$3,000, 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.

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.²²

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.²³ 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).²⁴

III. When the Consequences of Failing to Depart Do 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 thus courts have not addressed some of the arguments discussed below.

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

²² 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). Note, however, that immigration judges 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). Additionally, all courts to have considered the issue have found that equitable tolling applies to motions to reopen. See, e.g., *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *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).

²³ 8 C.F.R. § 1240.26(d) (alternate order of removal entered along with voluntary departure); 8 C.F.R. § 241.7 (any departure following a final order of removal is considered a self-removal, except where the voluntary departure period granted in connection with an alternate order of deportation or removal has not yet expired); 8 C.F.R. § 1241.7 (same).

²⁴ See USCIS Field Adjudicator's Manual, § 40.9.2(b)(3)(H), available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-17138/0-0-0-18383.html#0-0-0-1865> ("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 the United States according to the terms of the grant of voluntary departure"); see also Donald Neufeld, et al., Memorandum on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, U.S. Citizenship and Immigration Services (May 6, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF. Thus, a voluntary departure order does not cure previously accrued unlawful presence.

As discussed in 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.²⁵

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.²⁶ If the individual is represented by counsel, the decision must be served on the attorney of record.²⁷ 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.²⁸ Second, due process requires proper notice.²⁹

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.³⁰ 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.³¹ If the respondent did not request voluntary departure, did not have an opportunity to decline, or if there is not strict

²⁵ 8 C.F.R. §§ 1240.26(e)(1), (i).

²⁶ 8 C.F.R. §§ 1003.37, 1003.1(f).

²⁷ 8 C.F.R. § 1292.5(a).

²⁸ *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007). Although the regulations require only that the BIA or IJ properly serve the decision, under *Matter of Zmijewska*, 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).

²⁹ See generally *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³⁰ 8 C.F.R. § 1240.26(c)(3).

³¹ *Id.*

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.³²

Government Failed to Provide Proper Notice of Voluntary Departure Requirements.

Respondents granted voluntary departure must be given notice of the penalties of failure to depart.³³ If the respondent has not received proper written notice in the order of removal, the statutory requirements were not met and the consequences should not apply. Similarly, the IJ must provide notice of the requirement in 8 C.F.R. § 1240.26(c)(3)(ii) that respondents filing a notice of appeal must provide proof to the BIA within 30 days that a voluntary departure bond was paid.³⁴ If the IJ fails to provide this mandatory advisal, the BIA may remand the case to the IJ with instructions to provide the advisals and grant a new period of voluntary departure.³⁵

Failure to Depart Was Not Voluntary.

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the consequences of failing to depart did not apply to any respondent whose failure to depart was because of “exceptional circumstances.”³⁶ This language was removed in IIRIRA and replaced with the language in INA § 240B(d) that attached penalties where a respondent “voluntarily fails to depart.”³⁷ In *Matter of Zmijewska*, 24 I&N Dec. 87 (BIA 2007), the BIA first interpreted this new language, and found that it created a new “voluntariness” exception.

³² Cf. *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).

³³ See INA § 240B(d) (“The order permitting the alien to depart voluntarily shall inform the alien of the penalties under this subsection.”); 8 C.F.R. § 240.25(b) (“A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.”); see also *Matter of Arguelles*, 22 I&N Dec. 811, 818 (BIA 1999) (“We note that the order permitting the alien to depart voluntarily must inform the alien of these consequences”).

³⁴ *Matter of Gamero*, 25 I&N Dec. 164, 167-168 (BIA 2010). If an individual fails to submit proof that the voluntary departure bond was posted, the BIA is barred from reinstating the period of voluntary departure following an unsuccessful appeal. See 8 C.F.R. § 1240.26(c)(3)(ii).

³⁵ See *id.* at 167-168 (noting that “a remand is the appropriate remedy when the mandatory advisals have not been provided by the Immigration Judge.”).

³⁶ See *Matter of Zmijewska*, 24 I&N Dec. 87, 93-95 (BIA 2007). 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.

³⁷ INA § 240B(d)(1).

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.³⁸ The BIA “emphasize[d] that the ‘voluntariness’ exception is not a substitute for the repealed ‘exceptional circumstances’ exception” but a “much narrower” one.³⁹

A review of unpublished decisions since *Matter of Zmijewska* shows that the BIA has only rarely granted the voluntariness exception, primarily for ineffective assistance of counsel claims. In *Matter of Zmijewska*, the 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.⁴⁰ The BIA has also found that a child’s failure to depart cannot be voluntary.⁴¹

However, in other cases, where the BIA has determined a level of responsibility lies with respondent for failing to depart, the BIA has denied access to the “voluntariness” exception. Thus, even where a respondent failed to depart because he was indicted during the voluntary departure period and was ordered not to depart the country, his failure to depart was deemed “voluntary” because “his inability to timely depart stemmed from his own criminal conduct....”⁴² Similarly, the BIA found a failure to depart “voluntary” where a SIJS-eligible respondent failed to depart because his father told him “not to depart because the respondent’s mother abandoned him in Guatemala and he was the respondent’s sole support.”⁴³

For respondents citing ineffective assistance of counsel to support a claim that the failure to depart was involuntary, the BIA has required that respondents adhere to the requirements for claiming ineffective assistance of counsel laid out in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998).⁴⁴ The application of the *Matter of Lozada* requirements to the factual question of whether

³⁸ See *Matter of Zmijewska*, 24 I&N Dec. at 94. 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. See *id.*

³⁹ *Id.*

⁴⁰ Thus, in *Zmijewska*, the BIA analyzed whether the respondent had complied with the requirements of bringing an ineffective assistance of counsel claim under *Matter of Lozada*, 19 I&N Dec. 639 (BIA 1988).

⁴¹ See *Matter of Emelin Reynoso*, 2016 WL 8471162 *1 n1 (BIA Dec. 21, 2016) (finding a 9-year-old’s failure to depart not voluntary “due to her young age”); *Matter of Climaco-Amaya*, , 2016 WL 1084513 (BIA Feb. 25, 2016) (remanding a 16-year-old’s case for the IJ to determine whether “due to his young age, he did not understand the consequences of not leaving under the voluntary departure order”); *Matter of Smith*, 2011 WL 6962784, at *1 (BIA Dec. 19, 2011) (14-year-old’s failure to depart not “voluntary”).

⁴² *Matter of Jaradat*, 2016 WL 946713, at *3 (BIA Feb. 16, 2016).

⁴³ *Matter of Zapil Sop*, 2016 WL 8471231, at *2 (BIA Dec. 13, 2016). However, the BIA did not analyze whether the respondent’s age would render his failure to depart involuntary. It is unclear from the decision whether that argument was raised.

⁴⁴ To meet the requirements under *Lozada*, a respondent must (1) submit an affidavit detailing the ineffective assistance, (2) inform the counsel who provided the assistance of the

a respondent “voluntarily failed to depart” arguably is *ultra vires* as *Lozada* requirements do not flow from INA § 240B(d).

In several unpublished cases, the BIA also has limited the voluntariness exception by imposing a due diligence requirement; requiring respondents to move to reopen their case within a reasonable period of time after having learned of the voluntary departure order or after the event causing their failure to depart.⁴⁵ In these cases, the BIA has linked due diligence—a requirement for equitable tolling of a motion to reopen filed outside of the statutory period—with voluntariness, determining that a failure to act with due diligence merits both a denial of a motion to reopen *and* a finding that the 10-year bar on relief applies.⁴⁶ However, *Matter of Zmijewska* is clear that when a respondent “is unaware of the voluntary departure order or is physically unable to depart” through “through no fault of his or her own,” the penalties in INA § 240B(d)(1) do not apply.⁴⁷ To the extent that the BIA is now imposing the penalties for failure to depart on respondents who did not act with due diligence, respondents should argue that this requirement is *ultra vires*.

VAWA Self Petitioner Exception.

allegations and provide him or her an opportunity to respond, (3) detail whether—and if not, why—a complaint regarding the performance has been submitted to appropriate attorney disciplinary authority, and (4) show that counsel’s assistance was so ineffective as to prejudice the respondent’s case. *Matter of Lozada*, 19 I&N Dec. at 639. *See, e.g. Matter of Zmijewska*, 24 I&N Dec. at 95 (evaluating under *Matter of Lozada* the respondent’s claim of ineffective assistance leading to involuntary failure to depart); *Matter of al-Tarawneh*, 2010 WL 3027582, at *1 (BIA July 8, 2010) (same); *see also Matter of Khurram Khan*, 2015 WL 1208077, at *1 (BIA Feb. 2, 2015) (rejecting argument that failure to depart was not voluntary where applicant had not met the required showing of prejudice from the alleged ineffective assistance of counsel).

⁴⁵ *See Matter of Jaradat*, 2016 WL 946713 at *4 (denying motion to reopen and finding that respondent “did not demonstrate that he acted with due diligence” when he waited two years to file a motion to reopen); *Matter of Gomez-Gonzalez*, 2017 WL 2570223, at *1 (BIA May 12, 2017) (denying motion to reopen and finding no due diligence where respondent waited three years to raise a claim of ineffective assistance of counsel); *Matter of Valerie Lee Maedgen*, 2014 WL 3697784, at *2 (BIA May 30, 2014) (granting motion to reopen because respondent showed “sufficient diligence”).

⁴⁶ *See Matter of Jaradat* at *4 (finding that Respondent’s lack of diligence in filing the motion to reopen meant his failure to depart was voluntary); *see also Matter of Maedgen*, 2014 WL 3697784, at *2 (“[T]he respondent ... showed sufficient diligence in filing the motion to reopen [T]herefore, we conclude that the respondent's failure to depart was not voluntary under section 240B(d)(1) of the Act.”).

⁴⁷ *Matter of Zmijewska*, 24 I&N Dec. at 87.

Violence Against Women Act self-petitioners who overstay a period of voluntary departure remain eligible for cancellation of removal and adjustment of status if the extreme cruelty or battery was at least one central reason for the overstay.⁴⁸

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 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.⁴⁹ The BIA order reopening the case "effectively vacated" the "voluntary departure order (a previously entrenched fixture of the underlying proceedings), disposing of both it and all arguments contingent upon the continued validity of the order—namely, those predicated on Section 240B(d)."⁵⁰

However, at least two courts have disagreed with the Seventh Circuit's analysis and have held that a motion to reopen filed after the voluntary departure period has run does not eliminate the consequences of a failure to depart even where the BIA reopened.⁵¹ Moreover, 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.⁵² For respondents who waived appeal, failure to post the bond within five days automatically triggers the alternate order of removal, as well as the consequences of failure to depart.⁵³ However, respondents who fail to post the voluntary departure bond within five days may still avoid these consequences if they (1) depart within twenty-five days of the failure to post bond (2) provide evidence to DHS that they departed within the appropriate time, and (3) provide evidence that they remain outside of the United States.⁵⁴

⁴⁸ INA § 240B(d)(2).

⁴⁹ *Orichitch*, 421 F.3d at 598.

⁵⁰ *Id.*

⁵¹ See *DaCosta v. Gonzales*, 449 F.3d 45, 50-51 (1st Cir. 2006); *Singh v. Gonzales*, 468 F.3d 135, 139-40 (2d Cir. 2006); see also *Odogwu v. Gonzales*, 217 F. App'x 194, 197 (4th Cir. 2007) (non-precedential per curiam opinion adopting First Circuit's holding in *DaCosta*).

⁵² 8 C.F.R. § 1240.26(c)(4); 8 C.F.R. § 1241.1(f).

⁵³ 8 C.F.R. § 1240.26(c)(4).

⁵⁴ 8 C.F.R. §§ 1240.26(c)(4)(i)-(iii).

For respondents who were granted voluntary departure at the conclusion of proceedings prior to the 2009 regulations, *Matter of Diaz-Ruacho* held that a respondent who failed to post bond did not have voluntary departure order and was not subject to the consequences of failing to depart.⁵⁵ The BIA found that Congress' inclusion of a bond requirement for an individual 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."⁵⁶ The BIA also found that prior BIA precedent and the statutory and regulatory scheme in place at the time indicated that the posting of bond was a condition precedent to ensure timely departure, and that failure to post the bond resulted in a termination of voluntary departure, relieving the respondent of the penalties for failure to depart.⁵⁷

EOIR's January 20, 2009 voluntary departure regulations purport to reverse *Matter of Diaz-Ruacho*.⁵⁸ Pre-2009 voluntary departure regulations stated that a voluntary departure order "shall vacate automatically" if a respondent fails to pay the bond within five days. The 2009 regulations eliminated this language and instead state that a respondent'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)."⁵⁹ The regulations further 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).⁶⁰ Thus, pursuant to the 2009 regulations, *Matter of Diaz-Ruacho* now only applies to voluntary departure orders entered prior to January 20, 2009. Respondents who failed to post the voluntary departure bond prior to then should not be subject to penalties for failure to depart.

Note, however, that 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.⁶¹ Second, the removal of the regulatory language "shall vacate automatically" did not change the substance of the rule: the

⁵⁵ *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006).

⁵⁶ *Id.* at 50.

⁵⁷ *Id.* at 50-51.

⁵⁸ See 73 Fed. Reg. at 76933-34, 76935.

⁵⁹ 8 C.F.R. § 1240.26(c)(4).

⁶⁰ *Id.* ("The alien's failure to post the required voluntary departure bond within the time required does not terminate the alien's obligation to depart within the period allowed or exempt the alien from the consequences for failure to depart voluntarily during the period allowed.")

⁶¹ For example, in *Diaz-Ruacho*, the BIA noted that "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.

regulations still make it clear that when a respondent fails to post bond, the voluntary departure order no longer exists and is replaced by a removal order.⁶²

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 States *within the time period specified*....”⁶³ When a respondent does not post the bond within five days, the alternate order goes into effect and therefore 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 Have Passed After Failing to Depart.

Individuals granted voluntary departure where ten years have passed from the expiration of the departure period should not be barred from applying for 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. There is no indication that the 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.⁶⁴ 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.⁶⁵ Another option is to request that the BIA or the immigration court exercise its *sua sponte* authority to reopen the case.⁶⁶

⁶² See 8 C.F.R. § 1240.26(c)(4) (providing that the “alternate order of removal takes effect immediately”).

⁶³ INA § 240B(d)(1) (emphasis added)

⁶⁴ The one exception is for “arriving” noncitizens, as defined in 8 C.F.R. § 1001.1(q). USCIS has jurisdiction over the adjustment applications of these individuals and must exercise this jurisdiction even if there is a final, unexecuted order of removal. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1); see also the American Immigration Council’s Practice Advisory, “[Arriving Aliens’ and Adjustment of Status](#).”

⁶⁵ 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).

⁶⁶ 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.⁶⁷ 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.⁶⁸ The respondent must request voluntary departure and agree to its terms and conditions.⁶⁹ The respondent must present DHS with a passport or travel document, which DHS may hold to investigate its authenticity.⁷⁰ 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.”⁷¹ 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.⁷² Persons stopped at the border are not eligible for voluntary departure; however, they may request to withdraw their application for admission.⁷³

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.⁷⁴ 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

⁶⁷ 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).

⁶⁸ INA § 240B(a)(1), (2)(A); 8 C.F.R. § 240.25(c).

⁶⁹ 8 C.F.R. § 240.25(c).

⁷⁰ 8 C.F.R. § 240.25(b).

⁷¹ 8 C.F.R. § 240.25(b).

⁷² INA § 240B(a)(1).

⁷³ INA § 240B(a)(4).

⁷⁴ INA § 240B(a).

stipulates to the voluntary departure order.⁷⁵ 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.⁷⁶ The IJ may impose conditions that he or she deems necessary to ensure the respondent's timely departure, and the respondent may be required to submit travel documents to DHS.⁷⁷ In addition, the applicant must merit a favorable exercise of discretion.⁷⁸

At the Conclusion of Removal Proceedings

At the conclusion of proceedings, the immigration judge may order up to 60 days of voluntary departure.⁷⁹ 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.⁸⁰ In addition, the applicant must merit a favorable exercise of discretion⁸¹ and post a voluntary departure bond of at least \$500..⁸² The immigration judge has authority to order continued detention as a condition of voluntary departure and may set other conditions as he or she deems necessary.⁸³

⁷⁵ 8 C.F.R. § 1240.26(b)(1)(i).

⁷⁶ *Id.* 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).

⁷⁷ 8 C.F.R. § 1240.26(b)(3)(i).

⁷⁸ *Matter of Arguelles*, 22 I&N Dec. 811, 816 (BIA 1999).

⁷⁹ INA § 240B(b)(2).

⁸⁰ INA § 240B(b)(1); 8 C.F.R. §§ 1240.26(c)(1) and (c)(2).

⁸¹ *Matter of Arguelles*, 22 I&N Dec. at 817

⁸² INA § 240B(b)(3); 8 C.F.R. § 1240.26(c)(3)(i); *see also Matter of Gamero*, 25 I&N Dec. at 165-166.

⁸³ *Matter of M-A-S-*, 24 I&N Dec. 762 (BIA 2009) (continued detention may be imposed as a condition of voluntary departure); *see also* 8 C.F.R. § 1240.26(c)(3).