



AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY¹

January 2004

Protecting the Voluntary Departure Period During Court of Appeals Review

By AILF's Legal Action Center

The information in this advisory is current, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, there may be other relevant cases in addition to the cases included here.

HIGHLIGHTS OF THIS ADVISORY

This Practice Advisory reviews the existing law on what happens to an order of voluntary departure while a person pursues a petition for review in the court of appeals.

- * **Noncitizens should consider whether taking voluntary departure in the first place truly is beneficial given that overstaying the voluntary departure period subjects individuals to severe penalties. (See Part V)**
- * **Most circuits have held that the voluntary departure period begins to run from the day that the BIA issues its decision, regardless of whether a petition for review is filed. (See Part III)**
- * **Petitioners may consider filing a motion for a stay of the voluntary departure period, just as they would move for a stay of the removal order. (See Part III)**
- * **There are important distinctions between the pre-IIRIRA law and the current law. Older cases (interpreting pre-IIRIRA law) may not apply in a particular case.**

¹ Copyright (c) 2004, American Immigration Law Foundation. See www.aifl.org/copyright for information on reprinting this practice advisory.

- * **The Ninth Circuit recently has abandoned its rule from *Contreras-Aragon v. INS*, which said that the voluntary departure period begins to run when the court of appeals issues its mandate. (See Part IV)**

I. INTRODUCTION

An immigration judge may grant voluntary departure during removal or deportation proceedings. The voluntary departure period does not run while an administrative appeal to the Board of Immigration Appeals (BIA or Board) is pending. *Matter of Villegas Aguirre*, 13 I&N Dec. 139, 140 (BIA 1969). If the BIA dismisses the appeal, the Board generally grants a 30-day voluntary departure period from the date its decision was issued.² *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977).

But what happens to the voluntary departure period if a person files a petition for review in the court of appeals? Does the period begin as soon as the BIA issues its decision and run out within 30 days, before the individual has even briefed the case to the court of appeals? Can the court of appeals restore or extend the voluntary departure period? Can the court of appeals stay the voluntary departure period so it does not run?

These are important questions not only because individuals should be allowed to depart voluntarily even if their petitions for review are denied, but also because there are severe penalties imposed on individuals who fail to depart within the voluntary departure period specified by the BIA or U.S. Immigration and Customs Enforcement (ICE).³

For noncitizens in the Ninth Circuit, the recent case *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir. 2003) abandoned the rule previously set forth in *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc) that the voluntary departure period did not commence until the circuit court issued the mandate in the case.⁴ Because of this major change in the law, many questions have arisen about the consequences of *Zazueta-Carrillo*. Furthermore, the Ninth Circuit still must determine which cases, if any, remain governed by *Contreras-Aragon*. The practice advisory contains a section specifically

² If the original voluntary departure grant by the Immigration Judge had not yet expired at the time the Board issued its decision and the remaining period exceeded 30 days, the individual was permitted to depart voluntarily on or before the date specified by the Immigration Judge. *Matter of Chouliaris*, 16 I&N Dec. 168, 170 (BIA 1977).

³ Among the most severe penalties is that the person becomes ineligible for certain forms of relief from removal, including adjustment of status, for ten years. INA § 240B(d). For a discussion of the consequences of failing to depart, please see AILF's practice advisory, "Failure to Depart After a Grant of Voluntary Departure," (July 2003) (http://www.aifl.org/lac/lac_pa_072203.asp).

⁴ In general, the mandate is issued seven days after the time for filing a petition for rehearing expires or seven days after the entry of an order denying a petition for rehearing. FRAP 41. The mandate consists of a certified copy of the judgment and other relevant court materials.

addressing the recent changes in voluntary departure law in the Ninth Circuit and provides guidance on what to do if your client's case is affected by these changes.

II. BACKGROUND

IIRIRA made several significant changes to the voluntary departure provisions and to the rules governing petitions for review, so it is important to determine whether your client was subject to the pre-IIRIRA law and the transitional rules or whether the client is subject to all of the changes made by IIRIRA. If your client was in deportation proceedings (i.e., proceedings commenced prior to April 1, 1997), he or she is subject to the pre-IIRIRA voluntary departure statute (former INA § 244(e)) and to the “transitional rules” governing judicial review as set forth in IIRIRA § 309(c)(1). If your client is in removal proceedings (i.e., proceedings commenced on or after April 1, 1997), he or she is subject to the current voluntary departure statute at INA § 240B and to all the judicial review provisions enacted by IIRIRA and codified in INA § 242 (“permanent rules”).

A. Pre-IIRIRA Statute

In cases where the pre-IIRIRA statute applies, there is no statutory limit on the voluntary departure period, and the regulations allow the district director to grant unlimited extensions and to reinstate the voluntary departure period. INA § 244(e) (1995); 8 C.F.R. § 1240.57. Absent “exceptional circumstances,” individuals who fail to depart within the specified departure period are subject to a five year bar to several forms of relief from deportation, including adjustment of status. INA § 242B(e)(2)(A) (1995). However, in order for the consequences to attach, immigration judges must provide *oral* notice of the consequences of failing to depart. INA § 242B(e)(2) (1995).

Under the transitional rules, the court of appeals loses jurisdiction over petitions for review if the petitioner departs the United States.⁵ Therefore, if the voluntary departure period runs from the issuance of the BIA's decision, noncitizens whose cases fall under the transitional rules may be forced to choose between pursuing their petition for review or departing voluntarily.

B. Post-IIRIRA Statute

The current voluntary departure statute differs from the pre-IIRIRA statute in several significant ways. If voluntary departure is sought at the conclusion of removal proceedings, applicants must establish that they were present in the United States for at least one year prior to service of the Notice to Appear; they must post a bond of at least

⁵ See IIRIRA § 309(c)(1) (saying that pre-IIRIRA law governing judicial review applies in deportation cases); INA § 106(c) (1995) (providing that court loses jurisdiction over petition for review when petitioner departs); *see also Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 675 (7th Cir. 2003); *Hose v. INS*, 180 F.3d 992, 996 (9th Cir. 1999) (*en banc*); *Moore v. Ashcroft*, 251 F.3d 919, 922 (11th Cir. 2001); *Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001).

\$500; and if they fail to depart within the time specified, they are subject to a *ten* year bar to several forms of relief, including adjustment of status, and may be fined up to \$5000.⁶ INA § 240B(b) and (d). In addition, the statute no longer requires *oral* notice of the consequences of failing to depart and the “exceptional circumstances” exception for failing to depart was removed. *Compare* INA 240B(d) *with* former INA § 242B(e)(2) (1995). The voluntary departure order, however, must provide notice of the penalties for failing to depart.

Importantly, the voluntary departure period may not exceed 60 days. INA § 240B(b)(2). Individuals still may ask the district director for extensions of the departure period, but the total period of time, including any extensions, may not exceed 60 days. 8 C.F.R. § 1240.26(f)(3).

Individuals in removal proceedings may pursue their appeals from outside of the United States, despite the undesirability or impracticality of doing so.

III. OVERVIEW OF CIRCUIT COURT LAW REGARDING THE VOLUNTARY DEPARTURE PERIOD

As the chart below shows, the courts of appeals are divided on when the voluntary departure period commences and whether the court has jurisdiction to extend or reinstate the voluntary departure period. Importantly, however, many of the courts have not addressed these issues in the context of the post-IIRIRA voluntary departure statute and the permanent rules. Even in courts that have addressed these issues, the law may be subject to change. The following chart lists the current key cases in each circuit as well as the circuit’s general rule.

At this time, only in the Eighth Circuit does the voluntary departure period commence when the court issues the mandate, as opposed to when the BIA issues its decision. The Ninth Circuit’s decision *Contreras-Aragon v. INS*, 852 F.2d 1088, 1093 (9th Cir. 1988)(en banc), had reached the same conclusion, but the Court subsequently found its analysis inapplicable under the current statutory scheme. *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166 (9th Cir. 2003). Transitional rule cases in the Ninth Circuit, however, may be governed by *Contreras-Aragon*. This issue is discussed in more detail in section III of this practice advisory.

The First and Fourth Circuits generally reinstate the voluntary departure period when a petition is denied. Alternatively, the Tenth and Eleventh Circuits said that under the pre-IIRIRA law they lack authority to reinstate or extend the voluntary departure period.

The Second and Fifth Circuits, also under the pre-IIRIRA law, have declined to reinstate voluntary departure though they have not reached the jurisdictional issue. The reasoning in these cases, however, may no longer be applicable given the statutory changes to the

⁶ Under pre-IIRIRA voluntary departure, individuals who failed to depart were subject to a five year bar to relief. INA § 242B(e)(2)(A) (1995).

voluntary departure statute. Both courts reasoned that there are other methods available by which petitioners could seek to extend their voluntary departure, i.e., seeking an extension from INS district director or asking the BIA to grant a longer departure period. Under the current statute, most petitioners will not be able to seek extensions beyond 60 days from the date of the BIA’s order. This fact may help persuade the courts to either reinstate or extend the voluntary departure period or issue a stay of the voluntary departure period.

With the exception of the Ninth Circuit and Sixth Circuit – which have decided this issue favorably – the courts have not decided whether they may exercise their equitable power to stay the voluntary departure period during the petition for review. Even in those circuits where the courts have held that they lack authority to reinstate or extend the voluntary departure period, petitioners still may ask for a stay of the voluntary departure period because the court’s equitable power is distinct from the statutory authority that these courts found was lacking. **AILF encourages petitioners to consider seeking a stay of the voluntary departure period in all circuits.**

First Circuit	<p>Key Cases: <i>Umanzor-Alvarado v. INS</i>, 896 F.2d 14, 16 (1st Cir. 1990); <i>Khalil v. Ashcroft</i>, 337 F.3d 50, 56 (1st Cir. 2003); <i>Velasquez v. Ashcroft</i>, 342 F.3d 55, 59 (1st Cir. 2003).</p> <p>General Rule: In transitional rule and permanent rule cases, the court will reinstate the voluntary departure where it appears that petition was not filed solely for purposes of delay.</p>
Second Circuit	<p>Key Cases: <i>Ballenilla-Gonzalez v. INS</i>, 546 F.2d 515, 521-22 (2d Cir. 1976), <i>cert. denied</i> 434 U.S. 819 (1977); <i>Brathwaite v. INS</i>, 633 F.2d 657, 660 (2d Cir. 1980).</p> <p>General Rule: The voluntary departure period commences when BIA issues order. The court has declined to reinstate voluntary departure where petitioners can request extension or reinstatement from district director. There are no post-IIRIRA cases.</p>
Third Circuit	<p>No published cases.</p>
Fourth Circuit	<p>Key Cases: <i>Ramsay v. INS</i>, 14 F.3d 206, 213 (4th Cir. 1994).</p> <p>General Rule: The court will reinstate voluntary departure when (1) the INS is wielding its discretion to withhold voluntary departure to deter applicants from seeking judicial review of BIA decisions, or (2) the INS does not suggest that it will present the district director with any other reason for refusing the reinstatement. There are no post-IIRIRA cases.</p>

Fifth Circuit	<p>Key Cases: <i>Faddoul v. INS</i>, 37 F.3d 185, 191-92 (5th Cir. 1994).</p> <p>General Rule: The voluntary departure period commences when the BIA issues its decision. In its pre-IIRIRA decision, the court held that petitioners should ask the BIA in advance for an extended voluntary departure period that would expire within a specified time after the court’s denial of the petition for review. If the Board refused such a request, then the court could review the denial along with the merits of the case in the petition for review. There are no post-IIRIRA cases.</p>
Sixth Circuit	<p>Key Cases: <i>Nwakanma v. Ashcroft</i>, No. 03-4317, ___ F.3d ___, 2003 U.S. App. LEXIS 24769 (6th Cir. Dec. 10, 2003).</p> <p>General Rule: The voluntary departure period commences when the BIA issues its order. If petitioner filed a motion to stay the voluntary departure period, the Court may grant a stay of the voluntary departure period <i>nunc pro tunc</i> to the date of the filing of the motion.</p>
Seventh Circuit	<p>Key cases: <i>Kaczmarczyk v. INS</i>, 933 F.2d 588, 598 (7th Cir. 1991), <i>cert. denied</i> 116 L. Ed. 2d 608, 112 S. Ct. 583 (1991); <i>Ademi v. INS</i>, 31 F.3d 517, 521 n.8 (7th Cir. 1994).</p> <p>General Rule: The voluntary departure period commences when the BIA issues its order. The Court may have authority to extend or reinstate the voluntary departure period where petitioner can show that the agency is exercising its authority to extend or reinstate voluntary departure to deter petitioners from seeking judicial review. There are no post-IIRIRA cases.</p>
Eighth Circuit	<p>Key case: <i>Safaie v. INS</i>, 25 F.3d 636, 641 n.1 (8th Cir. 1994).</p> <p>General Rule: The voluntary departure period commences when the Court issues its mandate. Note, however, that <i>Safaie</i> relied on <i>Contreras-Aragon v. INS</i>, 852 F.2d 1088, 1093 (9th Cir. 1988)(en banc), which the Ninth Circuit has held no longer applies given the changes made by IIRIRA. The Eighth Circuit has yet to address this issue in a post-IIRIRA case.</p>
Ninth Circuit	<p>Key cases: <i>Zazueta-Carillo v. Ashcroft</i>, 322 F.3d 1166 (9th Cir. 2003); <i>El Himri v. Ashcroft</i>, 334 F.3d 1261 (9th Cir. 2003) (order); <i>Contreras-Aragon v. INS</i>, 852 F.2d 1088, 1093 (9th Cir. 1988)(en banc).</p> <p>General Rule: In permanent rule cases, the voluntary departure period commences when the Board issues its decision. <i>Arguably</i>, this rule is limited to permanent rule cases and transitional rule cases will be governed by <i>Contreras-Aragon</i>, which held that the voluntary departure period commences when the Court issues its mandate. If a petitioner files a motion to stay the voluntary departure period, the period will automatically be stayed temporarily (until the Court adjudicates the motion). Please see Section III for a detailed discussion of the voluntary departure law in the 9th Circuit.</p>

Tenth Circuit	<p>Key Cases: <i>Castaneda v. INS</i>, 23 F.3d 1576, 1578-83 (10th Cir. 1994) and <i>Castaneda v. INS</i>, 33 F.3d 44 (10th Cir. 1994).</p> <p>General Rule: The voluntary departure period commences when the BIA issues its order. The court lacks jurisdiction to extend or reinstate voluntary departure period. There are no post-IIRIRA cases.</p>
Eleventh Circuit	<p>Key Case: <i>Nkacoang v. INS</i>, 83 F.3d 353 (11th Cir. 1996).</p> <p>General Rule: The voluntary departure period commences when the BIA issues its order. The court lacks authority to reinstate or extend the voluntary departure period. There are no post-IIRIRA cases.</p>
DC Circuit	<p>No published cases.</p>

IV. NINTH CIRCUIT CONSIDERATIONS⁷

The Ninth Circuit has issued three major decisions addressing the effect of federal court review on voluntary departure. The decisions and holdings are:

Contreras-Aragon v. INS, 852 F.2d 1088, 1093 (9th Cir. 1988)(en banc): deportation case holding that the voluntary departure period begins to run from the date the Court issues its mandate after the completion of the petition for review process.

Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166 (9th Cir. 2003): removal case holding that the period of voluntary departure runs from the date of the BIA's order.

El Himri v. Ashcroft, 344 F.3d 1261 (9th Cir. 2003) (order): removal case, holding that the Court possesses the equitable power to grant a stay of the voluntary departure period.

Application of the holding in *Contreras-Aragon* is more beneficial to petitioners seeking federal court review than the holding in *Zazueta-Carrillo*. Under *Zazueta-Carrillo*, it is likely that petitioners will overstay their voluntary departure period while their petition for review is pending and thus will be subject to the harsh consequences of INA § 240B(d), including a civil fine and a ten year bar to eligibility for voluntary departure, adjustment of status, cancellation of removal, or permanent residence under INA § 249.

⁷ This discussion is also relevant to petitioners in the Eighth Circuit because that court adopted the reasoning of *Contreras-Aragon v. INS*, 852 F.2d 1088 (9th Cir. 1988)(en banc), in *Safaie v. INS*, 25 F.3d 636, 641 (8th Cir. 1994). *Safaie*, though still binding in the Eighth Circuit, is a pre-IIRIRA case and may be in jeopardy given its reliance on *Contreras-Aragon*. There are, however, strong arguments for reaffirming the holding of *Safaie* in post-IIRIRA cases. Anyone who has a case in which the validity of *Safaie* is an issue is encouraged to contact AILF's Legal Action Center.

This concern is not present under *Contreras-Aragon* because the voluntary departure period does not begin until after the Court’s mandate issues.

To date, the Ninth Circuit has not addressed whether the *Zazueta-Carrillo* and *El Himri* decisions apply to transitional cases. The court also has not addressed whether the decisions can be applied retroactively to individuals who filed their petitions for review when *Contreras-Aragon* stood as the law of the circuit. The following arguments may be used to limit the application of *Zazueta-Carrillo*.

A. Petitioners in Transitional Cases

There are distinguishing legal facts between the *Zazueta-Carrillo* and *Contreras-Aragon* cases. In *Zazueta-Carrillo*, the petitioner was in removal proceedings, the voluntary departure provision at issue was INA § 240B, and judicial review was governed by INA § 242 (“permanent rules”). In *Contreras-Aragon*, the petitioner was in deportation proceedings, the voluntary departure provision at issue was former INA § 244(e), and judicial review was governed by former INA § 106. Similarly, in transitional cases, voluntary departure is authorized under former INA § 244(e) and judicial review is governed by IIRIRA’s transitional rules, IIRIRA § 309 and former INA § 106.

There are at least two arguments that *Zazueta-Carrillo* does not apply to transitional rule cases and the commencement of the voluntary departure period should continue to be controlled by the *en banc* decision in *Contreras-Aragon*. Until the Court publishes an opinion on this issue – or the Court issues an unfavorably opinion – petitioners may consider requesting a stay of the voluntary departure period in accordance with *El Himri*.

1. The Rationale of *Contreras-Aragon* Still Applies to Transitional Cases

In *Contreras-Aragon*, the Court was concerned that it would lose jurisdiction under former INA § 106(c) over a petition for review if the petitioner departed while the petition was pending. The Court reasoned that if the voluntary departure period begins to run from the date of the BIA order, petitioners would be forced to choose between complying with their voluntary departure order and avoiding the severe consequences of noncompliance or filing and pursuing petitions for review. The *Contreras-Aragon* Court held that it could not uphold this Catch-22 situation because forcing individuals to choose between complying with their voluntary departure order and seeking judicial review infringes on the right to judicial review. In *Zazueta-Carrillo*, the Court concluded that, because petitioners in removal cases can continue to seek judicial review from outside the United States, this concern was no longer present.

Unlike in permanent rule cases, however, former INA § 106(c) still applies to transitional rule cases and federal courts may not review an order of exclusion or deportation if the petitioner departs from the United States while the petition for review is pending. Thus, because petitioners in transitional cases continue to face the Catch-22 situation that concerned the Court in *Contreras-Aragon*, the rationale of *Contreras-Aragon* continues to apply to them.

2. The Rationale of *Zazueta-Carrillo* Is Not Applicable to Voluntary Departure Grants In Transitional Cases Under Former INA § 244(e).

In *Zazueta-Carrillo*, the Court concluded, “the executive branch, rather than the courts, shall specify when aliens must depart voluntarily.”⁸ *Zazueta-Carrillo*, 322 F.3d at 1172 (emphasis added). In reaching this conclusion, the Court relied, in part, on the language of INA § 240B, stating, “*the immigration judge* enters an order granting voluntary departure.” *Id.* (emphasis in the original). This language is not present in former INA § 244(e) and therefore the Court’s rationale on this point is not applicable to transitional cases.

The Court in *Zazueta-Carrillo* also reasoned that its decision supported the policy underlying voluntary departure, which is to “encourage aliens to depart without further ado.” However, the Court acknowledged that this “concern has become more pressing after IIRIRA, in which Congress made clear its desire to expedite removal proceedings.” 322 F.3d at 1173 (emphasis added). Although IIRIRA contained drastic changes that have expedited deportations, Congress did not similarly intend this policy to apply to individuals who already were in deportation and exclusion proceedings. In fact, Congress specifically exempted these individuals from the substantive changes enacted in IIRIRA. See IIRIRA § 309(c)(1). Thus, the Court’s policy concerns regarding expediting removals should apply prospectively to “permanent rule” removal cases only.

B. Petitioners Who Filed Their Petitions For Review Before *Zazueta-Carrillo*

Whether judicial review is governed by the permanent or transitional rules, the holding of *Zazueta-Carrillo* arguably should not apply to individuals who filed their petitions for review before that decision was issued (before March 13, 2003). The retroactive application of the *Zazueta-Carrillo* decision to these petitioners would upset settled expectations and unfairly impact appeal decisions made when *Contreras-Aragon* stood as the law of the circuit.⁹

Many petitioners who filed their petitions for review when *Contreras-Aragon* was the established law in the Ninth Circuit had already overstayed their voluntary departure period before *Zazueta-Carrillo* was issued. If their petitions for review are denied and the Court retroactively applies *Zazueta-Carrillo* to their cases, they may be subject to severe penalties as a result of overstaying the voluntary departure period. INA § 242B(e)(2)(A) (1995).

⁸ The immigration courts, part of the Executive Office for Immigration Review, are a division within the Department of Justice, and thus fall within the executive branch.

⁹ If the Court were to reject this contention and hold that *Zazueta-Carrillo* applies retroactively to individuals who filed petitions for review before the decision was issued, then petitioners should be allowed to request a stay of the voluntary departure period nunc pro tunc. See discussion below in Section C.

The Supreme Court case law on the retroactivity of court decisions supports the argument that *Zazueta-Carrillo* should not apply retroactively. The Supreme Court held, “When this Court applies a rule of law to the parties before it, that rule is the controlling interpretation of federal law and must be given full effect in all cases still open on direct review and as to all events....” *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). In announcing this rule, the Supreme Court was motivated by concerns about equal treatment under the law. *Harper*, 509 U.S. at 97. Accordingly, the Court’s rule avoids “selective treatment” and precludes taking into consideration the particular equities of an individual’s claim or an individual’s actual reliance on an old rule in deciding whether to apply a new rule retroactively. *Id.*

In *Zazueta-Carrillo*, the Ninth Circuit did not apply its decision to the petitioner before it. 322 F.3d at 1174-75. Thus, consistent with the Supreme Court’s concern about equal treatment for similarly situated petitioners, *Zazueta-Carrillo* should not be applied to individuals, like the petitioner in that case, who filed their petitions for review when *Contreras-Aragon* stood as the law in the Ninth Circuit.

C. Petitioners Who Filed Their Petitions For Review After *Zazueta-Carrillo* But Before *El Himri*

Petitioners who filed their petitions for review after *Zazueta-Carrillo* but before *El Himri* (between March 13, 2003 and September 19, 2003) were unaware that they could move the Court to stay the voluntary departure period.

In many cases, the 30-day voluntary departure period granted by the Board likely expired before *El Himri* was decided and thus before petitioner was on notice that he could have filed a motion asking the court to stay the period. To apply *Zazueta-Carrillo* to individuals who were unaware of the newly fashioned legal remedy available to them (i.e., the stay of the voluntary departure period) would be unfair. In these cases, petitioners may request that the Court exercise its broad equitable power to issue a *nunc pro tunc* stay of the voluntary departure period.

D. Petitioners in Removal and Transitional Cases May Request A Stay of the Voluntary Departure Period Under *El Himri*

Petitioners in removal and transitional cases may request a stay of the voluntary departure period under *El Himri*. Even petitioners who argue that *Zazueta-Carrillo* does not apply to transitional cases may request a stay of the voluntary departure period to protect their grant of voluntary departure in case the court of appeals rejects these arguments. Nothing in the *El Himri* decision suggests that the decision is, or could be, limited to permanent rule cases.

V. VOLUNTARY DEPARTURE: A RISKY PROPOSITION?

Voluntary departure has long been viewed as a desirable alternative to deportation and its consequences. However, IIRIRA's changes to the voluntary departure statute, as well as other provisions of the INA, compel consideration of whether accepting voluntary departure is, in fact, beneficial.

The most important question to ask when your client is considering voluntary departure is: *Is my client going to be able to leave before the expiration of the voluntary departure period?* Individuals who do not depart within the specified time period are barred from applying for adjustment of status, cancellation of removal, voluntary departure, change of status, and registry for a period of ten years and may be subject to monetary fine up to \$5000.¹⁰ INA § 240B(d). Commonly, these penalties are implicated when a person becomes eligible for adjustment of status after the conclusion of removal proceedings. The immigration court or the BIA will not reopen cases where the departure period has expired.¹¹ Thus, individuals who overstay the voluntary departure period may end up in a worse situation than those who were ordered removed.

As this advisory illustrates, individuals who plan to file a petition for review and who will remain in the United States while the petition is pending may overstay the voluntary departure period. This is particularly true now that the Ninth Circuit has abandoned its holding in *Contreras-Aragon*. Even individuals who do not plan to seek judicial review and who intend to depart timely may be unable to do so if, for example, they are detained or cannot secure a plane ticket.

Furthermore, one benefit that used to flow from voluntarily departing – avoiding the inadmissibility bars for previously being deported – may be cancelled out. For example,

¹⁰ Individuals in deportation proceedings are ineligible for relief for only five years and are not subject to monetary fines. INA § 242B(e)(2)(A) (1995).

¹¹ Prior to IIRIRA, the law contained an exception to the penalties when failure to depart was because of “exceptional circumstances.” INA § 242B(e)(2). The current statute does not contain this exception, although there may be arguments available to avoid the consequences of failing to depart. See AILF's practice advisory, “Failure to Depart After a Grant of Voluntary Departure,” (July 2003) (http://www.ailf.org/lac/lac_pa_072203.asp).

Note, however, that even if the person was ordered removed, and thus not subject to the ten year bar for failing to depart, motions to reopen generally must be filed within 90 days of the final order of removal unless the government agrees to join in the motion. INA § 240(b)(6)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b). INS set forth guidelines for when it will join in a motion to reopen removal proceedings in order to apply for adjustment of status. See Memo, Cooper, G.C. HQCOU 90/16.22.1, *Motions to Reopen for Adjustment of Status* (May 17, 2001) (Posted on AILA InfoNet at Doc. No. 01070333 (July 3, 2001)). The immigration court and the BIA also may exercise their sua sponte authority to reopen cases, but will only do so if the person is still eligible for relief. 8 C.F.R. § 1003.2(a), 1003.23(b)(1).

if a person accrued more than one year of unlawful presence prior to taking voluntary departure, he or she still may face a ten year bar to admission.¹² INA § 212(a)(9)(B)(i). Also, if a person comes back illegally after taking voluntary departure, at least in the Ninth Circuit he would be subject to reinstatement of removal under INA § 241(a)(5). See *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001).

These cautions, of course, do not mean that voluntary departure is not advantageous for some people. There will be various situations where taking voluntary departure will allow a person to depart the United States unescorted and will facilitate easier admission to the country at a later time. However, for many people in deportation or removal proceedings, voluntary departure may make their situation worse if they fail to depart within the specified period. Complicating matters, many immigration judges – perhaps acting under the presumption that voluntary departure is generally beneficial – sometimes grant voluntary departure even where the person technically is ineligible¹³ or in cases where the respondent does not even request this form of relief. Respondents will need to assess whether voluntary departure is truly the best option or whether they should refuse an offer of voluntary departure in circumstances where they are not completely certain that they will depart within the specified period.

¹² However, a person who is granted voluntary departure *after commencement of proceedings* is not subject to the three-year bar. INA § 212(a)(9)(B)(i)(I); Letter, Chang, Branch Chief of Residence and Status Branch, INS, HQ 70/21/1/16 (Mar 23, 1998).

¹³ For example, applicants for voluntary departure must establish that they have both the means and intent to depart. INA § 240B(b)(1)(D).