

# NUTS AND BOLTS OF IMMIGRATION LITIGATION



**PROGRAM MATERIALS**  
**April 29, 1999**

*INSTITUTE OF CONTINUING LEGAL EDUCATION IN GEORGIA*



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## VOLUNTARY DEPARTURE: THE NEW POISON PILL

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# VOLUNTARY DEPARTURE: THE NEW POISON PILL

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## I. INTRODUCTION AND SCOPE OF ARTICLE

Some authors have observed that if voluntary departure did not exist it would have been invented because it was so beneficial to the Immigration & Naturalization Service ("Service") and for aliens. Voluntary departure allowed the Service to carry out its enforcement at a relatively low cost. One of the most distinguishing feature of voluntary departure before the passage of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996<sup>1</sup> ("IIRAIRA") is the broad discretion granted to the Service and the Immigration Judge in granting this discretionary relief. This was a major benefit to aliens, since they could leave the United States and avoid deportation which is a five year bar, and they would be eligible for the processing of permanent resident status without obtaining special permission from the Attorney General to reenter.

However, IIRAIRA has taken the discretion out of discretion of voluntary departure and with other provisions renders this relief without life. Section § 304 of IIRAIRA added these new provisions effecting voluntary departure under § 240B of the Immigration Nationality Act ("INA").<sup>2</sup> The purpose of this article is to examine and identify the fundamental changes introduced by IIRAIRA.<sup>3</sup>

## II. VOLUNTARY DEPARTURE UNDER IIRAIRA BEFORE THE INS

IIRAIRA delegated limited authority to the Service to provide aliens voluntary departure in lieu of being subject to removal proceedings under INA § 240. Interim Regulations were

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<sup>1</sup> Pub. L No. 104-208, effective September 30, 1996.

<sup>2</sup> It must be pointed out that deportation proceedings that were commenced prior to April 1, 1997, are under the provisions of pre-IIRAIRA voluntary departure. Thus, the new provisions only effect proceedings commenced after April 1, 1997, under Section § 240.

<sup>3</sup> For other discussions and analysis of the impact of IIRAIRA on the issue of voluntary departure, see AILA 1998-1999, *Annual Handbook*, Interpreter Releases's publication *Understanding the 1996 Immigration Act*, *Interpreter Releases'* issues dated January 16, 1998 and December 9, 1996.

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promulgated by the Service enacting Section § 304 of IIRAIRA and became effective on April 1, 1997.<sup>4</sup> The regulations granted authority to the district director, assistant district directors for investigations, assistant district director for examinations, officer in charge, chief patrol agents, service center directors, and assistant center directors for examinations to grant voluntary departure with the following conditions:

1. Albeit an open-ended standard, the Service may attach any conditions it deems necessary to ensure the alien's timely departure from the U.S. including continued detention pending departure, posting bond, and removal with safeguards;
2. The alien must provide to the Service his or her passport for inspection and photocopying. Moreover, the Service may hold the passport to investigate its authenticity;
3. Voluntary departure period accorded by the Service shall not exceed 120 days with the requisite warning on form I-210, Notice of Action;
4. Of course, aliens who have been convicted of an aggravated felony as defined under INA § 101(a)(43) or any alien who is deportable under INA § 237(a)(4)(B) (engaged in terrorist activity) are statutorily ineligible for voluntary departure<sup>5</sup>;
5. There is no appeal from the decision from the Service; however, the alien has the right to apply for voluntary departure in accordance with 8 CFR § 240.26 before an Immigration Judge.<sup>6</sup>

The significant aspect of these provisions are the aggregate time limitation of 120 days, and the fact that a **criminal alien** is statutorily eligible for voluntary departure, since there is no requirement of good moral character.<sup>7</sup> In the past, this was left to the discretion of the Service or the Immigration Judge. Moreover, there is no mandatory requirement of physical presence in the United States.

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<sup>4</sup> 8 CFR § 240.25.

<sup>5</sup> INA § 240B(a)(1).

<sup>6</sup> 8 CFR § 240.25(e).

<sup>7</sup> This is a significant difference because under prior law, any alien who had been convicted of criminal offenses were virtually ineligible for voluntary departure. For instance, under IIRAIRA, an alien convicted of a crime of moral turpitude whose sentence does not rise to the classification of an aggravated felony is **statutorily eligible for voluntary departure**. In the past, the alien would have been barred because he or she could not establish good moral character for the preceding five years.

Once removal proceedings have been initiated under Section § 240 by the issuance of a notice to appear, the Service can still grant voluntary departure.<sup>8</sup> The regulations requires that the alien makes this request through the Service's counsel. If the Service agrees, the Service may then join in a motion to terminate proceedings or join in a motion requesting that voluntary departure be granted in accordance with 8 CFR § 240.26.

Last, the regulations preserve the Service's right to revoke without advance notice, but such revocation shall be communicated in writing citing the statutory basis for revocation.<sup>9</sup>

### III. VOLUNTARY DEPARTURE UNDER IIRAIRA BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Voluntary departure can also be granted by the Immigration Judge in removal proceedings.<sup>10</sup> The statute and regulations divides two different circumstances with applicable standards. Before the **completion of removal proceedings**, the Immigration Judge may grant voluntary departure up to **120 days** under the following conditions:

1. The request of voluntary departure must be made prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;
2. The alien makes no additional requests for relief, or more importantly, forsakes any relief previously applied for;<sup>11</sup>
3. The alien concedes removability and waives appeal of all issues;<sup>12</sup>
4. Again, the alien must not have been convicted of an aggravated felony as defined under INA § 101(a)(43), or who is deportable under INA § 237(a)(4)(B) (engaged in terrorist activity).

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<sup>8</sup> 8 CFR § 240.25(d).

<sup>9</sup> 8 CFR 240.25(f). Again, there is no appeal from this adverse decision of revocation.

<sup>10</sup> INA § 240B(b) and enacted by 8 CFR § 240.26.

<sup>11</sup> This point is noteworthy of discussion because many applicants for voluntary departure do not understand the effects of this concession. Whether one has a meritorious marriage case or bona-fide asylum case, the acceptance of voluntary departure forecloses any further defense in proceedings.

<sup>12</sup> 8 CFR § 240.26(b)(1)(i).

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If more than 30 days have elapsed since the master calendar hearing at which the case is initially calendared for a merits hearing, the Immigration Judge is without authority to grant voluntary departure without stipulations by the Service.<sup>13</sup>

The statute authorizes the Immigration Judge to set conditions necessary to ensure the alien's timely departure from the United States including the posting of a voluntary departure bond and requiring the alien to present to the Service his or her passport or other travel documentation for the Service for inspection and photocopying.<sup>14</sup> Additionally, the Service is allowed to hold the passport or travel documentation to determine its authenticity. Furthermore, in the case that the travel document or passport is not available at the hearing before the Immigration Judge, the Immigration Judge can still grant up to 120 days voluntary departure with the condition that the alien shall within 60 days of the entry of voluntary departure provide the passport or travel document to the Service or otherwise the voluntary departure order will vacate automatically, and an alternate order of removal takes effect.<sup>15</sup>

After the completion of removal proceedings, the Immigration Judge may grant voluntary departure up to 60 days under the following conditions<sup>16</sup>:

1. The alien must have been physically present for a period of at least one year preceding the date of Notice to Appear under INA § 239(a);
2. The alien is and has been a person of good moral character for at least five years preceding the application;
3. Again, the alien must not have been convicted of an aggravated felony as defined under INA § 101(a)(43) or who is deportable under INA § 237(a)(4)(B) (engaged in terrorist activity), and additionally, the alien must not have been found inadmissible under INA § 212(a)(6)(A)<sup>17</sup>;
4. The alien has established by clear and convincing evidence that the alien has the means to depart the U.S., and has the intention to do so.

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<sup>13</sup> 8 CFR § 240.26(b)(1)(ii).

<sup>14</sup> 8 CFR § 240.26(b)(i).

<sup>15</sup> 8 CFR § 240.26(b)(3)(ii).

<sup>16</sup> INA § 240B(b)(1) and 8 CFR § 240.26(c)(1).

<sup>17</sup> INA § 240B(c).

Again, as provided in other sections of the regulations, the alien must provide evidence to the Immigration Judge that he or she has a valid travel document and passport to assure lawful entry into the alien's country, and the Service will have the opportunity to inspect and investigate the passport or document.<sup>18</sup> Last, the Immigration Judge is given broad authority to impose conditions to insure the alien's departure. However, the alien will be required to post a minimum bond of \$500 within five days of the order granting voluntary departure.<sup>19</sup> The regulations allow the Service to hold the alien in detention during the five day period. If the bond is not posted within five days, the order of voluntary departure is **automatically revoked**.

#### IV. PENALTIES FOR FAILURE TO DEPART

IIRAIRA raises the stakes significantly for failing to depart pursuant to the voluntary departure order. An alien failing to depart within the requisite time under the voluntary departure order will be subjected to a civil penalty of not less than \$1,000, and not more than \$5,000.<sup>20</sup> Furthermore, the alien will be ineligible for relief under sections 240A (cancellation of removal), 245 (adjustment of status), 248 (change of non-immigrant status), and 249 (registry) of the INA.

#### V. ARRIVING ALIENS

With respect to aliens who have not been admitted or are otherwise deemed arriving aliens, they are not eligible for voluntary departure.<sup>21</sup> However, such aliens are allowed to withdraw their admission in accordance with INA § 235(a)(4).<sup>22</sup>

#### VI. JUDICIAL REVIEW

IIRAIRA effectively eliminated judicial review over an appeal of a request for voluntary departure under subsection (b) which is the provision governing application for voluntary departure before the Immigration Judge.<sup>23</sup> This section purportedly eliminates judicial review since a request for voluntary departure under subsection (a) has no avenues for appeals except a renewal of the request before the Immigration Judge under subsection (b). It remains to be seen whether this provision will pass muster under the Constitution.

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<sup>18</sup> 8 CFR § 240.26(c)(2).

<sup>19</sup> 8 CFR § 240.26(c)(3).

<sup>20</sup> INA § 240B(d).

<sup>21</sup> INA § 240B(a)(4).

<sup>22</sup> See Interpreter Release issue of January 26, 1998.

<sup>23</sup> INA § 240B(f).

VII.            ANALYSIS

While the option of voluntary departure for some aliens is tantamount to a mirage in the desert, there are several significant circumstances where voluntary departure is a meaningful and viable option for relief in removal proceedings. First, the Service has interpreted voluntary departure as a period authorized by the Attorney General under INA § 212(a)(9)(B)(ii).<sup>24</sup> This means that aliens who have accrued less than 180 days of unlawful presence before the grant of voluntary departure will not be subjected to the three year bar under INA § 212(a)(9)(B)(i)(I). For aliens who have accrued more than 180 days, but less than one year of unlawful presence, voluntary departure works as redemption from the three year bar under INA § 212(a)(9)(B)(i)(I).<sup>25</sup> However, this analysis will not work for aliens who have accrued more than one year of unlawful presence under INA § 212(a)(9)(B)(i)(II) before the grant of voluntary departure.<sup>26</sup>

Another class of aliens that stand to benefit from proper use of voluntary departure are aliens who have made bona-fide asylum applications and who never worked without authorization.<sup>27</sup> Before or during removal proceedings, these aliens who chose not to pursue their asylum claims and take voluntary departure will not be subjected to the bars described above. Aliens may wish to pursue voluntary departure to shield them from bars of inadmissibility if their country conditions may have changed, rendering their asylum applications unapprovable, or they may have developed other routes to permanent residence which are far more attainable as opposed to uncertainty of litigation in removal proceedings.

Last, as mentioned previously, voluntary departure may be used in circumstances where aliens have been convicted of minor criminal offenses. Since IIRAIRA eliminated the requirement of good moral character, this avenue allows aliens who had been convicted of minor

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<sup>24</sup> The Service in a memorandum issued by Pearl B. Chang, Chief of the INS' Residence and Status Service Branch on September 19, 1997, reversed their initial position and stated that voluntary departure is a period deem authorized by the Attorney General. This memo is reproduced in the September 29, 1997 issue of *Interpreter Release*.

<sup>25</sup> In a text cable released to all consular posts (98-State-060539) issued on April 4, 1998, the State Department with approval of the Service affirms this point. This text is reproduced in the April 20, 1998 issue of *Interpreter Release*.

<sup>26</sup> This provision states that any alien who has been **unlawfully present** in the U.S. for **one year or more** is subject to the **ten year bar**. The language of the statute dealing with the ten year bar is quite distinct from the three year bar. Thus, creating a small exception described above.

<sup>27</sup> INA § 212(a)(9)(B)(iii)(II).



criminal offenses and as well as other immigration and non-immigration violations to escape removal or "deportation." In the past, these offenses would render aliens statutorily ineligible for voluntary departure subjecting them to deportation.<sup>28</sup> Thus, some aliens may escape the stigma and legal consequence of removal by the Service through this small exception.

## V. CONCLUSION

As demonstrated above, voluntary departure no longer is a simple relief to avoid deportation or removal. One must consider the full history of the alien and understand the interplays of the various provision of IIRAIRA to effectively use voluntary departure to the advantage of an alien. In most cases, voluntary departure is a poison pill, however, there are limited circumstances where the poison becomes a remedy.

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Under the old INA § 244(e)(1), good moral character was a requisite for statutory eligibility for voluntary departure. INA § 101(f) defines various violations that would render a finding that a person lacks good moral character such as giving false testimony, one who is a habitual drunkard, an individual who has served more than 180 days in confinement, etc.