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Alerts

NEW VOLUNTARY DEPARTURE REGULATION

Summary:

- On December 18, 2008, the Department published the final rule amending the voluntary departure regulations. See [73 Fed. Reg. 76,927](#). This rule will become effective January 20, 2009, and applies to any decision granting voluntary departure on or after the effective date. A [Notice](#) has been drafted that you may print and hand out to the parties. The [Notice](#) contains the necessary advisals in a .pdf format that you may complete, deliver to the respondent and the DHS, and include in the record. ([Voluntary Departure Advisals.pdf](#))

- Under the rule, a grant of voluntary departure is automatically terminated upon the filing of a post-decision motion to reopen or reconsider with the immigration court or the Board during the voluntary departure period, or upon the filing of a petition for review in a federal court of appeals. 8 C.F.R. §§ 1240.26(b)(3)(iii), (c)(3)(iii), (e)(1) and (i).

Note – With the filing of a post-decision motion to reopen or reconsider or a petition for review, the alien no longer has the benefit of voluntary departure, but the alien is also not subject to the penalties for failure to depart voluntarily under INA § 240B(d). 8 C.F.R. §§ 1240.26(b)(3)(iii), (e)(1) and (i).

- There are new advisals immigration judges must give aliens for both pre-conclusion and post-conclusion voluntary departure. 8 C.F.R. §§ 1240.11(b), 1240.26(b)(3)(iii), (c)(3)(iii), (j). [These advisals are outlined below](#). There are also new advisals the Board must give aliens when reinstating voluntary departure. 8 C.F.R. §§ 1240.26(e)(1), (i).

- If an alien does not post the voluntary departure bond within the time required, the alien is still obligated to depart within the period allowed and is not exempted from the consequences for failure to depart. This regulation overrules the Board's decision in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA

2006). The failure to post bond may be considered as a negative discretionary factor with respect to any discretionary form of relief. 8 C.F.R. § 1240.26(c)(4).

- If an alien waived appeal of the immigration judge's decision, the failure to timely post the voluntary departure bond means that the alternative order of removal takes effect immediately, except that an alien granted voluntary departure under 8 C.F.R. § 1240.26(c) will not be deemed to have departed under an order of removal if the alien:

- ▶ departs the United States no more than 25 days after the failure to post bond;
- ▶ provides to DHS such evidence of departure as the ICE Field Office Director may require;
- ▶ provides evidence DHS deems sufficient that the alien remains outside of the United States. 8 C.F.R. § 1240.26(c)(4).

New Advisals – Pre-Conclusion Voluntary Departure

- For pre-conclusion voluntary departure, the immigration judge must advise the alien that if he or she files a post-decision motion to reopen or reconsider during the voluntary departure period given by the immigration judge:

1. the grant of voluntary departure is terminated automatically;
2. the alternate order of removal takes effect immediately; and
3. the penalties for failure to depart voluntarily under INA § 240B(d) shall not apply. 8 C.F.R. § 1240.26(b)(3)(iii).

New Advisals – Post-Conclusion Voluntary Departure

- Before granting post-conclusion voluntary departure, the immigration judge must advise the alien:

1. of any conditions the immigration judge may set in granting voluntary departure beyond those specifically enumerated in the regulation. 8 C.F.R. § 1240.26(c)(3).
2. of the specific bond amount that will be set and the duty to post bond with the ICE Field Office Director within 5 business days of the immigration judge's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).

Note – Upon setting the conditions and the amount of the bond, the alien must 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. 8 C.F.R. § 1240.26(c)(3).

- Upon granting post-conclusion voluntary departure, the immigration judge must advise the alien:
 1. of the requirement to provide to the Board, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. 8 C.F.R. § 1240.26(c)(3)(ii).
 2. that the Board will not reinstate the voluntary departure period in its final order if the alien does not submit timely proof to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).
 3. that if the alien files a post-decision motion to reopen or reconsider during the voluntary departure period:
 - ▶ the grant of voluntary departure is terminated automatically, and
 - ▶ the alternate order of removal takes effect immediately. 8 C.F.R. § 1240.26(c)(3)(iii).

Note - Unlike pre-conclusion voluntary departure, the regulations do not specifically require the immigration judge to advise the alien that upon the filing of a motion to reopen or reconsider, the penalties for failure to depart voluntarily under INA § 240B(d) shall not apply. But see 8 C.F.R. § 1240.11(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.").

New Advisal - Civil Monetary Penalty

- Immigration judges must advise the alien of the amount of the civil penalty at the time of granting voluntary departure. 8 C.F.R. § 1240.26(j).

Note – There is a rebuttable presumption of a civil monetary penalty of \$3,000 if the alien fails to depart within the voluntary departure period, but the immigration judge may set a higher or lower amount as permitted by INA § 240B(d)(1)(A). 8 C.F.R. § 1240.26(j).

CONCLUSION

- A complete copy of the final rule and supplementary information is [attached](#) for your review. Please note that the supplementary information is detailed and may answer questions that may arise in implementing this regulation.

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