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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1240 and 1241

[EOIR Docket No. 163; AG Order No. 3027-2008]

RIN 1125-AA60

Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is publishing this final rule to amend the regulations regarding voluntary departure. This rule adopts, without substantial change, the proposed rule under which a grant of voluntary departure is automatically withdrawn upon the filing of a motion to reopen or reconsider with the immigration judge or the Board of Immigration Appeals (Board) or a petition for review in a federal court of appeals. This final rule adopts, with some modification, the proposed rule under which an immigration judge will set a presumptive civil monetary penalty of \$3,000 if the alien fails to depart within the time allowed. However, this rule adopts only in part the proposals to amend the provisions relating to the voluntary departure bond. Finally, this rule adopts the notice advisals in the proposed rule and incorporates additional notice requirements in light of public comments.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: John Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. PUBLIC PARTICIPATION

The Attorney General published a proposed rule in the Federal Register on November 30, 2007 (72 FR 67674). The comment period ended on January 29, 2008. Comments were received from nine commenters, including public interest law and advocacy groups, a law firm, three non-attorneys, and one immigration bond agency. Since some comments overlap, and other commenters covered multiple topics, the comments are addressed by topic in Sections III-VIII of this preamble, rather than by reference to each specific comment and commenter.

II. INTRODUCTION

A. Background

The Immigration and Nationality Act (INA or Act) provides that, as an alternative to formal removal proceedings and entry of a formal removal order, “[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense.” INA 240B(a)(1), (b)(1) (8 U.S.C. 1229c(a)(1), (b)(1)). Voluntary departure “is a privilege granted to an alien in lieu of deportation.” *Iouri v. Aschroft*, 487 F.3d 76, 85 (2d Cir. 2007), cert. denied, 128 S.Ct. 2986 (2008) (citing *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976)). It is “an agreed upon exchange of benefits between the alien and the government.” *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006), cert. denied, 127 S.Ct. 1874 (2007). This *quid pro quo* offers an alien “a specific

benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government.” *Id.* at 390 (quoting *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004)). When choosing to seek voluntary departure, the alien agrees to take the benefits and burdens of the statute together. *Ngarurih*, 371 F.3d at 194. In order to obtain voluntary departure at the conclusion of removal proceedings, an alien must establish to the immigration judge by clear and convincing evidence that he or she is both willing and able to depart voluntarily. 72 FR at 67674-75.

Section 240B of the Act provides that an alien who is granted voluntary departure at the conclusion of removal proceedings is allowed a period of no more than 60 days after the issuance of a final order in which the alien may voluntarily depart from the United States, and certain penalties apply to aliens who do not voluntarily depart within the time allowed. *See* INA 240B(b)(2), (d) (8 U.S.C. 1229c(b)(2), (d)). Another section of the Act provides that an alien has up to 90 days to file a motion to reopen or 30 days to file a motion to reconsider after entry of a final administrative order issued in removal proceedings. INA 240(c)(6), (7) (8 U.S.C. 1229a(c)(6), (7)). Under longstanding regulation, however, an alien’s departure from the United States, including under a grant of voluntary departure, has the effect of withdrawing the motion. 8 CFR 1003.2(d), *Matter of Armendarez*, 24 I&N Dec. 646, 686 (BIA 2008) (noting that the current regulation bears a strong resemblance to the regulation first introduced in 1952).

B. Summary of Regulatory Changes from the Proposed Rule

The proposed rule explained that the amendments set forth therein were “intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue

administrative motions and judicial review without risking the imposition of the voluntary departure penalties, to promote uniformity, and also to bring the voluntary departure process back to its statutory premises.” 72 FR at 67679, 67682. The proposed rule provided an in-depth background discussion of voluntary departure and motions to reopen and reconsider. *Id.* at 67674-77. This final rule adopts, without change, the sections of the proposed rule providing that an alien’s grant of voluntary departure will automatically terminate if the alien files a motion to reopen or reconsider with an immigration judge or the Board within the time period the alien was granted to depart voluntarily.

The proposed rule also sought to address divergent motions practice among the courts of appeals concerning the impact on the voluntary departure period when filing a petition for review. *See* 72 FR at 67681. This final rule adopts, without change, the sections of the proposed rule providing that an alien’s grant of voluntary departure automatically terminates upon the filing of a petition for review.

The proposed rule provided for additional notice to aliens regarding the consequences of filing a motion to reopen or reconsider, or a petition for review after a grant of voluntary departure. This final rule adopts those amendments, without change, and includes additional notice requirements in light of public comments.

The rule also specified that an immigration judge shall set a specific dollar amount of less than \$3,000 as a civil monetary penalty in the event that the alien fails to depart voluntarily within the time allowed. This final rule adopts modified language providing that an immigration judge will set a presumptive civil monetary penalty of \$3,000 unless the immigration judge sets a

higher or lower amount at the time of granting voluntary departure.

Further, the proposed rule revised the applicable bond provisions to clarify that an alien's failure to post a voluntary departure bond as required did not have the effect of exempting the alien from the penalties for failure to depart under the grant of voluntary departure. This was a reversal of the Board's decision in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). The final rule adopts without change the proposed rule regarding reversal of *Matter of Diaz-Ruacho*.

Finally, the proposed rule provided that the alien remained liable for the amount of the voluntary departure bond if he or she did not depart as agreed, and that failure to post the bond could be considered as a negative discretionary factor in determining whether the alien is a flight risk and in determining whether to grant a discretionary application for relief. Under certain circumstances, however, the proposed rule provided that an alien could get a refund of the bond amount upon proof that he or she was physically outside the United States or if the final administrative order was later overturned, reopened, or remanded. This final rule does not include the language of the proposed rule that an alien forfeits his or her bond upon automatic termination of voluntary departure due to the filing of a motion to reopen or reconsider or petition for review. That issue raises a question about the scope of the authority of the immigration judges and the Board, on the one hand, and the authority of the Department of Homeland Security (DHS) with respect to bond issues. Accordingly, the final rule takes no position at this time with respect to the forfeiture of bond, and language providing for forfeiture of the voluntary departure bond upon the filing of a motion to reopen or reconsider or the filing of a petition for review has been deleted. Because this final rule is not adopting the changes

regarding forfeiture of the bond, there is no need to adopt the provisions for a refund upon proof of being physically outside the country. However, this final rule adopts, in part, the proposed rule regarding the circumstances under which an alien can obtain a refund of the bond amount

where the final administrative order is overturned or remanded, and the rule that failure to post the bond could be considered as a negative discretionary factor in determining whether the alien is a flight risk or whether to grant a discretionary application for relief.

III. RELATIONSHIP BETWEEN VOLUNTARY DEPARTURE AND MOTIONS TO REOPEN OR RECONSIDER

A. The Proposed Rule

While four courts of appeals had held that the alien's filing of a motion to reopen with the Executive Office for Immigration Review (EOIR) within the time allowed for voluntary departure automatically "tolled" the voluntary departure period, thereby allowing the alien to remain in the United States under the grant of voluntary departure until after the immigration judge or the Board had adjudicated the motion,¹ three other courts of appeals have held that the filing of a motion to reopen did not toll the period allowed for voluntary departure.²

The proposed rule sought to address this circuit split by amending the voluntary departure regulations to provide that an alien's timely filing of a motion to reopen or reconsider prior to the expiration of the voluntary departure period automatically terminates the grant of voluntary

¹ See *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006); *Kanivets v. Gonzales*, 424 F.3d 330, 331 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Barríos v. United States Att'y General*, 399 F.3d 272 (3rd Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005).

² See *Chedad v. Gonzales*, 497 F.3d 57, 63–64 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006); *Banda-Ortiz*, 445 F.3d at 389.

departure. Because the grant of voluntary departure would be terminated upon the filing of such a motion, there would be no remaining voluntary departure period and thus no tolling of the period allowed for voluntary departure upon the filing of the motion. In the Department's view, this course of action would protect aliens who file administrative motions within the voluntary departure period from facing the consequences of failing to depart pursuant to a voluntary departure order, such as the loss of eligibility for certain forms of relief.

B. *Dada v. Mukasey* and Related Changes to the Proposed Rule

On June 16, 2008, the Supreme Court decision in *Dada v. Mukasey*, ___ U.S. ___, 128 S.Ct. 2307 (2008), resolved the split among the courts of appeals concerning how the filing of a motion to reopen impacts a grant of voluntary departure. The alien in *Dada* had requested that an immigration judge continue his removal proceedings pending the adjudication of a second visa petition filed on his behalf by his United States citizen spouse. The immigration judge denied the request, and granted the alien a period of voluntary departure pursuant to section 240B(b) of the Act. The Board dismissed the alien's appeal and reinstated the grant of voluntary departure for a 30-day period. Two days before the end of the period allowed for voluntary departure, the alien filed a motion to reopen with the Board, asserting that he had new evidence to support the bona fides of his marriage, and requesting a continuance until his visa petition was adjudicated by DHS. The alien also sought to withdraw his request for voluntary departure. Several months later, the Board denied reopening and cited section 240B(d) of the Act, which bars an alien from adjustment of status and other relief when he or she fails to depart voluntarily within the permitted period. The Board did not address the respondent's request to withdraw his voluntary departure request.

The respondent subsequently filed a petition for review with the United States Court of Appeals for the Fifth Circuit, which affirmed the Board's decision, concluding that there was no automatic tolling of the voluntary departure period.

On certiorari, the Supreme Court considered the situation faced by an alien who abides by a voluntary departure grant and departs within the time allowed. If the alien had filed a timely motion before he or she departed under the grant of voluntary departure, the alien's departure, pursuant to regulation, would have the effect of withdrawing the motion to reopen.

Alternatively, if the alien chose to remain in the United States to await a decision on the motion, he or she could then become ineligible for the relief sought in the motion because in most instances the motion would not be adjudicated until after the voluntary departure period had expired, exposing the alien to the bars under section 240B(d) of the Act. The Court framed the issue as "whether Congress intended the statutory right to reopen to be qualified by the voluntary departure process." *Dada*, 128 S.Ct. at 2311. The Court concluded that, under the current regulations, an alien does not knowingly give up the right to file a motion to reopen once he or she accepts voluntary departure.

The Court rejected the alien's contention that there should be "automatic tolling" of the period of voluntary departure upon the filing of a motion to reopen or a motion to reconsider removal proceedings before the immigration judge or the Board. The Court concluded that such an interpretation "would reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design," and it found no "statutory authority for this result." *Dada*, 128 S.Ct. at 2311, 2319.

In its decision, the Court held that "[a]lthough a statute or regulation might be adopted to

resolve the dilemma in a different manner, as matters now stand the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period.” *Id.* at 2311.

The Department has considered whether to adopt the Court’s approach in *Dada* in this final rule, rather than the automatic termination approach set forth in the proposed rule. The Department has also considered whether to incorporate the Court’s suggestion that “[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture.” *Id.* at 2320. For the reasons explained below, the Department is adopting the automatic termination approach set forth in the proposed rule, and thereby is “resolv[ing] the dilemma in a different manner.” *Id.* at 2311.

C. Termination of Voluntary Departure upon the Filing of a Motion to Reopen or Reconsider

The proposed rule provided that the filing of a motion to reopen or reconsider would have the effect of automatically terminating the grant of voluntary departure. Because voluntary departure is “an agreed upon exchange of benefits between the alien and the Government [that] offers an alien ‘a specific benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government,’” 72 FR at 67675 (internal citations omitted), the proposed rule took the position that an alien’s decision to challenge a final administrative order

through a post-decision motion or petition for review demonstrates that “the alien is no longer willing to abide by the initial *quid pro quo*.” *Id.* at 67679. Instead, an automatic termination of an alien’s grant of voluntary departure upon the filing of a motion to reopen or reconsider would allow the alien to remain in the United States to pursue the motion or petition without becoming subject to the penalties for failure to voluntarily depart. *Id.* at 67680.

Several commenters challenge the Department’s characterization of the *quid pro quo* aspect of voluntary departure in the proposed regulation and the proposal to automatically terminate voluntary departure upon the filing of a post-decision motion to reopen or reconsider. In addition, several of these commenters suggest, as an alternative to the proposed automatic termination rule, that the regulations be amended to provide for the tolling or administrative stay of voluntary departure during the filing of a motion to reopen or reconsider, or that the immigration judges and the Board be given the discretion to waive the automatic termination procedure and stay or reinstate voluntary departure when appropriate.³ One commenter suggests that the voluntary departure time could be improved by changing the expiration date on the voluntary departure order to a suitable time, taking into account when the case can be reopened and when it will most likely be completed.

³ With regard to reinstatement, the ability to reinstate voluntary departure is already covered under the current regulations in the context of permitting reinstatement of voluntary departure in a proceeding which has been reopened for another purpose if reopening was granted prior to the expiration of the original period of voluntary departure. 8 C.F.R. 1240.26(f), (h).

⁴ It is the considerable expense of protracted litigation that negates any savings to the government of avoiding the costs of removal. The Department has not ignored avoiding the costs of removal as a potential benefit for savings through a voluntary departure grant, as suggested by several commenters. Rather, the Department is equally deprived of this benefit where an alien fails to quickly depart in accordance with a voluntary departure order.

As the Supreme Court recognized in *Dada*, there is no statutory authority for tolling. *Id.* at 2311, 2319; *see also* section 240B(b)(2) of the Act (providing for no more than 60 days to voluntarily depart). To the extent the commenters were relying on previous appellate decisions to the contrary, those holdings have now been overruled. Further, as the proposed rule explained, tolling the period of voluntary departure deprives the government of an important

element of the voluntary departure agreement—“a quick departure without the considerable expense of protracted litigation.” 72 FR at 676814.⁴ Thus, after the issuance of a final order, immigration judges and the Board cannot stay the voluntary departure period, or extend the expiration of the voluntary departure period, beyond the amount of time provided by statute.

The Court’s decision also discusses the *quid pro quo* benefits to the government and the alien in much the same way as the proposed rule. *Dada*, 128 S.Ct. at 2314. The Court found that allowing an alien to elect to withdraw voluntary departure before the expiration of the voluntary departure period “preserve[d] the alien’s right to pursue reopening while respecting the government’s interest in the *quid pro quo* of the voluntary departure arrangement.” *Dada* at 2319. Accordingly, this final rule retains the *quid pro quo* analysis of the proposed rule as a basis for these regulatory amendments. *See* 72 FR at 67675-76, 67679-80.

This final rule also retains the proposal that an alien’s grant of voluntary departure will automatically terminate upon the filing of a motion to reopen or motion to reconsider. In *Dada*, the Court provided the alien with a different option: a unilateral right to withdraw from the

voluntary departure agreement in connection with the filing of a motion to reopen or reconsider. *Dada*, 128 S.Ct. at 2319. The Department does not believe that this is the best approach to adopt by rule for the future, for several reasons.

First, the Department finds it preferable to adopt the proposed rule that was subject to a comment period, rather than delay finalizing this new rule for further consideration of the *Dada* approach. Second, allowing the option of withdrawal would seem to require an immigration judge to provide additional advisals to an alien regarding another aspect of the bargain to which the alien is agreeing. The Department is concerned that the growing number of advisals surrounding voluntary departure creates the potential for confusion and unnecessary complexity; this would be especially true for the many pro se aliens who appear before immigration judges. The Department is considering the use of an application form to request voluntary departure, which can then set forth all of the necessary advisals for voluntary departure. However, we do not want to delay publication of this final rule for development and implementation of a form. Further, even with a form that includes advisals, the option to withdraw might continue to be difficult to navigate.

Finally, allowing an alien the option to withdraw from voluntary departure carries the potential for confusion, inadvertent omissions of withdrawal requests, and collateral challenges over whether the alien actually intended, or should have sought, to withdraw voluntary departure in filing a motion. For instance, an alien filing a motion to reopen to seek adjustment of status might either intend to request withdrawal but fail to include the request, or not know to make the request. The alien might later argue that the motion should have been construed as a request for withdrawal since he or she would not otherwise be eligible for the relief sought if the voluntary

departure bar applies. The automatic termination rule is more clear-cut and saves the Department from having to dedicate additional resources to a second round of collateral litigation.

This rule will apply to motions filed before immigration judges and the Board. For instance, some aliens file motions to reopen with immigration judges before seeking appeal with the Board. In this case, the alien's voluntary departure would be terminated upon the filing of the motion with the immigration judge. If, while the alien's motion is pending with the immigration judge, the alien subsequently files a Notice of Appeal with the Board, the Board assumes jurisdiction over the case, and the motion becomes nugatory. In this instance, the Board may reinstate the alien's voluntary departure, if the alien demonstrates, as set forth in the rule, that he or she properly posted the voluntary departure bond within the required time period. *See* Section VI, *infra*, for further discussion regarding notice to the immigration judge or the Board that the bond was posted.

Several commenters took issue with this automatic termination rule and asserted that if an alien is forced to give up voluntary departure to pursue a motion, the alien would be improperly discouraged from filing a motion to reopen. These comments note examples of applicants for asylum who benefit from voluntary departure by being able to choose the country to which they will depart, or by returning to their home countries without the "high profile that accompanies deportation."

The Department is cognizant of the various ways in which aliens benefit from voluntary departure. However, the Department must balance these considerations against the overriding responsibility to implement the voluntary departure process in accordance with its statutory premises. There is no statutory authority for tolling. *See Dada*, 128 S.Ct. at 2311, 2319; *see also*

INA 240B(b)(2) (providing for no more than 60 days voluntary departure when granted at the conclusion of proceedings). Therefore, expiration of the voluntary departure period cannot be changed beyond the amount of time provided by statute.

Even the approach taken by the Supreme Court in *Dada* requires the alien to make a choice: “as a result, the alien has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure, or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion.” *Dada*, 128 S.Ct. at 2319. As the proposed rule recognized, “it is often the case that an immigration judge or the Board cannot reasonably be expected to adjudicate a motion to reopen or reconsider during the voluntary departure period.” 72 FR at 67677. Thus, even if the filing of a motion did not result in automatic termination of voluntary departure, an alien who was granted voluntary departure and later files a motion to reopen to apply for asylum is going to be faced with a choice because it is unlikely that the alien’s motion would be adjudicated in enough time to allow the alien to depart within the limited time period permitted for voluntary departure if the motion is denied. *See Dada*, 128 S.Ct. at 2317 (“It is foreseeable, and quite likely, that the time allowed for voluntary departure will expire long before the BIA issues a decision on a timely filed motion to reopen.”) (citing the proposed rule). In any event, an applicant for asylum is not an appropriate example to use to illustrate the choice faced by aliens granted voluntary departure but seeking discretionary relief through a post-order motion because the consequences for overstaying the period of voluntary departure do not preclude an alien from receiving asylum. Section 240B(d) bars an alien from obtaining future voluntary departure grants, adjustment of status under INA section 245,

cancellation of removal, change of nonimmigrant status, and registry. Section 240B(d) does not make an alien ineligible for asylum, withholding of removal under section 241(b)(3), protection under Article 3 of the Convention Against Torture, or adjustment of status for asylees and refugees under INA section 209.

The only other means by which aliens facing a choice between voluntary departure and filing a post-order motion might continue to benefit from voluntary departure and pursue a motion to reopen would be the Supreme Court's suggestion that "[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture." *Dada*, 128 S.Ct. at 2320. The Board recently discussed many of these issues in *Matter of Armendarez*, *supra*. As the Board stated, "the physical removal of an alien from the United States is a transformative event that fundamentally alters the alien's posture under the law." 24 I&N Dec. at 656. While aliens who voluntarily depart may not be considered "physically removed" through execution of a removal order, the controlling regulatory provisions and the force of the Board's statement apply equally in both situations. An alien's departure from the United States, even under a grant of voluntary departure, may trigger a new ground of inadmissibility under section 212(a)(9)(B) or (C) of the Act (8 U.S.C. 1182(a)(9)(B), (C)). Under section 212(a)(9)(B)(i)(II), an alien is inadmissible for ten years from the date of departure (whether voluntary or removed) if he or she was unlawfully present in the United States for one year or more after April 1, 1997. Though this provision is inapplicable to several categories of aliens including, for example, minors and aliens who have filed a bona fide asylum application,

many aliens will be subject to this ground of inadmissibility because of the period of unlawful presence they have already accrued. On the other hand, in order to be eligible for voluntary departure at the conclusion of proceedings, aliens must demonstrate that they have been “physically present in the United States for a period of at least one year immediately preceding the alien’s application for voluntary departure.” INA 240B(b)(1) (8 U.S.C. 1229c(b)(1)). While some aliens may be able to satisfy this physical presence requirement through the time within which an alien may have been lawfully in the United States, in many other cases the period of physical presence includes the amount of time an alien was not lawfully present. Many aliens who depart the United States due to being subject to a removal proceeding have accrued one year or more of unlawful presence and would be inadmissible under section 212(a)(9)(B)(i)(II) of the Act if they depart and then seek admission to the United States. Similarly, under section 212(a)(9)(C)(i)(I), an alien who was unlawfully present in the United States for an aggregate period of more than 1 year, departs, and thereafter enters or attempts to enter the United States without being admitted is inadmissible.

Further, waivers of inadmissibility under section 212(a)(9)(B) of the Act are limited to “an immigrant” who is the spouse, son, or daughter of a United States citizen or legal permanent resident and can show that this qualifying relative would suffer “extreme hardship” if his or her admission were denied. For aliens inadmissible under section 212(a)(9)(C) of the Act, the alien must wait for ten years after the date of the alien’s last departure before the alien may request that the Secretary of Homeland Security consent to an alien’s reapplying for admission (with a narrow exception for aliens who have been battered or subjected to extreme cruelty).

In addition, there are issues with respect to aliens who voluntarily departed, if the

immigration judge or the Board thereafter grants the motion to reopen or reconsider after the alien has departed from the United States. One possibility is that the alien might seek to be paroled back into the United States to pursue the benefits of reopening, but the granting of parole is not within the authority of the immigration judges or the Board. *Matter of Armendarez, supra* at 656-57, FN8 (recognizing that “the Immigration Judges and the Board have been given no authority to compel the DHS to admit or parole such aliens into the United States”); *Matter of Conceiro*, 14 I&N Dec. 278 (BIA 1973), *aff’d*, *Conceiro v. Marks*, 360 F.Supp 454 (S.D.N.Y. 1973). Instead, DHS determines whether to grant parole for “urgent humanitarian reasons or significant public benefit” pursuant to section 212(d)(5) of the Act, 8 U.S.C 1182(d)(5).

With respect to aliens seeking adjustment of status, the same inadmissibility impediments discussed herein may exist since in general, in order to be eligible for adjustment, an alien must be “admissible to the United States.” INA 245(a) (8 U.S.C. 1255(a)). Moreover, allowing an alien to pursue a motion to reopen from outside the United States in order to obtain adjustment of status is in clear tension with the purpose of adjustment of status, which is to provide a means for aliens to obtain lawful permanent resident status from within the United States without the need to depart in order to obtain an immigrant visa from a consular officer abroad. For aliens outside the United States, Congress has designed the immigration system such that aliens seeking admission as immigrants are to obtain an immigrant visa from a consular officer abroad.

Further complicating matters is the fact that the alien would have departed voluntarily. This is significantly different than the situation where an alien is ordered removed, the removal

order is executed, and a federal court of appeals later vacates the removal order. In the latter circumstance, if the court finds that the alien's removal was improper, the government may be required to return the alien to the United States. In the context of voluntary departure, there would be no improper voluntary departure that the government must rectify, since the alien departed after the issuance of the grant of voluntary departure as he or she had promised to do. In addition, unlike a federal court of appeals, EOIR does not have the authority to order the return of an alien upon the granting of a motion.

The foregoing demonstrates the complex issues raised by allowing an alien granted voluntary departure, or any alien, the ability to pursue an administrative motion after departing the United States. While the Department is not foreclosing the idea of adopting such an approach in the future, it has concluded that the present rulemaking does not provide an adequate

basis for addressing and resolving these issues and concerns at this time, particularly in the absence of an opportunity for public comment on such a proposal and how it might be implemented.

This final rule does not adopt the proposed rule regarding forfeiture of the voluntary departure bond where an alien's voluntary departure is terminated upon the filing of a motion to reopen or reconsider. *See* Section VI, *infra*, for further discussion.

Finally, no comments were received regarding the separate provision in the proposed rule providing "that the granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect does not have the effect of vitiating or

vacating those penalties, except as provided in section 240B(d)(2) of the Act.” 72 FR at 67680.

This rule explicitly declines to follow an interpretation that may have been reflected in prior court decisions to the effect that the Board’s grant of reopening would have the effect of vacating the underlying voluntary departure order and the penalties attributable to the alien’s voluntary failure to depart during the time allowed. This rule will be adopted in this final rule, without change.

IV. TERMINATION OF VOLUNTARY DEPARTURE UPON THE FILING OF A PETITION FOR REVIEW

Several commenters criticize the proposal to terminate voluntary departure upon the filing of a petition for review in a federal court of appeals, arguing that it is overreaching, beyond the scope of the Attorney General’s authority, and would restrict access to judicial review. One of the commenters states that “there is no role for EOIR to play in maintaining the uniformity of the courts of appeals’ own procedures and practices,” and the proposed rule “takes discretion away from federal judges.”

The proposed rule clearly sets forth the Attorney General’s authority to “implement the voluntary departure provisions of the Act and to limit eligibility for voluntary departure for specified classes or categories of aliens, as provided in section 240B(e) of the Act.” 72 FR at 67678. In this context, the Attorney General is not “maintaining the uniformity of the courts of appeals’ procedures and practices,” or taking discretion away from federal judges. Rather, pursuant to section 240B(e) of the Act, the Attorney General is exercising his authority to limit eligibility for voluntary departure to ensure uniform application of the immigration laws.

The Supreme Court’s decision did not resolve the separate issue of whether the courts of

appeals have the authority to grant a motion to stay the period allowed for voluntary departure pending a petition for judicial review with the court of appeals. *See Dada*, 128 S.Ct. at 2314; compare *Thapa v. Gonzales*, 460 F.3d 323, 329-32 (2d Cir. 2006) (holding that the court may stay voluntary departure pending consideration of a petition for review on the merits), and *Obale v. Attorney General of United States*, 453 F.3d 151, 155-57 (3d Cir. 2006) (same), with *Ngarurih v. Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) (holding that the court may not stay voluntary departure period pending consideration of a petition for review).

The divergent practice among the federal courts of appeals undermines the sound public policy reasons to “promote a greater measure of uniformity and expedition in the administration of the immigration laws.” *See* 72 FR at 67678. As the Supreme Court stated in *Dada*, the voluntary departure statute “contains no ambiguity: The period within which the alien may depart voluntarily ‘shall not be valid for a period exceeding 60 days.’” *Dada*, 128 S.Ct. at 2316. Yet, an alien’s ability to obtain a judicial stay in some circuits, but not others, provides certain aliens with a different rule than that recognized by the Supreme Court, that is, the ability to extend their voluntary departure periods well beyond 60 days. The grant of a stay of voluntary departure by a circuit court essentially tolls the voluntary departure period. Although not addressing voluntary departure in the circuit court context, the Supreme Court made clear that there is no statutory authority for tolling. *Dada*, at 2311, 2319; see also section 240B(b)(2) of the Act (providing for no more than 60 days to voluntarily depart). A stay deprives the government of the same principal considerations of the voluntary departure period—“a quick departure without the considerable expense of protracted litigation.” 72 FR at 67681.

The concern expressed by the Department in the proposed rule regarding the granting of judicial stays continues to be significant. 72 FR at 67681-82. In practice, we have seen that those who seek judicial review do not adhere to the terms of the agreement and depart, despite the clear statutory authority for such aliens to continue to pursue judicial review even after they have departed from the United States. See *Mendez-Alcaraz v. Gonzales*, 464 F.3d 842, 844 n.8-13 (9th Cir. 2006) (holding that permanent rules under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (Sept. 30, 1996), effective April 1, 1997, “do not include the old jurisdiction-stripping provision for excluded, deported, or removed aliens” under former 8 U.S.C. 1105a(c); that the court retains jurisdiction over a petition for review after an alien has departed; and that a petitioner’s removal does not render a case moot). Rather, aliens have sought to remain in the United States, which has resulted in this “non-uniform, patchwork system of motions practice in the courts of appeals.” 72 FR at 67681. Aliens granted stays are effectively allowed to remain in the United States for months and years after the statutorily required time to depart.

While the Supreme Court did not consider the effect of judicial stays of voluntary departure in *Dada* because the issue was not presented for decision in that case, the Court’s analysis regarding the time allowed to voluntarily depart supports the Department’s position that the time for an alien to voluntarily depart should be limited to that allowed by statute. *Dada*, 128 S.Ct. at 2319 (recognizing that there is no statutory authority for tolling, and finding that “the alien when selecting voluntary departure is [under] the obligation to arrange for departure, and

actually depart, within the 60-day period”); 72 FR at 67682 (“This [automatic termination rule for petitions for review] is consistent with the congressional intent, as expressed in the 1996 changes to the Act, that aliens may no longer remain in a period of voluntary departure for years, but instead are strictly limited to a discrete period of time for voluntary departure.”).

Because few aliens choose to use the authority granted by Congress to pursue judicial review after departing from the United States, and because the practice of granting stays has resulted in non-uniform application of the immigration laws, the Attorney General is exercising his statutory authority to limit eligibility for voluntary departure to those aliens who do not seek judicial review. Accordingly, this final rule adopts the automatic termination rule for an alien granted voluntary departure who files a petition for review in order to result in “a uniform application of the effect of the voluntary departure period in all the circuit courts of appeals.” 72 FR at 67682.

However, in an effort to provide an incentive for aliens to depart during their voluntary departure periods and pursue judicial review from their home countries, the proposed rule sought comment on “whether or not it might be advisable (and the possible means for accomplishing such a result) to consider adopting a rule that those aliens who do depart the United States during the period of time specified in the grant of voluntary departure, after filing a petition for review, would not be deemed to have departed under an order of removal for purposes of section 212(a)(9)(A) of the Act.” 72 FR at 67682.

One comment was submitted in response to this request. This comment suggests that the recommendation in the proposed rule regarding section 212(a)(9)(A) of the Act be adopted. Based on this favorable comment, and further consideration by the Department, this final rule

adopts new 8 CFR 1240.26(i) to provide that if an alien who was granted voluntary departure files a petition for review any grant of voluntary departure shall terminate automatically upon the filing of the petition and the alternate order of removal shall immediately take effect, except that the alien will not be deemed to have departed under an order of removal if the alien (i) departs the United States no later than 30 days following the filing of a petition for review; (ii) provides to DHS such evidence of his or her departure as the ICE Field Office Director may require; and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.

The voluntary departure statutory provision states that an order granting voluntary departure is entered “in lieu of removal.” INA 240B(b)(1). It is by regulation, however, that the Attorney General requires immigration judges and the Board to enter an alternate order of removal upon granting voluntary departure. 8 CFR 1240.26(d). It is also by regulation that the Attorney General dictates when this alternate order of removal becomes effective. *See e.g.*, 8 CFR 1240.26(c)(3) (“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 on the following day”). In addition, immigration judge and Board orders state that “if the respondent fails . . . to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following orders shall thereupon become immediately effective.” In the proposed rule, the Attorney General further proposed that if an alien’s voluntary departure terminates due to the filing of a post-order motion or petition for review, “the alternate order of removal will take effect immediately.” 72 FR at 67686. This final rule adopts an exception to the proposed rule. If an alien does depart and meets the conditions described above, the alien will not have departed under a removal order.

In order for an alien to take advantage of this opportunity to avoid the stigma of departing under an order of removal, it will be necessary for the alien to establish a contemporaneous record documenting the alien's departure from the United States by notice to DHS documenting his or her departure and to establish that he or she remains outside of the United States. Evidence sufficient to meet these requirements may include proof of the alien's intended departure and itinerary, and prompt presentation by the alien along with such evidence necessary to prove his or her timely departure to a United States consulate. DHS may determine other acceptable proof documenting the alien's time of departure or define the timely period as meeting the definition of prompt presentation.

A statement setting forth this rule will be added to the advisals regarding voluntary departure that are already included with Board decisions.

Finally, this final rule does not adopt the provisions of the proposed rule regarding forfeiture of the voluntary departure bond where an alien's voluntary departure is automatically terminated upon the filing of a petition for review. *See* Section VI, *infra* for further discussion.

V. NOTICE TO THE ALIEN UNDER THE RULE

Several commenters state that the notice provisions set forth in the proposed rule are insufficient because they only provide notice of the consequences of accepting voluntary departure after an alien actually does accept voluntary departure. One commenter posits that the large majority of aliens who are unrepresented in immigration proceedings base their limited knowledge of penalties and obligations on the explanations given by immigration judges. In addition, this commenter suggests that the Board notify aliens when dismissing their appeals of aliens' right to file a petition for review in a federal court of appeals within 30 days. Another

commenter states that the rule fails to include a requirement that the immigration judge notify aliens of their obligation to submit proof to the Board that the bond has been posted in order for the Board to reinstate their voluntary departure. This same commenter argues that the timeframe to submit this proof to the Board—“in connection with the filing of an appeal with the Board”—is “unnecessarily restrictive.”

The Department agrees that timely notice to aliens regarding their rights, responsibilities, and the consequences associated with voluntary departure is an important issue. This final rule retains the proposed changes to 8 CFR 1240.11 to provide that the immigration judge will advise an alien that voluntary departure will be automatically terminated if the alien files a motion to reopen or reconsider during the pendency of the period in which to depart; and for the Board to inform aliens that voluntary departure will be automatically terminated if the alien files a motion to reopen or petition for review during the pendency of the period in which to depart. In addition, this final rule also amends 8 CFR 1240.26 to require immigration judges to inform aliens of the bond amount that will be set before allowing the alien to accept voluntary departure, as well as any other conditions the immigration judge may set in granting voluntary departure. The alien will then have an opportunity to accept the grant of voluntary departure, upon the conditions set forth, or in the alternative the alien may decline the voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

Regarding the requirement to submit proof to the Board that the bond has been posted in order for the Board to reinstate voluntary departure, section 1240.26 is revised to require notice regarding the need to file proof of posting a bond with the Board in the immigration judge’s decision, and the effect of failing to timely post the bond. Further, this rule revises the timeframe

to submit this proof to the Board to “within 30 days of filing of an appeal with the Board.” After an immigration judge issues his or her decision, an alien has five business days to post the bond and thirty days to file an appeal with the Board. From the date the appeal is filed with the Board, the alien will have thirty days to submit proof to the Board that the bond was posted. Evidence that the bond was posted may include a copy of Form I-352, the Immigration Bond worksheet that will be provided to the obligor when the bond is posted with DHS Immigration and Customs Enforcement (ICE) Detention and Removal Office (DRO), or Form I-305, which is the fee receipt provided by DRO.

The Department has also considered the suggestion that the Board notify aliens of their right to file a petition for review within 30 days of the Board’s dismissal of the alien’s appeal. This advisal is beyond the scope of this rule, as it would require the Board to include such an advisal in every decision, not just those involving voluntary departure. However, such an advisal can be implemented administratively without the need for a regulation. The Board historically has not given such a notice, but the Department will give further consideration to the matter administratively.

VI. ISSUES RELATING TO THE VOLUNTARY DEPARTURE BOND

Four commenters provided comments regarding the voluntary bond provisions included in the proposed rule. The proposed rule provided for the following unless the alien departs within the time permitted to depart, or is successful in reopening or overturning the final administrative order: (1) aliens who are granted voluntary departure but fail to post the bond within the required five business days remain liable for the bond amount regardless of whether voluntary departure is later terminated due to the filing of a motion or petition for review; (2)

aliens who are granted voluntary departure and post bond will forfeit the bond if voluntary departure is later terminated due to the filing of a motion or petition; (3) an alien's failure to post bond does not relieve the alien of the obligation to depart and the alien will be subject to the consequences for failure to depart if the alien does not depart within the permitted period (reversing the Board's decision in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006)); (4) an alien's failure to post bond within the required five business days may be considered in determining whether the alien is a flight risk and as a negative discretionary factor with respect to discretionary forms of relief; (5) aliens who waive their administrative appeal at the conclusion of proceedings and fail to post bond within the required five business days will become subject to the final order of removal after the fifth business day; and (6) in order to have voluntary departure reinstated by the Board on appeal, the alien must provide proof to the Board at the time of the appeal that the bond was posted.

None of the comments took issue with the proposed rule that aliens who are granted voluntary departure and fail to post their bond remain liable for the bond. However, based on further discussion below, this final rule does not adopt the part of the proposed rule that imposed continuing liability for the bond "regardless of whether voluntary departure is later terminated due to the filing of a motion or petition for review." Because issues relating to forfeiture of bond can be complex, and also implicate the authority of DHS as well as that of the immigration judge and the Board, the final rule does not include the provision that the alien will forfeit the bond if the alien's voluntary departure is later terminated upon the filing of a post-order motion or a petition for judicial review.

Three of the commenters describe the proposed rules as unduly burdensome, unfair, and

punitive. Two of them state that these rules should not be adopted because notice to the alien of these rules is insufficient. As discussed in Section IV, part C, this final rule requires that notice of the consequences of failing to depart voluntarily, the consequences of filing a post-decision motion, the amount of bond and any other conditions the immigration judge intends to impose, all be provided to aliens at the time they request voluntary departure.

One commenter posits that the rules appear to regulate enforcement related issues that are within the purview of DHS, not EOIR, because they involve bond and monetary penalties. This commenter, as well as one other, objects to the rules proposing forfeiture of the bond where voluntary departure is later terminated and the alien is no longer under an obligation to voluntarily depart. This commenter describes this rule as a due process violation precisely because the alien is no longer under an obligation to depart, and because in some cases the alien may be prevented from departing because he or she is detained pending execution of the removal order.

Pursuant to section 103(g)(2) of the Act, the Attorney General has the authority to “establish such regulations, prescribe such forms of bond . . . and perform such other acts as the Attorney General determines to be necessary for carrying out this section.” Further, section 240B(b)(3) of the Act states that the bond amount will “be surrendered upon proof that the alien has departed the United States within the time specified,” and does not, by its terms, provide exceptions for the circumstances of an alien who later decides that he or she does not wish to depart within the time specified. As explained in the proposed rule, “the purpose of the bond [is] to ensure that the alien does depart during the time allowed, as the alien had promised to do at the time of the immigration judge’s order granting voluntary departure.” 72 FR 67683. The

Department considers the bond akin to earnest money provided by the alien at the time the voluntary departure contract is entered. By posting the bond, the alien is manifesting the intent to follow through with the bargain under which he or she intends to depart the United States within the specific time period allotted at no cost to the government. While the alien may later change his or her mind, this does not extinguish the initial promise and the government's reliance on that promise.

On the other hand, the Department recognizes that issues relating to forfeiture of bond also implicate the authority of DHS. Public comments stated that aliens should not be penalized for filing a post-order motion or a petition for review. The Department has also considered the language of the Supreme Court's decision in *Dada* ("the alien who withdraws from a voluntary departure arrangement *is in the same position* as an alien who was not granted voluntary departure in the first instance"), *id.* at 2320 (emphasis added), though it is worth noting that the Court's observation there was in the context of the option for withdrawal of a request for voluntary departure, an option that the Department has chosen not to follow in this final rule.

In light of the foregoing considerations, this final rule does not include the bond forfeiture rule previously proposed. Because this final rule is not adopting the changes regarding forfeiture of the bond, there is no need to adopt the provisions for a refund of the bond upon proof of being physically outside the country. These are issues that DHS will be able to address in carrying out its responsibilities relating to the posting and surrender of bonds.

However, this final rule adopts, in part, the proposed rule regarding the circumstances under which an alien can obtain a refund of the bond amount where the final administrative order is overturned or remanded. This rule allows for refund of the bond where an alien is granted

voluntary departure by an immigration judge, posts the voluntary departure bond within the time required, appeals the immigration judge's decision to the Board, and obtains reversal or remand of the immigration judge's decision regarding the order of removal. If, pursuant to the Board's decision, the alien is no longer removable then the alien should obtain a refund of his or her bond. In that situation, the grant of voluntary departure did not take effect since the immigration judge's decision is stayed upon the filing of an appeal to the Board, and the Board's decision overturning or remanding the immigration judge's decision on the merits thereby renders issues relating to voluntary departure moot. Likewise, if, pursuant to a remand by the Board, the alien is not currently subject to an order of removal, the alien should obtain a refund of the bond amount.

Lastly, this commenter states that DHS should provide the Board with information regarding whether the alien actually posted bond, and that 30 days to provide this information to the Board is a restrictive amount of time. The commenter provides the example of a detained alien whose family member may have posted the bond. In this case, the commenter argues, the 30 days may not be enough time for the alien to gather the information needed regarding bond and provide it to the Board.

In light of the comments, the Department is revising this rule to allow an alien to provide proof to the Board of having posted the bond within 30 days of the filing of the Notice of Appeal. As for requiring DHS to provide the information, such a process would assume that every alien granted voluntary departure by the immigration judge would request reinstatement by the Board. Further, it is the alien's burden to demonstrate to the Board continuing eligibility for voluntary departure. *See* 8 CFR 1240.11(d); 72 FR 67685 ("the burden of proof is on the alien to establish

eligibility for a discretionary form of relief”) (internal citations omitted). Thus, it would be inappropriate to require DHS to be responsible for providing this information relating to the posting of the bond by the alien, as the alien had agreed to do.

Another commenter opposes the flight risk and negative discretion factors. This commenter argues that this categorical approach ignores individual circumstances and creates penalties for the small fraction of aliens who only qualify for voluntary departure due to their strong equities and characteristics in the first place. This rule does not mandate that aliens who do not post their voluntary departure bonds are flight risks or that they should be denied relief in the exercise of discretion. Rather, this rule provides guidance to adjudicators regarding particular factors they may consider in exercising discretion.

For instance, an alien’s failure to post the bond “may be considered” a negative discretionary factor with regard to relief. 72 FR 67684, 67686. Specific inclusion of these potentially adverse factors in the voluntary departure regulations is appropriate to encourage aliens to adhere to the bond requirement within the required five business days, as they had specifically promised to do. If a rule carries no consequence for failure to comply, then the rule may be rendered effectively meaningless. The proposed rule that an alien’s voluntary departure is terminated upon failure to post bond where the alien waived administrative appeal serves the same purpose. 72 FR 67684 (stating that “this proposal ensures that aliens who waive appeal before the immigration judge still have an incentive to post bond as they agreed to do.”). Accordingly, the Department adopts without change the provisions of the proposed rule regarding the adverse factors for failure to post bond and termination of voluntary departure for failure to post bond by an alien who waives administrative appeal.

One commenter objects to the proposed rule changing the result in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). As noted in the proposed rule, the result in *Diaz-Ruacho* is not a sound policy approach because the alien's default should not exempt the alien from the penalties for failure to depart. 72 FR 67684. Moreover, the commenter does not state how the practical concerns of retaining *Diaz-Ruacho* might be avoided if *Diaz-Ruacho* were retained. See *id.* (“using the failure to post a bond as the trigger that vitiates the grant of voluntary departure does not make practical sense because it is not an open, discrete, affirmative step and there is no ready process for highlighting the absence of a bond”).

The approach set forth in this final rule recognizes that aliens who request voluntary departure and enter into this agreement with the government may not simply back out of the agreement because they later realize that they actually have to depart or be subject to the consequences of failing to voluntarily depart. This rule is designed to address the conflict recognized in *Dada* for aliens whose circumstances have changed and want to pursue a motion to reopen, or who believe error exists in the administrative decision and want to pursue a motion to reconsider but cannot do so if they comply with the voluntary departure order. As for those aliens who file petitions for review, this rule is also designed to prevent the voluntary departure period from being extended beyond the statutorily permitted amount of time by the issuance of a judicial stay. Neither of these intended purposes of the rule allows for an alien unilaterally to change his or her mind after having been granted voluntary departure; which is what would occur if an alien's failure to post bond merely resulted in vitiating the original grant of voluntary departure.

None of the comments specifically object to the rule that an alien who waives appeal at

the conclusion of proceedings and fails to post bond within the required five business days will immediately become subject to the final order of removal. The proposed rule also stated, however, that “if the alien thereafter does depart within the voluntary departure period, the alien will not be subject to the penalties under 240B(d) of the Act (8 U.S.C. 1229a(c)(4)(B)) or inadmissibility under 212(a)(9)(A) of the Act.” 72 FR at 67684. This final rule adopts this provision. However, in order to maintain consistency between this provision and the similar provision being adopted for the filing of petitions for review, this final rule revises the regulatory language to read: “if the alien had waived appeal of the immigration judge’s decision, 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 CFR 1241.1(f), except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien: (i) departs the United States no later than 25 days following the failure to post bond; (ii) provides to DHS such evidence of his or her departure as the ICE Field Office Director may require; and (iii) provides evidence DHS deems sufficient that he or she remains outside of the United States.”

As explained above in the context of petitions for review, in order for an alien to take advantage of this opportunity to avoid the stigma of departing under an order of removal, it will be necessary for the alien to establish a contemporaneous record documenting the alien’s departure from the United States by notice to DHS documenting his or her departure and to establish that he or she remains outside of the United States. Evidence 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. DHS may determine other acceptable proof documenting the alien's time of departure or define the timely period as meeting the definition of prompt presentation

Finally, one commenter asks whether the filing of a motion would terminate the voluntary departure bond. As explained earlier, issues relating to the cancellation of bond implicate the authority of DHS. Thus, the Department is not in a position to unilaterally respond to this comment in this rulemaking. However, the Department has consulted with DHS regarding this question and DHS is considering the appropriate way to respond and provide guidance for this and similar bond questions.

In addition, this commenter states that the bond should be raised to \$5,000 because \$500 is not enough leverage to ensure departure. Under the regulations, the specific bond amount is within the discretion of the immigration judge, to be set "in an amount necessary to ensure that the alien departs within the time specified," except that it can be no less than \$500. 8 CFR 1240.26(c)(3). The Department did not include an increase in the minimum bond amount in the proposed rule, and declines at this time to impose such a change by regulation. However, as explained in the previous discussion, this rule uses other means to implement the requirement that the bond set by the immigration judge is posted.

The proposed rule also sought comment on whether the rule should provide for additional sanctions for aliens who fail to post the required bond. 72 FR 67684. One commenter urged the Department to table consideration of such a provision because it would be punitive and hurt individuals who would be least able to carry the additional financial burden. The Department is not adopting further changes in this final rule regarding posting of the bond. However, this issue

may be revisited in the future, if necessary to address additional concerns.

VII. AMOUNT OF THE MONETARY PENALTY FOR FAILURE TO DEPART VOLUNTARILY

Two commenters object to the proposed rule to set a minimum \$3,000 civil penalty for failure to depart pursuant to section 240B(d)(1)(A) of the Act. One of the commenters argues that if Congress had intended the minimum penalty to be \$3,000, it would not have specifically set the minimum at \$1,000. The commenter also states that immigration judges should have discretion to set the amount anywhere between the statutory range of \$1,000 and \$5,000. Finally, this commenter argues that it does not make sense to have the immigration judge set the penalty when factors relevant to overstaying the voluntary departure period in order to determine an appropriate fine would only arise during the voluntary departure period.

Congress has provided that failure to depart is subject to a civil penalty. Through this regulation, the Department is using the consequences provided by Congress to further encourage aliens to adhere to their voluntary departure orders. As stated in the proposed rule, the Department does not have authority to enforce or collect the penalty, but this rule deals only with the authority to set the amount of the penalty. 72 FR at 67685. There is nothing in the statute that precludes having the immigration judge set the penalty in advance prior to the granting of voluntary departure. Moreover, nothing in this rule precludes DHS from adopting a process that allows for mitigation of the amount of a civil penalty that it seeks to collect based on the

particular circumstances of an alien's case. Finally, there is much to be said for providing the additional clarity for the alien, up front, in deciding whether to accept voluntary departure and in choosing ultimately to comply with the obligation to depart voluntarily, rather than facing an uncertain and unknowable penalty amount to be selected in the future within a broad monetary range.

The final rule does make one change to allow greater flexibility regarding the amount of the monetary penalty, within the allowable statutory range. Rather than setting a minimum amount of \$3,000 as the civil penalty, the final rule will set a rebuttable presumption that the civil penalty amount should be \$3,000. The immigration judge will have discretion to set a lower or higher amount based on an alien's individual circumstances, including a consideration of the likelihood that the alien will comply or fail to comply with the grant of voluntary departure. The final rule will adopt, without change, the proposed rule that failure to pay a required civil penalty may be a relevant discretionary factor in later applications for relief.

VIII. EFFECTIVE DATE

One commenter argues that the final rule regarding motions should apply retroactively to persons granted voluntary departure before the effective date of the rule. Because the Department did not present such retroactive application as an option in the proposed rule, and because aliens would not otherwise receive notice that the filing of their motions would automatically terminate their voluntary departure, the Department will not apply this rule retroactively.

Since the provisions of this rule are prospective only, this rule does not provide transition rules with respect to aliens who were granted voluntary departure and had motions pending

before an immigration judge or the Board or a petition for review pending with a federal court of appeals on or after the date of the Supreme Court's decision in *Dada*, and before the effective date of this final rule. It is worth noting that an alien who was within a period of voluntary departure on the day *Dada* was issued could have relied on that decision to withdraw from the request of voluntary departure in order to pursue a motion without being subject to the consequences for failing to voluntarily depart.

There are no other reasons to apply this rule retroactively. Accordingly, the proposed rule to apply this final rule prospectively only will be adopted without change. This means that this rule will apply to all cases pending before EOIR, or adjudicated by EOIR, on the effective date of this rule and any cases that later come before it. For instance, an alien who receives a decision by an immigration judge granting voluntary departure on or after the effective date of this rule will be subject to the voluntary departure bond provisions of this rule as well as all other applicable provisions. An alien who receives a decision by the Board reinstating voluntary departure on or after the day of the effective date of this rule will be subject to the automatic termination rule if that alien decides to seek judicial review, as well as all other application provisions. Likewise, if an alien's case is pending before a circuit court, and the case is remanded to the Board on or after the day of the effective date of this rule, any subsequent grant of voluntary departure will be subject to this rule.

IX. REGULATORY REQUIREMENTS

A. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a

significant economic impact on a substantial number of small entities. This rule affects individual aliens and does not affect small entities as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year and also will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 (Regulatory Planning and Review)

The Attorney General has determined that this rule is a “significant regulatory action” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive

Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104-13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons stated in the preamble, chapter V of title 8 of the Code of Federal Regulations is amended as follows:

PART 1240 – PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

1. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1229(c)(e), 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100, (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681); 8 CFR part 2.

2. Section 1240.11 is amended by adding a new sentence at the end of paragraph (b) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(b) * * * The immigration judge shall advise the alien of the consequences of filing a post-decision motion to reopen or reconsider prior to the expiration of the time specified by the immigration judge for the alien to depart voluntarily.

* * * * *

3. Section 1240.26 is amended by:

- a. Adding new paragraphs (b)(3)(iii) and (b)(3)(iv);
- b. Revising paragraph (c)(3);
- c. Adding new paragraphs (c)(4), (e)(1), and (e)(2);
- d. Adding a new sentence at the end of paragraph (f); and by
- e. Adding new paragraphs (i) and (j), to read as follows:

1240.26 Voluntary Departure—authority of the Executive Office for Immigration Review.

* * * * *

(b) * * *

(3) * * *

(iii) If the alien files a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall be terminated automatically, and the alternate order of removal will take effect immediately. The penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply if the alien has filed

a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. Upon the granting of voluntary departure, the immigration judge shall advise the alien of the provisions of this paragraph (b)(3)(iii).

(iv) The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(c) * * *

(3) *Conditions.* The immigration judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States. The immigration judge shall advise the alien of the conditions set forth in this paragraph (c)(3)(i)–(iii). If the immigration judge imposes conditions beyond those specifically enumerated below, the immigration judge shall advise the alien of such conditions before granting voluntary departure. Upon the conditions being set forth, the alien shall be provided the opportunity to accept the grant of voluntary departure or decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions. In all cases under section 240B(b) of the Act:

(i) The alien shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien departs within the time specified, but in no case less than \$500. Before granting voluntary departure, the immigration judge shall advise the alien of the specific amount of the bond to be set and the duty to post the bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure.

(ii) An alien who has been granted voluntary departure shall, within 30 days of filing of

an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. If the alien does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order.

(iii) Upon granting voluntary departure, the immigration judge shall advise the alien that if the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure shall terminate automatically and the alternate order of removal will take effect immediately.

(iv) The automatic termination of an order of voluntary departure and the effectiveness of the alternative order of removal shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter.

(v) If, after posting the voluntary departure bond the alien satisfies the condition of the bond by departing the United States prior to the expiration of the period granted for voluntary departure, the alien may apply to the ICE Field Office Director for the bond to be canceled, upon submission of proof of the alien's timely departure by such methods as the ICE Field Office Director may prescribe.

(vi) The voluntary departure bond may be canceled by such methods as the ICE Field Office Director may prescribe if the alien is subsequently successful in overturning or remanding the immigration judge's decision regarding removability.

(4) *Provisions relating to bond.* The voluntary departure bond shall be posted with the ICE Field Office Director within 5 business days of the immigration judge's order granting

voluntary departure, and the ICE Field Office Director may, at his or her discretion, hold the alien in custody until the bond is posted. Because the purpose of the voluntary departure bond is to ensure that the alien does depart from the United States, as promised, the failure to post the bond, when required, within 5 business days may be considered in evaluating whether the alien should be detained based on risk of flight, and also may be considered as a negative discretionary factor with respect to any discretionary form of relief. 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. However, if the alien had waived appeal of the immigration judge's decision, 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 CFR 1241.1(f), except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien:

- (i) Departs the United States no later than 25 days following the failure to post bond;
- (ii) Provides to DHS such evidence of his or her departure as the ICE Field Office

Director may require; and

- (iii) Provides evidence DHS deems sufficient that he or she remains outside of the United States.

* * * * *

(e) * * *

(1) *Motion to reopen or reconsider filed during the voluntary departure period.* The

filing of a motion to reopen or reconsider prior to the expiration of the period allowed for voluntary departure has the effect of automatically terminating the grant of voluntary departure, and accordingly does not toll, stay, or extend the period allowed for voluntary departure under this section. See paragraphs (b)(3)(iii) and (c)(3)(ii) of this section. If the alien files a post-order motion to reopen or reconsider during the period allowed for voluntary departure, the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure.

(2) Motion to reopen or reconsider filed after the expiration of the period allowed for voluntary departure. The filing of a motion to reopen or a motion to reconsider after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure under this section. The granting of a motion to reopen or reconsider that was filed after the penalties under section 240B(d) of the Act had already taken effect, as a consequence of the alien's prior failure voluntarily to depart within the time allowed, does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.

(f) * * * The filing of a motion to reopen or reconsider does not toll, stay, or extend the period allowed for voluntary departure. The filing of a petition for review has the effect of automatically terminating the grant of voluntary departure, and accordingly also does not toll, stay, or extend the period allowed for voluntary departure.

* * * * *

(i) *Effect of filing a petition for review.* If, prior to departing the United States, the alien

files a petition for review pursuant to section 242 of the Act (8 U.S.C. 1252) or any other judicial challenge to the administratively final order, any grant of voluntary departure shall terminate automatically upon the filing of the petition or other judicial challenge and the alternate order of removal entered pursuant to paragraph (d) of this section shall immediately take effect, except that an alien granted the privilege of voluntary departure under 8 CFR 1240.26(c) will not be deemed to have departed under an order of removal if the alien departs the United States no later than 30 days following the filing of a petition for review, provides to DHS such evidence of his or her departure as the ICE Field Office Director may require, and provides evidence DHS deems sufficient that he or she remains outside of the United States. The Board shall advise the alien of the condition provided in this paragraph in writing if it reinstates the immigration judge's grant of voluntary departure. The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became administratively final, as determined under the provisions of the applicable regulations in this chapter. Since the grant of voluntary departure is terminated by the filing of the petition for review, the alien will be subject to the alternate order of removal, but the penalties for failure to depart voluntarily under section 240B(d) of the Act shall not apply to an alien who files a petition for review, and who remains in the United States while the petition for review is pending.

(j) *Penalty for failure to depart.* There shall be a rebuttable presumption that the civil penalty for failure to depart, pursuant to section 240B(d)(1)(A) of the Act, shall be set at \$3,000 unless the immigration judge specifically orders a higher or lower amount at the time of granting voluntary departure within the permissible range allowed by law. The immigration judge shall advise the alien of the amount of this civil penalty at the time of granting voluntary departure.

* * * * *

PART 1241 – APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

4. The authority citation for part 1241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

5. Section 1241.1 is amended by revising paragraph (f), to read as follows:

§ 1241.1 Final order of removal.

* * * * *

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

Dated: December 12, 2008

Michael B. Mukasey
Attorney General

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