VOLUNTARY DEPARTURE

JUDGE ROBERT BARRETT

LESSON OUTLINE

VOLUNTARY DEPARTURE

NATIONAL JUDICIAL COLLEGE

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VOLUNTARY DEPARTURE IN IMMIGRATION COURT PROCEEDINGS

Statute: Sec. 240B, INA.
Regulation: 8 CFR 240.26.
Leading BIA decisions: *Matter of Arguelles-Campos*, 22 I&N 811 (BIA 1999); *Matter of Cordova*, 22 I&N 966 (BIA 1999); *Matter of Ocampo-Uralde*, 22 I&N 1301 (BIA 2000).
Application: No written application is required, likewise no fee.

Aliens Not Eligible for Voluntary Departure:

•an "**arriving alien**" Sec. 240B(a)(4), but such aliens may be allowed as a matter of discretion to withdraw the request for admission and depart without being placed in removal proceedings. Sec. 235(a)(4) INA.

•an alien who has been **granted voluntary departure in the past** after being found inadmissable under Section 212(a)(6)(A) INA [in the U.S. without admission or parole]. Sec. 240B(c) INA.

•an alien who is deportable under Sec. 237(a)(4)(B) INA **[engaged in terrorist activity]**. Sec. 240B(a)(1) INA.

•an alien who is deportable under Section 237(a)(2)(A)(iii) **[convicted of an aggravated felony]**. Sec. 240B(a)(1) INA. Note that under the statutory language, the alien must be deportable for the aggravated felony conviction. An alien who is present without being admitted or paroled would be an applicant for admission, and thus would not be "deportable" [there is no ground of inadmissability for aggravated felonies]. However, by regulation the Attorney General has *extended* this restriction to cover any alien who has been convicted of an aggravated felony, without regard to whether the alien is deportable for the conviction. 8 CFR 240.26(b)(1)(i)(E) and 240.26(c)(1)(iii). Statutory authority for this extension appears to be Sec. 240B(e) INA. As the additional restriction is found in the regulations which apply to the Immigration Court, an argument may be made that INS could grant voluntary departure by agreement, under the procedure in 8 CFR 240.25, to an alien who had been convicted of an aggravated felony, since the latter regulation does not contain the additional restriction.

Three types of voluntary departure in removal proceedings:

•by INS without initiation of a removal case before the Court;

•by the Court in the initial stages of the removal case; or

•by the Court at the conclusion of the removal hearings.

subject of a valid appeal.

Note also that INS may hold the alien in custody until any required VR bond is posted. 8 CFR 240.26(c)(3). Anecdotal evidence suggests that district offices are split as to whether a delivery bond (posted while the removal case was pending) is canceled when the case is completed with the entry of the IJ's order. In some districts, the delivery bond is deemed to be satisfied when VR is granted, and the alien is then required to post a new bond. In other districts, the delivery bond is considered to be carried over to serve the purpose of a VR bond. The former procedure entails additional paperwork, and may leave the alien financially strapped since the original delivery bond may not be refunded for months, thus requiring the alien to have two bonds posted for the same period.

Note further that the fingerprint and background check regulation, effective April 1, 2005 [8 C.F.R. § 1003.47] generally exempts the voluntary departure application from requiring such checks. 8 C.F.R. § 1003.47(j). However, this regulation also provides that, in any given case, the DHS may seek a continuance to conduct such checks and the IJ, in the exercise of discretion may grant the continuance and, if done, the 30-day period for the IJ to grant voluntary departure , as provided in 8 C.F.R. § 1240.26(b)(1)(ii) shall be extended accordingly.

Exceptions to the travel document requirement. 8 CFR 240.2(b).

The travel document may be something less official than a passport. Some consulates will issue a temporary travel document, such as a letter under seal, which is valid for return to one's country of citizenship. Some countries allow their citizens to travel back to the country on the strength of a national identity document, such as a cedula. Further, if INS is holding the alien's travel document, the alien needs to arrange to recover it, which can be discussed with the detention and deportation section of INS.

Extension of Voluntary Departure. 8 CFR 240.26(f).

A period of voluntary departure may be extended only by the district director, and the original period granted plus the extension may not exceed 120 days for initial stage VR or 60 days for completion stage VR. [Note, the same provision is repeated in 8 CFR 240.26(h)].

Reinstatement of Voluntary Departure. 8 CFR 240.26(f).

Although VR cannot be extended by order of the IJ or Board of Immigration Appeals, it may be reinstated if the case is reopened for some purpose other than solely making an application for VR. However, the case must be reopened before the original period of VR expires, and the total amount of VR granted in the original order and the order following reopening cannot exceed the applicable limit of 120 or 60 days. For example: respondent is granted 60 days VR in original order. After 30 days go by, the case is reopened by the IJ because of significant new evidence, such as a revolution in the respondent's country. The resulting asylum claim is eventually

More lenient aspects:

1. There is no limitation on the length of voluntary departure which may be granted, although one year was considered the longest period which could normally be justified.

2. No bond was required.

3. No minimum period of presence in the U.S. was required. *However, aliens seeking admission in exclusion proceedings could not be granted voluntary departure.*

4. It was not necessary to concede removability.

5. An appeal of any non-frivolous issue was available. *However, the BIA had no jurisdiction to consider an appeal challenging the length of voluntary departure as too short, so long as at least 30 days was granted.*

6. It was not required to present a travel document.

7. A person could be granted voluntary departure more than once.

Less lenient aspect: Each applicant for voluntary departure had to establish good moral character throughout the five-year period preceding the application.

Voluntary Departure Case Law:

Recent Cases

Matter of Arguelles-Campos, 22 I&N Dec. 811 (BIA 1999)

This is the landmark case on voluntary departure in removal proceedings. A close reading of it is highly recommended, as it gives the rationale for the two kinds of voluntary departure under § 240B of the Act.

- The BIA found that the IJ erred when he applied the voluntary departure criteria applicable to an Order to Show Cause deportation hearing to a removal setting in adjudicating pre-conclusion voluntary departure under § 240B(a) of the Act.

- The criteria for the exercise of discretion for either version of § 240B voluntary departure in removal proceedings are generally the same criteria considered for voluntary departure in deportation proceedings: the nature of the ground of removal/deportation at issue; additional violations of the immigration laws; the existence, seriousness, and recency of any criminal record; and other evidence of bad character and the undesirability of the applicant as a permanent resident. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972) (voluntary departure discretion in a deportation hearing).

- With regard to pre-conclusion voluntary departure under § 240B(a), both the alien and the Government can appeal on the issues of eligibility and discretion. This indicates that, if the IJ denies either form of voluntary departure, the alien can appeal, and conversely, if the IJ grants either form of relief over Government objection, the Government may appeal.

- In *Arguelles-Campo*, the alien had been granted voluntary departure on five previous occasions (apparently by Government agents), had been ticketed for driving without a license, and admitted he had been driving without a license for the past three years. The alien's equities consisted of two American-born children plus volunteer work at his church. However, the BIA took note that the last voluntary departure occurred three months prior to the institution of removal proceedings, and commented the IJ could reasonably conclude that the alien was using voluntary departure simply as a means to avoid immigration court proceedings.

- The alien cannot appeal the length of voluntary time granted, and an arriving alien cannot apply for voluntary departure as per § 240B(a)(4) of the Act. However, this provision should not be construed from precluding such aliens to move to withdraw their applications for admission in accordance with § 235(a)(4) of the Act. *Arguelles-Campo*, 22 I&N Dec. at 814 n.2.

- The only situation where the IJ may safely forgo such an oral notification is when the record contains a written stipulation or comparable documentary evidence wherein the alien, or the alien's representative of record, expressly waives appeal as part of establishing that all the regulatory requirements of this form of voluntary departure have been established.

Cases Dealing With the Exercise of Discretion

- **Burden of proof** to show worthiness in the **exercise of discretion** is upon the respondent. *Matter of Turcotte*, 12 I&N Dec. 206 (BIA1967); *Matter of Mariani*, 11 I&N Dec. 212 (BIA 1965).

- **Driving while under the influence** is extremely dangerous conduct and a serious adverse factor against granting voluntary departure. *Villanueva-Franco v. INS*, 802 F.2d 327 (9th Cir. 1986).

- **Conviction for illegal entry** under 8 U.S.C. § 1325 is an adverse factor to be considered on the issue of voluntary departure discretion. *Matter of Rina*, 15 I&N Dec. 346 (BIA 1975).

- **Suspension from non-immigrant student status** is a significant factor in evaluating the application for voluntary departure, and can properly be considered as a separate, adverse factor in exercising discretion. *Hassan v. INS*, 66 F.3d 266 (10th Cir. 1995).

- **Prior grant of voluntary departure** and **illegal re-entries with aid of alien smuggler**. Alien first accepted voluntary departure which implied an agreement not to re-enter illegally but she re-entered twice with the alien of an alien smuggler. This afforded a proper basis to doubt her willingness to leave voluntarily and her implied promise not to return illegally and was a proper basis for denying voluntary departure. *Estrada-Posada v. INS*, 924 F.2d 916, 920 (9th Cir. 1990).

- **Illegal entry with aid of alien smuggler** is a serious adverse factor against granting voluntary departure in the exercise of discretion in view of the significant impediment such conduct presents to the effective enforcement of this country's immigration laws. *Matter of Shirdel, et. al*, 19 I&N Dec. 33 (BIA 1984); *Matter of Rojas*, 15 I&N Dec. 492 (BIA 1975).

- **Prior pre-hearing grant of voluntary departure** is a factor to be considered on the issue of discretion. *Tupacyupanqui-Marin v. INS*, 447 F.2d 603 (7th Cir. 1971); *Matter of M–*, 4 I&N Dec. 626, 628 (BIA 1952).

- **Intentional misrepresentations to immigration officers and IJ.** Respondent paid $250.00 to a alien smuggler to assist her illegal entry and then made intentional misrepresentations as to her name and marital status to both the immigration officer at the time of initial interview and to the IJ at the time of hearing. This was a valid basis for denying voluntary departure in the exercise of discretion. *Ramirez v. INS*, 550 F.2d 560, 566 (9th Cir. 1977).

- **Visa petition pending.** The fact that the respondent is the beneficiary of a pending visa petition is a favorable factor on the issue of voluntary departure discretion. *Matter of Raol*, 16 I&N Dec. 466 (BIA 1978).

- **Lawful permanent resident sibling.** The fact that the respondent has an immigrant sibling who may one day be in a position to file a visa petition to immigrate respondent is a valid equity to be considered in the exercise of voluntary departure discretion. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989).

- **Disorderly conduct and other charges pending resolution.** At time of hearing, respondent had pending against him a charge of arson which arose as a result of a violent Iranian student demonstration in this country where police cars were burned and rocks thrown at police. He was involved in a violent confrontation with a police officer and was convicted of disorderly conduct and resisting arrest and fined $15.00. *Held:* Denial of voluntary departure upheld. Respondent's conviction for acting improperly and violently against a police officer militates against him. In addition, a serious felony charge was pending at the time of the deportation hearing can be considered an adverse factor. The fact that the charge was later dismissed does not change the result as the application for voluntary departure was judged on the facts in existence at the time of the hearing. *Parcham v. INS*, 769 F.2d 1001 (4th Cir. 1985).

- **Conviction not involving moral turpitude: possession of altered immigration documents under 18 U.S.C. § 1546.** This misconduct can justify a denial of voluntary departure on a discretionary basis. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

- **Respondent's contest of deportability is not an adverse factor.** Respondent contested the charge of deportability by filing a motion to suppress the Government's evidence of alienage and deportability. The contest failed and the respondent then requested voluntary departure. The IJ denied the application in the exercise of discretion, observing that the respondent's contest "put the Government to a lot of trouble.: Respondent appealed. *Held:* Reversed. The valid exercise of the privilege against self-incrimination should not be penalized by a denial of voluntary departure. *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973).

conclusion voluntary departure.

- Outline the requirements of voluntary departure, with translation to the respondent if he or she does not speak English, and then recess the case with instructions to counsel to take the client out of the courtroom and discuss the issue. Counsel and client later return and the issue then taken up.

- If the respondent indicates, through counsel, that he or she has no interest in pre-conclusion voluntary departure but will ask for voluntary departure at conclusion of hearing, the IJ should point out that:

  - If the charging document was issued to the respondent within one year of his or her arrival in the U.S., the respondent is ineligible for this form of voluntary departure.

  - If the respondent cannot show good moral character for the preceding five-year period, the respondent is ineligible.

  - If the respondent is unable to post a voluntary departure bond with the DHS, within five days of the date of the decision granting conclusion voluntary departure, then the remedy expires and the alternative order of deportation takes effect on the sixth day.

Inasmuch as voluntary departure is a separate and distinct remedy against an order of removal and deportation, it is recommended that it be adjudicated separate and apart from the primary form of relief, such as asylum, cancellation of proceedings, etc. This makes note-taking easier and also makes the record on relief easier to follow.

Voluntary Departure Bars: Pre-Conclusion and Conclusion

If the respondent falls into any of the following categories, he or she is ineligible for either form of voluntary departure and the IJ should deny the application on that ground without reaching the issue of discretion:

- Deportable as aggravated felon under § 237(a)(2)(A)(iii). *See* § 240B(a)(1)

- Deportable under security and related grounds under § 237(a)(4)(B). *See* § 240B(a)(1)

- Arriving alien is ineligible as per § 240B(a)(4).

- Alien previously granted § 240B voluntary departure in removal hearing after having been found inadmissible under § 212(b)(6)(A)- present in US without inspection or parole. *See* § 240B(c) .

- Does the respondent have, or can he or she obtain, appropriate travel documents and submit them to the Department of Homeland Security.
    - It must be remembered that the need for travel documents depends on case facts. For example, Canadian or Mexican respondents require no travel documents to return to their countries. However, a respondent from Poland must depart voluntarily by air and will need a travel document to do so.
- Is the respondent aware that he or she must (each requirement must be clearly set forth on the record):
    - Abandon any contest to the charge in the NTA if one was made.
    - Withdraw all other applications for relief.
    - Agree to actually depart the U.S. within the time granted.
    - Give up the right of appeal.

With this proffer on the record, the IJ can then inquire of the DHS counsel the agency's position on voluntary departure.

- If the DHS counsel voices no opposition to pre-conclusion voluntary departure, then the IJ can grant the remedy in the exercise of discretion.
- If the DHS counsel voices opposition to the voluntary departure remedy, the IJ should ask the facts upon which the opposition is founded.
- The IJ should then ask counsel for the respondent whether those facts (usually information regarding convictions or prior voluntary departures at the hands of DHS agents) are stipulated and, if so, the IJ can then consider them in ruling on pre-conclusion voluntary departure.
    - If the information is not admitted, then the respondent may have to take the stand to be examined on the issues.
- Case law indicates that the IJ has wide latitude in adjudicating applications for pre-conclusion voluntary departure. The legislative history of the statute indicates its purpose is to provide a means for aliens illegally in this country to leave the US without extended litigation. It is recommended that the IJ keep this in mind when ruling on such applications.
- Once the record is complete on the issue of pre-conclusion voluntary departure, then the IJ should announce from the bench the ruling on the application, this in general terms. The

- No extensions can be given

- Bond requirement
  - Usually no bond requirement for pre-conclusion voluntary departure
  - A bond (minimum of $500.00) is required for conclusion voluntary departure
- Appeal
  - Must be waived for pre-conclusion voluntary departure.
  - Can be reserved, even if conclusion voluntary departure is granted.
- Consequences of failing to apply for either form of voluntary departure.
  - The respondent will become subject to arrest and deportation.
  - A deportation on the respondent's record will render him or her ineligible for a period of ten years to return to the US, and after ten years, the respondent may return only upon written permission of the AG. *See* § 212(a)(9)(C) INA.
  - Returning after deportation in violation of law may subject the respondent to criminal prosecution and, upon conviction, a term of imprisonment.

- Once the respondent indicates an understanding of the types of voluntary departure, the IJ then should ask the respondent whether he or she wishes to apply.
  - If the respondent states that he or she will not apply for either form, the IJ should then proceed with a decision to order the respondent's deportation.
  - If the respondent indicates a desire to ask for voluntary departure, the IJ must determine what kind is requested, and then get the DHS view and proceed to a ruling on voluntary departure and a dictation of the decision.

Conclusion Voluntary Departure: Respondent Represented

Typically, this issue will be addressed at individual calendar hearing and sometimes also resolved at master calendar hearing. It may be a situation where the respondent has contested the charge of deportability or removability and the only remedy he or she is seeking, aside from termination of proceedings, is conclusion voluntary departure. The IJ has determined that the motion to

deportation. The Government has voiced no opposition to the application. The Court finds the respondent eligible for this remedy and worthy of it in the exercise of discretion. The following order shall issue:

IT IS HEREBY ORDERED . . .

- If the above scenario does not play out, the IJ will have to hold further hearing on voluntary departure, and address such concerns as:
  - Statutory eligibility, i.e. is the respondent barred from the remedy because of a criminal record, lack of good moral character, inability to pay travel expenses, etc.
  - The issue of the amount of voluntary departure bond. The reference materials indicate that the various DHS offices have a difference of opinion on whether the appearance bond the alien paid can be substituted for the voluntary departure bond.
    - If this issue is raised, the IJ should ask DHS counsel what the policy of his or her office is. Since DHS handles the mechanics of the bond, that office policy should control the issue.
    - As for the amount of bond for conclusion voluntary departure, the IJ must set the amount, in the exercise of discretion, on the facts of the case.
      - For example, if the respondent has no criminal record, and has faithfully attended all prior court session, and has no record of previous apprehensions by immigration office, a minimum bond of $500.00 may be appropriate.
      - On the other hand, if there are adverse factors, the IJ may decide a higher bond is necessary.
  - Worthiness of the respondent for the remedy in the exercise of discretion.
    - The IJ must balance the favorable factors, such as years of residence here, close family members who are either American citizens or immigrants, record of employment, compliance with other laws, such a payment of taxes, and contrast these equities with the adverse factors, such as criminal record, record of other misconduct, record of prior grants of voluntary departure at the hands of immigration officers.
- In the oral decision the IJ will discuss these issues, and state the reasons why he or she is either granting or denying pre-conclusion voluntary departure.

IJ issued a pre-conclusion voluntary departure. This form order can be used to grant pre-conclusion voluntary departure where the respondent has conceded the factual allegations and charge in the NTA, that there are no issues of law or fact on the issue of deportability/removability, that the respondent applies only for pre-conclusion voluntary departure, the Government does not object, and both parties waive appeal.