LEGAL ACTION CENTER

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VOLUNTARY DEPARTURE RULE Q&A[1]

Overview

On December 18, 2008, the Executive Office for Immigration Review (EOIR) issued a final rule on voluntary departure, "Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review." The rule, which goes into effect on January 20, 2009, addresses various aspects of voluntary departure, including the relationships between voluntary departure and motions to reopen and reconsider and petitions for review in the circuit court. These issues have been the subject of extensive litigation in the federal courts. Among other things, this rule:

- specifies that voluntary departure terminates upon the filing of a motion to reopen or reconsider
- specifies that voluntary departure terminates upon the filing of a petition for review
- requires immigration judges and the Board of Immigration Appeals (BIA) to provide notice about the obligations and conditions of voluntary departure and of filing a motions or petition for review
- requires individuals granted voluntary departure to provide proof to the BIA of payment of the voluntary departure bond if a case is appealed
- purports to reverse *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006) (regarding consequences of failing to depart if voluntary departure bond is not posted within five days)

The rule also serves as reminder of the weighty conditions placed on individuals granted voluntary departure and the severe penalties for failing to depart. Individuals who are eligible for voluntary departure should consider the potential repercussions of a grant of voluntary departure before deciding to apply for this relief.

The Legal Action Center (LAC) is issuing this Q&A to inform lawyers about some of the most important aspects of the December 18, 2008 voluntary departure rules. It does not address every

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

aspect of the rules, and lawyers are urged to read the rules and the preamble published in the Federal Register, see 73 Fed. Reg. 76927 (Dec. 18, 2008), available at http://www.aila.org/content/fileviewer.aspx?docid=27460&linkid=187734. In addition to issuing this Q&A, the LAC has been involved in the litigation surrounding voluntary departure and commented on EOIR's proposed regulations. The LAC has posted its comments at http://www.legalactioncenter.org/litigation/voluntary-departure.

What happens to voluntary departure when a person files a motion to reopen or reconsider?

Under the new rule, if a person files a motion to reopen or reconsider during his or her voluntary departure period, the filing automatically terminates the grant of voluntary departure and the alternate order of removal takes effect. 8 C.F.R. § 1240.26(b)(3)(iii).[2] As a result, the person is not subject to the consequences of overstaying the voluntary departure period pursuant to INA § 240B(d) (monetary penalties and ten year bar to various forms of relief, including adjustment of status). 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 very relief sought. *See Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996).

This rule applies to motions filed at the immigration court or the BIA. Filing a motion automatically terminates the voluntary departure; a person is not required to explicitly seek withdrawal of voluntary departure in the motion or in a separate motion. The rule does not allow immigration judges or the BIA to toll, stay or reinstate voluntary departure, except as allowed under current 8 C.F.R. § 1240.26(h). This existing regulation says that an immigration judge or the BIA may reinstate voluntary departure where a case was reopened for a purpose other than solely applying for voluntary departure.

The new rule does not apply to persons who file motions to reopen or reconsider after the voluntary departure period has expired. Such individuals are subject to the consequences of overstaying voluntary departure.

What is the relationship between this rule and the Supreme Court's decision in *Dada v. Mukasey*?

In *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), the Supreme Court also addressed the intersection of motions to reopen and voluntary departure. The Court held that voluntary departure recipients are permitted to unilaterally withdraw their voluntary departure request before the expiration of the voluntary departure period. In its rule, EOIR declined to adopt the approach taken in *Dada* (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.

[2] Unless otherwise noted, the citations in this Q&A are referencing the regulations as they will appear on January 20, 2009, the effective date of this rule.

To read more about the Supreme Court's decision in *Dada*, see AILF's case summary http://www.ailf.org/lac/chdocs/Dada-summary.pdf and Q&A http://www.legalactioncenter.org/sites/default/files/Dada-FAQ_0.pdf. Note, however, that AILF's Q&A predates EOIR's new voluntary departure rule.

What happens to voluntary departure when a person files a petition for review?

A grant 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. 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.

The rule attempts to deprive the circuit courts of the opportunity to issue stays of voluntary departure. 73 Fed. Reg. at 76932. To date, most of the courts of appeals have 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). Only the Fourth Circuit found that it lacks such authority. *Ngarurih v. Ashcroft*, 371 F.3d 182 (4th Cir. 2004).

What notice must immigration judges and the BIA provide regarding voluntary departure?

The final rule's notice requirements respond to some of AILF's criticisms and are an improvement over those EOIR initially proposed.

Notice prior to accepting voluntary departure. Under new 8 C.F.R. § 1240.26(c)(3), prior to accepting voluntary departure, an immigration judge must advise the individual of:

- the amount of the voluntary departure bond and the duty to post bond within five business days; and
- any voluntary departure conditions beyond those enumerated in the regulations.

After this notice is provided, the individual will have the opportunity to accept or decline voluntary departure.

Notice upon grant of voluntary departure. Under 8 C.F.R. § 1240.26(c)(3), the immigration judge also must advise the individual that:

- voluntary departure will terminate automatically upon the filing of a motion to reopen or reconsider during the voluntary departure period and the alternate order of removal will take effect immediately;

- if an appeal is filed, he or she must submit proof of having posted the voluntary departure bond to the BIA within 30 days of filing the appeal. If he or she does not submit proof, the BIA will not reinstate voluntary departure in the final order.[3]

BIA notice obligations. If the BIA reinstates voluntary departure following an appeal, the BIA must advise the individual in writing that voluntary departure will terminate automatically upon the filing of a motion to reopen or reconsider or a petition for review during the voluntary departure period. 8 C.F.R. § 1240.26(i).

Statutory notice provision. Although not addressed by this new rule, by statute, the order permitting an individual to depart voluntarily must inform him or her of the consequences of overstaying the voluntary departure period (including a civil penalty and ineligibility for relief) under INA § 240B(d).

What does the rule say about voluntary departure bond?

Requirement to post bond within five business days. The rule states that an individual granted voluntary departure at the conclusion of proceedings must post bond with ICE within five business days. 8 C.F.R. § 1240.26(c)(4). ICE may detain a person until bond is posted. *Id.* If the individual does not post bond, the alternate order of removal goes into effect. 8 C.F.R. § 1241.1(f). The rule also specifies that failure to post bond may be considered in determining whether the individual is a flight risk and as a discretionary factor with respect to applications for relief. 8 C.F.R. § 1240.26(c)(4).

In addition, the rule states that failure to post bond does not terminate the obligation to depart or exempt a person from the consequences of failing to depart under INA § 240B(d). 8 C.F.R. § 1240.26(c)(4). 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 voluntary departure 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.

The rule provides an exception for some individuals who fail to post bond and would be subject to removal. If a person 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.

Providing proof of posting bond to BIA. Under the rule, if an appeal is filed, an individual must submit proof of having posted the voluntary departure bond to the BIA within 30 days of filing

[3] The regulation is not explicit about when the immigration judge must provide notice of the obligation to submit proof to the BIA. However, it does not seem to require the immigration judge to provide notice prior to the individual accepting voluntary departure.

the appeal. 8 C.F.R. § 1240.26(c)(3)(ii). If he or she does not submit the proof, the BIA will not reinstate voluntary departure in the final order. In the preamble to the rule, EOIR says that Form I-352 (immigration bond worksheet) and Form I-305 (fee receipt) are evidence that bond was posted. 73 Fed. Reg. at 76933.

Return and forfeiture of bond. The rule provides that (1) an individual who departs the U.S. pursuant to a grant of voluntary departure may apply to ICE for the bond to be cancelled, 8 C.F.R. § 1240.26(c)(3)(v), and (2) ICE may cancel a voluntary departure bond if an individual is successful in overturning or remanding an immigration judge's decision regarding removability, 8 C.F.R. § 1240.26(c)(3)(vi). EOIR's decided not to adopt the proposed rule's provision that an individual whose voluntary departure was terminated by filing a motion or a petition for review forfeited his or her bond. *See* 73 Fed. Reg. at 76934. AILF opposed the proposed forfeiture rule in its comments.

What is the effective date of this rule?

This rule is effective on January 20, 2009. It applies prospectively only. 73 Fed. Reg. at 76936. The preamble to the rule also provides examples of how EOIR intends to apply this rule prospectively. *See* 73 Fed. Reg. at 76936. Importantly, according to EOIR, the automatic termination provisions will not apply to motions pending on the effective date, as such individuals did not receive prior notice of the termination rule. *Id.* Individuals with motions currently pending and others not covered by the rule may be able to withdraw their voluntary departure request pursuant to the rule set forth in the Supreme Court's decision in *Dada*. *See id.*; AILF's *Dada* Q&A http://www.legalactioncenter.org/sites/default/files/Dada-FAQ_0.pdf.

What does the rule say about the civil penalty for failing to depart under a grant of voluntary departure?

Although EOIR acknowledges that it lacks authority to enforce or collect a civil penalty for failing to depart voluntarily under INA § 240B(d), 73 Fed. Reg. at 76936, it nonetheless adopted a provision regarding the amount of the penalty. New 8 C.F.R. § 1240.26(j) establishes a rebuttable presumption that penalty for failure to depart shall be set at $3000, unless the immigration judge specifies a different amount. The immigration judge must inform the individual of the amount of the penalty at the time of granting voluntary departure.