APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
December 14, 2023
Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HUGO ABISAI MONSALVO VELAZQUEZ, Petitioner, v. MERRICK B. GARLAND, United States Attorney General, Respondent.	No. 22-9576 (Petition for Review)

ORDER

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

This matter is before the court on *Petitioner's Petition for Panel Rehearing or Rehearing En Banc and Respondent's Opposition to Petitioner's Petition for*

Panel Rehearing or Rehearing En Banc. Upon careful consideration of the petition and the response, we direct as follows.

Pursuant to Fed. R. App. P. 40, Petitioner's request for panel rehearing is GRANTED IN PART to the extent of the modifications in the attached revised opinion. The court's September 8, 2023 opinion is withdrawn and replaced by the attached revised opinion, which shall be filed as of today's date. Because the panel's decision to partially grant panel rehearing resulted in only non-substantive changes to the opinion that do not affect the outcome of this appeal, Petitioner may not file a second or successive rehearing petition. *See* 10th Cir. R. 40.3.

The petition, response, and the attached revised opinion were transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service requested that the court be polled, Petitioner's request for rehearing en banc is DENIED. *See* Fed. R. App. P. 35(f).

Entered for the Court,

Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

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Petition for Review from an Order of the Board of Immigration Appeals

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Henry Douglast Hollithron of Hollithron Advocates, P.C., Denver, Colorado, for Petitioner.

Corey L. Farrell, (Brian Boynton, Acting Assistant Attorney General, Civil Division, Sabatino F. Leo, Assistant Director, and Greg D. Mack, Office of Immigration Litigation, U.S. Department of Justice, on the brief), Washington, D.C., for Respondent.

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

KELLY, Circuit Judge.

Petitioner Hugo Abisaí Monsalvo Velázquez seeks review of the Board of Immigration Appeals' (BIA) denial of his motion for reconsideration of the BIA's dismissal of his motion to reopen proceedings. Accessing our jurisdiction under 8 U.S.C. § 1252(b)(1), we deny review because Mr. Velázquez failed to voluntarily depart or file an administrative motion within 60 calendar days, the maximum period provided by statute. 8 U.S.C. § 1229c(b)(2).

Background

Mr. Velázquez — a 32-year-old citizen and native of Mexico — entered the United States without authorization in 2005. In 2011, the Department of Homeland Security (DHS) sought to remove Mr. Velázquez for unlawful entry and served him a Notice to Appear (NTA) in immigration court. AR 713-14. The NTA did not designate the time or place to appear and was, therefore, deficient according to the Supreme Court's since-issued ruling in Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (2018). AR 479. In 2013, Mr. Velázquez admitted to each of the allegations in the NTA and conceded the sole charge of removability: that he had unlawfully entered the United States in 2005. Id. 435.

Mr. Velázquez then sought withholding of removal, protection under the Convention Against Torture

(CAT), and, in the alternative, voluntary departure, 8 U.S.C. § 1229c. AR 435. At a March 5, 2019, hearing, an Immigration Judge (IJ) deemed Mr. Velázquez ineligible for "withholding of removal, either under the Immigration and Nationality Act or under the torture convention." Id. 521. The IJ opted to grant voluntary departure "for 60 days . . . and that will be until May 6 of 2019." Id. 523. The written order, issued that same day, informed Mr. Velázquez he would "be granted voluntary departure under Section 240B(b) of the Act in lieu of removal without expense to the government on or before 60 calendar days from the date of service of th[e] order." Id. 439-40. The order also advised that if Mr. Velázquez "fail[ed] to voluntarily depart the United States within the time frame specified or within any extensions granted by DHS," he would face a civil penalty of $3,000 and "be[come] ineligible for a period of 10 years to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status." Id. 440. The order also advised Mr. Velázquez that were he to judicially challenge the order, the grant of voluntary departure would automatically terminate, and Mr. Velázquez would be removed to Mexico. Id. 440-41.

Mr. Velázquez retained counsel and appealed from the denial of his application for relief to the BIA on April 4, 2019. Id. 405-08. On October 12, 2021, the BIA dismissed Mr. Velázquez's appeal, affirming the IJ's decision in full and reinstating the 60-day voluntary departure period. Id. 386-89. The order advised that if Mr. Velázquez were to file a motion to reopen or reconsider, the voluntary departure would terminate and an alternate removal order would come into effect. Additionally, if Mr. Velázquez sought to petition for judicial review, the allotted period for voluntary

departure would automatically terminate. Id. 388. However, if Mr. Velázquez left within 30 days of filing such a petition, he would not be subject to the penalties for failing to voluntarily depart.

On December 13, 2021, Mr. Velázquez filed a motion to reopen his proceedings to apply for cancellation of removal, 8 U.S.C. § 1229b(b). Pet. Br. at 2; AR 23-26. Mr. Velázquez relied upon Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), and the fact that in 2011 he had been served a deficient NTA, to argue he had accrued 10 years of continuous presence in the United States, a prerequisite to eligibility for cancellation. AR 24-25.[1]

The BIA denied the motion to reopen based on its finding that Mr. Velázquez had not asserted "new facts" previously unavailable, 8 C.F.R. § 1003.2(c)(1), given Mr. Velázquez's claim for cancellation became viable before his 2019 removal hearing and before his appeal from the BIA's October 12, 2021 decision.[2] The

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[1] To be eligible for cancellation of removal, a nonpermanent resident must show continuous residence or physical presence in the United States for 10 years. 8 U.S.C. § 1229b(b)(1)(A). Generally, once an alien receives an NTA, time may no longer be accrued for this purpose. Id. § 1229b(d)(1). In Pereira, the court found that an NTA lacking a time and place of removal proceedings (as Mr. Velázquez's was) could not stop the accrual of time for the purpose of § 1229b(d)(1). 138 S. Ct. at 2114. Niz-Chavez clarified that the "stop-time rule" could also not be triggered by a later-issued written notice supplying information omitted from the NTA. 141 S. Ct. at 1485.

[2] The Court decided Pereira in June 2018, before Mr. Velázquez's March 2019 removal hearing. Niz-Chavez was decided on April 29, 2021, while Mr. Velázquez's appeal, filed on April 4, 2019, was pending. AR 404. Thus, the BIA found that based on these developments, Mr. Velázquez had a viable claim for

BIA also found the motion untimely because Mr. Velázquez filed after the 60-day period allotted by the BIA, the maximum permitted by statute.[3] AR 20. The effect: Mr. Velázquez was no longer statutorily eligible for cancellation of removal.[4]

Mr. Velázquez filed a timely motion to reconsider, challenging only the second component of the BIA's decision — that his motion to reopen was filed outside the 60-day voluntary departure period. Id. 7-9. In his view, the BIA's determination was at odds with the Executive Office of Immigration Review's (EOIR) policy concerning filing deadlines coinciding with a weekend or holiday. Id. 8. The BIA denied the motion, finding no statutory or regulatory authority to support Mr. Velázquez's desired "exten[sion] [of] the last day of the voluntary departure period falling on a weekend or a legal holiday to the next business day." Id. 3. It explained that the EOIR policy provisions cited by Mr. Velázquez did not speak to the issue before it as the policies governed filing deadlines, not the voluntary departure period. Id. 4. Mr. Velázquez filed a petition for review in this court.

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cancellation eligibility which could have been asserted at the March 2019 hearing or while his appeal was pending in 2021. AR 19-20.

[3] The 60th calendar day fell on Saturday, December 11, 2021. Mr. Velázquez filed his motion on Monday, December 13, 2021.

[4] See 8 U.S.C. § 1229c(d)(1)(B) ("Civil penalty for failure to depart") ("[I]f an alien is permitted to depart voluntarily . . . and voluntarily fails to depart the United States within the time period specified, the alien . . . shall be ineligible, for a period of 10 years, to receive any further relief under . . . section[] 1229b [cancellation of removal].").

Discussion

Mr. Velázquez's petition presents the question of how time is computed when 60 days' voluntary departure is granted to a noncitizen pursuant to section 240B of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229c(a)(1). Specifically, when the 60th calendar day falls on a weekend or federal holiday, does that day count in the accrual of voluntary departure time if the grantee files a motion to reopen his proceedings on the first available business day? This is an issue of first impression in this court and addressed before by only one other circuit of which we are aware. See Meza-Vallejos v. Holder, 669 F.3d 920, 926-27 (9th Cir. 2012). In light of clear legislative direction, we uphold the BIA's interpretation that regardless of what day of the week a voluntary departure period expires, an alien moving to reopen or reconsider his removal proceedings must file within 60 calendar days from the date the relief is granted.

The BIA has not issued a precedential disposition on this point. Thus, we defer to the BIA's determination to the extent we find it persuasive. See Carpio v. Holder, 592 F.3d 1091, 1097-98 (10th Cir. 2010) (applying the framework set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944), to unpublished, single-member decision by the BIA).

I. Jurisdiction

The government contends we lack jurisdiction to decide the issue presented by Mr. Velázquez's petition. It argues the BIA's denial of reconsideration derives from the underlying voluntary departure determination, and because we have no authority to review the agency's discretionary grant of this form of relief

under 8 U.S.C. § 1252(a)(2)(B), Patel v. Garland, 142 S. Ct. 1614 (2022),[5] we are unable to consider "any judgment regarding voluntary departure." Resp. Br. at 36-38.

We cannot agree. This theory misconstrues the issue and overstates the implications of Patel. Section 1252(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of" certain categories of relief. Patel, 142 S. Ct. at 1618, 1622. Voluntary departure is one such category. See 8 U.S.C. § 1252(a)(2)(B)(i) (precluding review of judgments made under 8 U.S.C. § 1229c). In Patel, the Supreme Court clarified this jurisdictional bar extends to underlying factual determinations. 142 S. Ct. at 1627. Mr. Velázquez does not challenge the BIA's award of voluntary departure, however. Indeed, he himself requested this form of relief. AR 435.[6] He seeks review of the denial of his motion to reconsider, a disposition categorically within our purview. Mata v. Lynch, 576 U.S. 143, 148 (2015); see 8 U.S.C. § 1252(b)(6) (providing for judicial review of a motion to reopen or reconsider along with a final order of removal).

We are also unpersuaded by the government's suggestion that because we lack jurisdiction over voluntary departure dispositions it follows that we may not review any judgment precipitated by such a decision.

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[5] See also 8 U.S.C. § 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . .").

[6] To the extent the government further suggests that § 1229c(f), which deprives courts of "jurisdiction over an appeal from denial of a request for an order of voluntary departure[,]" precludes our review, that section plainly does not apply here given the IJ granted voluntary departure.

See Resp. Br. at 38. For one, we retain the authority to review legal questions, notwithstanding that the vehicle for their presentment involves a discretionary determination. See Patel, 142 S. Ct. at 1623; id. at 1635 (Gorsuch, J., dissenting) ("[E]veryone agrees that [8 U.S.C. § 1252(a)(2)(D)] restores judicial review of . . . discretionary judgments . . . to the extent a legal question . . . is in play."). More broadly, the fact that Mr. Velázquez, at one stage in his proceedings, sought discretionary relief does not undermine our ability to review the issues presented by a later judgment regarding his removal. Mata, 576 U.S. at 148 ("That courts lack jurisdiction over one matter . . . does not affect their jurisdiction over another . . . .").

The government asserts that the motion to reopen was denied on two grounds, the first of which — that Mr. Velázquez failed to present previously unavailable evidence — is an "independent, dispositive, unchallenged, and undisputed" ground for denial. Resp. Br. at 31. Our ruling on the motion for reconsideration, in other words, would not alter the outcome of Mr. Velázquez's motion to reopen to apply for cancellation of removal — the underlying form of relief Mr. Velázquez sought. Id. at 34. We find otherwise. As in all cases, as a prerequisite to our review, this petition must present a justiciable conflict the resolution of which can result in "effectual relief" to the petitioner. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992)); see Granados-Oseguera v. Mukasey, 546 F.3d 1011, 1014-1015 (9th Cir. 2008). Mr. Velázquez concedes he has waived a challenge to the first ground for the BIA's denial. See Pet. Br. at 7-8 & 8 n.3. He instead seeks our review of the BIA's conclusion that he untimely moved to reopen in

violation of the conditions of his departure, and accordingly faces a monetary fine and ineligibility for future immigration relief. Thus, our disposition can conceivably result in effectual relief to Mr. Velázquez.

II. Merits

The INA authorizes the Attorney General to "permit an alien voluntarily to depart the United States at the alien's own expense . . . in lieu of" being forcibly removed. 8 U.S.C. § 1229c(a)(1). Following the conclusion of removal proceedings, the immigration judge may grant permission to depart not to exceed 60 days. Id. § 1229c(b)(2). If an alien fails to depart within the time allotted, he or she must pay a civil fine and becomes ineligible for certain forms of relief, including adjustment of status, for ten years. See 8 U.S.C. § 1229c(d)(1) ("Civil penalty for failure to depart").

Alternatively, prior to the expiration of the voluntary departure period, a noncitizen may file a motion to reopen or reconsider. [7] A timely such motion avoids the penalties associated with failure to voluntarily depart but automatically terminates the grant of voluntary departure, causing an alternate removal order to come into effect. If the noncitizen fails to voluntarily depart or move for affirmative relief within 60 days, in addition to becoming removable, the alien faces penalties triggered by noncompliance with the conditions of voluntary departure. See 8 C.F.R.

[7] Ordinarily, an alien has 90 days upon the entry of a final administrative order of removal to file a motion to reopen and 30 days within which to file a motion to reconsider. 8 C.F.R. § 1003.23(b). As is underscored by the issue presented for review, when one agrees to voluntary departure, the time to file a motion to reopen effectively decreases.

§ 1240.26(b)(3)(iii); see also id. § 1240.26(e)(2) ("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 . . . .").

Mr. Velázquez contends that when a 60-day voluntary departure period expires on a weekend day (or legal holiday), a motion to reopen filed on the next available business day must be deemed to have been filed within the statutory period. The government counters that adoption of Mr. Velázquez's rule necessarily involves tolling of the statutory period, a result it argues was considered and rejected by the Supreme Court in Dada v. Mukasey, 554 U.S. 1 (2008). Resp. Br. at 8-12. For his part, Mr. Velázquez insists that this rule does not involve statutory "tolling," but mere interpretation of "day" when the final "day" of the voluntary departure period falls on a weekend or federal holiday. Reply Br. at 16-19.

Mr. Velázquez's preferred interpretation, he argues, aligns with practice policies published by the EOIR providing that "when a deadline falls on a weekend or legal holiday, it is construed to fall on the immediately following business day." Pet. Br. at 15 (citing Exec. Off. for Immigr. Rev., Immigr. Ct. Practice Manual § 3.1(c)(2)(D) (2022); Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals Practice Manual, § 3.1(b)(2)(2022)). Accordingly, he argues that the BIA's ruling is inconsistent with EOIR policy concerning other deadlines and thus introduces "illogic . . . into the computation of deadlines before immigration courts and the BIA." Pet. Br. at 15-16.

To the contrary, the BIA's ruling does not introduce inconsistency into the immigration appeals process.

That "day" is applied in one manner when filing appeals, motions, or other documents in immigration court or with the BIA and another when interpreting a maximum time period designated by statute, makes sense. The same restrictions that apply in the filing context — court or agency closures — do not prevent one from departing, by, for example, boarding a plane, or otherwise being transported to one's chosen destination. While a movant or petitioner may be afforded until the next business day in the event a filing deadline falls on a weekend or holiday, that rule simply does not extend to this context. Although the BIA's interpretation may effectively require a movant to request reopening or reconsideration of his case before the expiration of the voluntary departure period, this would not be an unusual occurrence given a statutory deadline such as a limitations period.[8]

Conclusively, this case is governed by § 1229c, which unambiguously states that while the Attorney General has the discretion to grant voluntary departure, in no event may the time allotted exceed 60

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[8] It would also not be uncommon, even in the filing context, for a litigant to need to prepare and dispatch documents well in advance of a deadline to account for possible postal delays. See, e.g., Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals Practice Manual, § 3.1(a)(1) ("Receipt rule"); id. § 3.2(b) ("Because paper filings are date-stamped upon arrival at the Board, the Board strongly recommends that parties filing in paper should file as far in advance of the deadline as possible . . . ."). The BIA transitioned to electronic filing in 2022, but filing electronically is not available in cases initiated by paper, as Mr. Velázquez's was. Electronic Case Access and Filing, Exec. Off. for Immigr. Rev., 86 Fed. Reg. 70708, 70710 (Dec. 12, 2021) (effective Feb. 11, 2022).

days.[9] 8 U.S.C. § 1229c(b)(2); see also Dada, 554 U.S. at 15 ("To be sure, 8 U.S.C. § 1229c(b)(2) contains no ambiguity: The period within which the alien may depart voluntarily 'shall not be valid for a period exceeding 60 days.'"). The fact that one may file a motion to reopen does not obviate the conditions attached to voluntary departure: that the immigrant take action in some form, either by leaving the United States or filing an administrative motion. The Court made as much clear in Dada. 554 U.S. at 19 (addressing the intersection of voluntary departure and filing a motion to reopen; noting the alien's "obligation to arrange for departure, and actually depart, within the 60-day period."). By requesting and agreeing to voluntary departure, Mr. Velázquez accepted that he would be obligated to depart within 60 days, as a result of which he would not have 90 days to file a motion for affirmative relief. See supra n.7. Rather, he would have 57, or 58 days, given that his motion would need to be received by the BIA by December 11.[10]

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[9] Implementing regulations provide that though "[a]uthority to extend the time within which to depart voluntarily" lies with the "district director, the Deputy Executive Associate Commissioner for Detention and Removal, [and] the Director of the Office of Juvenile Affairs . . . . In no event can the total period of time, including any extension, exceed . . . 60 days . . . ." 8 C.F.R. § 1240.26(f) (emphasis added).

[10] In his reply brief, Mr. Velázquez draws our attention to the IJ's oral March 5, 2019 order, which indicated that he would have until May 6 to depart, without objection from the government. Reply Br. at 18-19; AR 523. He notes that 60 calendar days from March 5 was May 4, which fell on a Saturday. In his view, the fact that the IJ allowed him until Monday, May 6, indicates that the immigration court agrees with his interpretation. Given this argument was not presented to the BIA, or in Mr. Velázquez's opening brief, it is waived. See United States v. Leffler, 942 F.3d

The BIA's determination is further supported by the policy rationale underpinning voluntary departure. As the Supreme Court described it, inherent in the voluntary departure agreement is a "quid pro quo." Dada, 54 U.S. at 11. The immigrant fulfills his interest in departing to his destination of choice and avoids the stigma and legal consequences associated with deportation and subsequent reentry following removal.[11] In exchange, the government benefits from an expedited removal process and avoids the administrative expenses involved in removal and pre-removal detention. By electing to remain in the country and pursue an administrative motion, Mr. Velázquez chose to forgo the benefits of voluntary departure. Dada, 554 U.S. at 21 ("[T]he 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.").

The Ninth Circuit rejected the BIA's interpretation on analogous facts in Meza-Vallejos, finding the ruling's effect was to unfairly "shorten" the statutory departure window. 669 F.3d at 927. Accordingly, it held

> where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA,

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1192, 1197 (10th Cir. 2019); Torres de la Cruz v. Maurer, 483 F.3d 1013, 1022-23 (10th Cir. 2007) (same waiver rules that generally apply to appellate practice apply to review of proceedings conducted by the BIA).

[11] Removed aliens face significant barriers to reentry and in certain circumstances, may receive up to 20 years' imprisonment for unlawfully reentering the United States. 8 U.S.C. § 1326(a)(1)-(2), (b)(2).

> that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure . . . . [Petitioner's] motion to reopen was timely filed on Monday . . . .

Id. The court reasoned, as does Mr. Velázquez, that by its holding it was "not extending the voluntary departure period, but rather determining on which day the sixtieth day falls." Id. But despite this creative reasoning, construing a motion filed after the lapse of the voluntary departure period as "timely" necessarily extends the time an alien has to depart, thus exceeding the scope of relief permitted by statute. Cf. 8 U.S.C. § 1229c. In other words, according to the Ninth Circuit's construction, the alien has not 60 days to depart, as he would if he had not filed a motion, but 61 (or 62, should the voluntary departure period lapse on a Saturday which happens to precede a federal holiday) if he elects to file a motion but waits until the last moment to do so.

To construe "day" in the Ninth Circuit's and Mr. Velázquez's preferred manner would require the statute to specify that although "permission to depart voluntarily . . . shall not be valid for a period exceeding 60 days," 8 U.S.C. § 1229c(b)(2), such permission may exceed 60 days when the removable alien (a) elects to file a motion to reopen and (b) the 60th day would fall on a Saturday, Sunday, or federal holiday. We cannot reconfigure the statute in this manner. See Dada, 554 U.S. at 5 (rejecting the proposition that voluntary departure should be tolled pending resolution of a motion to reopen when that interpretation "would

reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design.").

We acknowledge that though voluntary departure shields an individual from the harsh consequences of a removal order, accepting relief in this form requires careful consideration, given the significant consequences for failure to timely depart. If he stays longer in hopes the motion will be successful, he is subject to removal for overstaying the voluntary departure period — and becomes ineligible for the very form of relief sought — if it is not. In either scenario, the alien faces significant legal consequences. However, although the statutory scheme forces an alien to weigh two less-than-desirable courses of action, it cannot be said that once one route is selected, the consequences for failure to follow through are unreasonable. While perhaps harsh, they are compelled by statute. See 8 U.S.C. § 1229c(d)(1).

REVIEW DENIED.

APPENDIX B

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Immigration Litigation, U.S. Department of Justice, on the brief), Washington, D.C., for Respondent.

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

KELLY, Circuit Judge.

Petitioner Hugo Abisaí Monsalvo Velázquez seeks review of the Board of Immigration Appeals' (BIA) denial of his motion for reconsideration of the BIA's dismissal of his motion to reopen proceedings. Accessing our jurisdiction under 8 U.S.C. § 1252(b)(1), we deny review because Mr. Velázquez failed to voluntarily depart or file an administrative motion within 60 calendar days, the maximum period provided by statute. 8 U.S.C. § 1229c(b)(2).

Background

Mr. Velázquez — a 32-year-old citizen and native of Mexico — entered the United States without authorization in 2005. In 2011, the Department of Homeland Security (DHS) sought to remove Mr. Velázquez for unlawful entry and served him a Notice to Appear (NTA) in immigration court. AR 713-14. The NTA did not designate the time or place to appear and was, therefore, deficient according to the Supreme Court's since-issued ruling in Pereira v. Sessions, 138 S. Ct. 2105, 2113-14 (2018). AR 479. In 2013, Mr. Velázquez admitted to each of the allegations in the NTA and conceded the sole charge of removability: that he had unlawfully entered the United States in 2005. Id. 435.

Mr. Velázquez then sought withholding of removal, protection under the Convention Against Torture (CAT), and, in the alternative, voluntary departure, 8 U.S.C. § 1229c. AR 435. At a March 5, 2019, hearing, an Immigration Judge (IJ) deemed Mr. Velázquez ineligible for "withholding of removal, either under the Immigration and Nationality Act or under the torture convention." Id. 521. The IJ opted to grant voluntary departure "for 60 days . . . and that will be until May 6 of 2019." Id. 523. The written order, issued that same day, informed Mr. Velázquez he would "be granted voluntary departure under Section 240B(b) of the Act in lieu of removal without expense to the government on or before 60 calendar days from the date of service of th[e] order." Id. 439-40. The order also advised that if Mr. Velázquez "fail[ed] to voluntarily depart the United States within the time frame specified or within any extensions granted by DHS," he would face a civil penalty of $3,000 and "be[come] ineligible for a period of 10 years to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status." Id. 440. The order also advised Mr. Velázquez that were he to judicially challenge the order, the grant of voluntary departure would automatically terminate, and Mr. Velázquez would be removed to Mexico. Id. 440-41.

Mr. Velázquez retained counsel and appealed from the denial of his application for relief to the BIA on April 4, 2019. Id. 405-08. On October 12, 2021, the BIA dismissed Mr. Velázquez's appeal, affirming the IJ's decision in full and reinstating the 60-day voluntary departure period. Id. 386-89. The order advised that if Mr. Velázquez were to file a motion to reopen or reconsider, the voluntary departure would terminate and an alternate removal order would come into

effect. Additionally, if Mr. Velázquez sought to petition for judicial review, the allotted period for voluntary departure would automatically terminate. Id. 388. However, if Mr. Velázquez left within 30 days of filing such a petition, he would not be subject to the penalties for failing to voluntarily depart.

On December 13, 2021, Mr. Velázquez filed a motion to reopen his proceedings to apply for cancellation of removal, 8 U.S.C. § 1229b(b). Pet. Br. at 2; AR 23-26. Mr. Velázquez relied upon Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), and the fact that in 2011 he had been served a deficient NTA, to argue he had accrued 10 years of continuous presence in the United States, a prerequisite to eligibility for cancellation. AR 24-25.[1]

The BIA denied the motion to reopen based on its finding that Mr. Velázquez had not asserted "new facts" previously unavailable, 8 C.F.R. § 1003.2(c)(1), given Mr. Velázquez's claim for cancellation became viable before his 2019 removal hearing and before his appeal from the BIA's October 12, 2021 decision.[2] The

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BIA also found the motion untimely because Mr. Velázquez filed after the 60-day period allotted by the BIA, the maximum permitted by statute.[3] AR 20. The effect: Mr. Velázquez was no longer statutorily eligible for cancellation of removal.[4]

Mr. Velázquez filed a timely motion to reconsider, challenging only the second component of the BIA's decision — that his motion to reopen was filed outside the 60-day voluntary departure period. Id. 7-9. In his view, the BIA's determination was at odds with the Executive Office of Immigration Review's (EOIR) policy concerning filing deadlines coinciding with a weekend or holiday. Id. 8. The BIA denied the motion, finding no statutory or regulatory authority to support Mr. Velázquez's desired "exten[sion] [of] the last day of the voluntary departure period falling on a weekend or a legal holiday to the next business day." Id. 3. It explained that the EOIR policy provisions cited by Mr. Velázquez did not speak to the issue before it as the policies governed filing deadlines, not the voluntary departure period. Id. 4. Mr. Velázquez filed a petition for review in this court.

2019, was pending. AR 404. Thus, the BIA found that based on these developments, Mr. Velázquez had a viable claim for cancellation eligibility which could have been asserted at the March 2019 hearing or while his appeal was pending in 2021. AR 19-20.

[3] The 60th calendar day fell on Saturday, December 11, 2021. Mr. Velázquez filed his motion on Monday, December 13, 2021.

[4] See 8 U.S.C. § 1229c(d)(1)(B) ("Civil penalty for failure to depart") ("[I]f an alien is permitted to depart voluntarily . . . and voluntarily fails to depart the United States within the time period specified, the alien . . . shall be ineligible, for a period of 10 years, to receive any further relief under . . . section[] 1229b [cancellation of removal].").

Discussion

Mr. Velázquez's petition presents the question of how time is computed when 60 days' voluntary departure is granted to a noncitizen pursuant to section 240B of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229c(a)(1). Specifically, when the 60th calendar day falls on a weekend or federal holiday, does that day count in the accrual of voluntary departure time if the grantee files a motion to reopen his proceedings on the first available business day? This is an issue of first impression in this court and addressed before by only one other circuit of which we are aware. See Meza-Vallejos v. Holder, 669 F.3d 920, 926-27 (9th Cir. 2012). In light of clear legislative direction, we uphold the BIA's interpretation that regardless of what day of the week a voluntary departure period expires, an alien moving to reopen or reconsider his removal proceedings must file within 60 calendar days from the date the relief is granted.

The BIA has not issued a precedential disposition on this point. Thus, we defer to the BIA's determination to the extent we find it persuasive. See Carpio v. Holder, 592 F.3d 1091, 1097-98 (10th Cir. 2010) (applying the framework set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944), to unpublished, single-member decision by the BIA).

I. Jurisdiction

The government contends we lack jurisdiction to decide the issue presented by Mr. Velázquez's petition. It argues the BIA's denial of reconsideration derives from the underlying voluntary departure determination, and because we have no authority to review the agency' s discretionary grant of this form of relief

under 8 U.S.C. § 1252(a)(2)(B), Patel v. Garland, 142 S. Ct. 1614 (2022),[5] we are unable to consider "any judgment regarding voluntary departure." Resp. Br. at 36-38.

We cannot agree. This theory misconstrues the issue and overstates the implications of Patel. Section 1252(a)(2)(B)(i) bars judicial review of "any judgment regarding the granting of" certain categories of relief. Patel, 142 S. Ct. at 1618, 1622. Voluntary departure is one such category. See 8 U.S.C. § 1252(a)(2)(B)(i) (precluding review of judgments made under 8 U.S.C. § 1229c). In Patel, the Supreme Court clarified this jurisdictional bar extends to underlying factual determinations. 142 S. Ct. at 1627. Mr. Velázquez does not challenge the BIA's award of voluntary departure, however. Indeed, he himself requested this form of relief. AR 435.[6] He seeks review of the denial of his motion to reconsider, a disposition categorically within our purview. Mata v. Lynch, 576 U.S. 143, 148 (2015); see 8 U.S.C. § 1252(b)(6) (providing for judicial review of a motion to reopen or reconsider along with a final order of removal).

We are also unpersuaded by the government's suggestion that because we lack jurisdiction over voluntary departure dispositions it follows that we may not review any judgment precipitated by such a decision.

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[5] See also 8 U.S.C. § 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . .").

[6] To the extent the government further suggests that § 1229c(f), which deprives courts of "jurisdiction over an appeal from denial of a request for an order of voluntary departure[,]" precludes our review, that section plainly does not apply here given the IJ granted voluntary departure.

See Resp. Br. at 38. For one, we retain the authority to review legal questions, notwithstanding that the vehicle for their presentment involves a discretionary determination. See Patel, 142 S. Ct. at 1623; id. at 1635 (Gorsuch, J., dissenting) ("[E]veryone agrees that [8 U.S.C. § 1252(a)(2)(D)] restores judicial review of . . . discretionary judgments . . . to the extent a legal question . . . is in play."). More broadly, the fact that Mr. Velázquez, at one stage in his proceedings, sought discretionary relief does not undermine our ability to review the issues presented by a later judgment regarding his removal. Mata, 576 U.S. at 148 ("That courts lack jurisdiction over one matter . . . does not affect their jurisdiction over another . . . .").

The government asserts that the motion to reopen was denied on two grounds, the first of which — that Mr. Velázquez failed to present previously unavailable evidence — is an "independent, dispositive, unchallenged, and undisputed" ground for denial. Resp. Br. at 31. Our ruling on the motion for reconsideration, in other words, would not alter the outcome of Mr. Velázquez's motion to reopen to apply for cancellation of removal — the underlying form of relief Mr. Velázquez sought. Id. at 34. We find otherwise. As in all cases, as a prerequisite to our review, this petition must present a justiciable conflict the resolution of which can result in "effectual relief" to the petitioner. City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000) (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992)); see Granados-Oseguera v. Mukasey, 546 F.3d 1011, 1014-1015 (9th Cir. 2008). Mr. Velázquez concedes he has waived a challenge to the first ground for the BIA's denial. See Pet. Br. at 7-8 & 8 n.3. He instead seeks our review of the BIA's conclusion that he untimely moved to reopen in

violation of the conditions of his departure, and accordingly faces a monetary fine and ineligibility for future immigration relief. Thus, our disposition can conceivably result in effectual relief to Mr. Velázquez.

II. Merits

The INA authorizes the Attorney General to "permit an alien voluntarily to depart the United States at the alien's own expense . . . in lieu of" being forcibly removed. 8 U.S.C. § 1229c(a)(1). Following the conclusion of removal proceedings, the immigration judge may grant permission to depart not to exceed 60 days. Id. § 1229c(b)(2). If an alien fails to depart within the time allotted, he or she must pay a civil fine and becomes ineligible for certain forms of relief, including adjustment of status, for ten years. See 8 U.S.C. § 1229c(d)(1) ("Civil penalty for failure to depart").

Alternatively, prior to the expiration of the voluntary departure period, a noncitizen may file a motion to reopen or reconsider. [7] A timely such motion avoids the penalties associated with failure to voluntarily depart but automatically terminates the grant of voluntary departure, causing an alternate removal order to come into effect. If the movant leaves the United States within 30 days upon filing a motion, he is deemed to have departed voluntarily. 8 C.F.R. § 1240.26(i). However, if the noncitizen fails to voluntarily depart or move for affirmative relief within 60

[7] Ordinarily, an alien has 90 days upon the entry of a final administrative order of removal to file a motion to reopen and 30 days within which to file a motion to reconsider. 8 C.F.R. § 1003.23(b). As is underscored by the issue presented for review, when one agrees to voluntary departure, the time to file a motion to reopen effectively decreases.

days, in addition to becoming removable, the alien faces penalties triggered by noncompliance with the conditions of voluntary departure. See 8 C.F.R. § 1240.26(b)(3)(iii); see also id. § 1240.26(e)(2) ("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 . . . .").

Mr. Velázquez contends that when a 60-day voluntary departure period expires on a weekend day (or legal holiday), a motion to reopen filed on the next available business day must be deemed to have been filed within the statutory period. The government counters that adoption of Mr. Velázquez's rule necessarily involves tolling of the statutory period, a result it argues was considered and rejected by the Supreme Court in Dada v. Mukasey, 554 U.S. 1 (2008). Resp. Br. at 8-12. For his part, Mr. Velázquez insists that this rule does not involve statutory "tolling," but mere interpretation of "day" when the final "day" of the voluntary departure period falls on a weekend or federal holiday. Reply Br. at 16-19.

Mr. Velázquez's preferred interpretation, he argues, aligns with practice policies published by the EOIR providing that "when a deadline falls on a weekend or legal holiday, it is construed to fall on the immediately following business day." Pet. Br. at 15 (citing Exec. Off. for Immigr. Rev., Immigr. Ct. Practice Manual § 3.1(c)(2)(D) (2022); Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals Practice Manual, § 3.1(b)(2)(2022)). Accordingly, he argues that the BIA's ruling is inconsistent with EOIR policy concerning other deadlines and thus introduces "illogic . . . into the computation

of deadlines before immigration courts and the BIA." Pet. Br. at 15-16.

To the contrary, the BIA's ruling does not introduce inconsistency into the immigration appeals process. That "day" is applied in one manner when filing appeals, motions, or other documents in immigration court or with the BIA and another when interpreting a maximum time period designated by statute, makes sense. The same restrictions that apply in the filing context — court or agency closures — do not prevent one from departing, by, for example, boarding a plane, or otherwise being transported to one's chosen destination. While a movant or petitioner may be afforded until the next business day in the event a filing deadline falls on a weekend or holiday, that rule simply does not extend to this context. Although the BIA's interpretation may effectively require a movant to request reopening or reconsideration of his case before the expiration of the voluntary departure period, this would not be an unusual occurrence given a statutory deadline such as a limitations period.[8]

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[8] It would also not be uncommon, even in the filing context, for a litigant to need to prepare and dispatch documents well in advance of a deadline to account for possible postal delays. See, e.g., Exec. Off. for Immigr. Rev., Bd. of Immigr. Appeals Practice Manual, § 3.1(a)(1) ("Receipt rule"); id. § 3.2(b) ("Because paper filings are date-stamped upon arrival at the Board, the Board strongly recommends that parties filing in paper should file as far in advance of the deadline as possible . . . ."). The BIA transitioned to electronic filing in 2022, but filing electronically is not available in cases initiated by paper, as Mr. Velázquez's was. Electronic Case Access and Filing, Exec. Off. for Immigr. Rev., 86 Fed. Reg. 70708, 70710 (Dec. 12, 2021) (effective Feb. 11, 2022).

Conclusively, this case is governed by § 1229c, which unambiguously states that while the Attorney General has the discretion to grant voluntary departure, in no event may the time allotted exceed 60 days.[9] 8 U.S.C. § 1229c(b)(2); see also Dada, 554 U.S. at 15 ("To be sure, 8 U.S.C. § 1229c(b)(2) contains no ambiguity: The period within which the alien may depart voluntarily 'shall not be valid for a period exceeding 60 days.'"). The fact that one may file a motion to reopen does not obviate the conditions attached to voluntary departure: that the immigrant take action in some form, either by leaving the United States or filing an administrative motion. The Court made as much clear in Dada. 554 U.S. at 19 (addressing the intersection of voluntary departure and filing a motion to reopen; noting the alien's "obligation to arrange for departure, and actually depart, within the 60-day period."). By requesting and agreeing to voluntary departure, Mr. Velázquez accepted that he would be obligated to depart within 60 days, as a result of which he would not have 90 days to file a motion for affirmative relief. See supra n.7. Rather, he would have 57, or 58 days, given that his motion would need to be received by the BIA by December 11.[10]

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[9] Implementing regulations provide that though "[a]uthority to extend the time within which to depart voluntarily" lies with the "district director, the Deputy Executive Associate Commissioner for Detention and Removal, [and] the Director of the Office of Juvenile Affairs . . . . In no event can the total period of time, including any extension, exceed . . . 60 days . . . ." 8 C.F.R. § 1240.26(f) (emphasis added).

[10] In his reply brief, Mr. Velázquez draws our attention to the IJ's oral March 5, 2019 order, which indicated that he would have until May 6 to depart, without objection from the government. Reply Br. at 18–19; AR 523. He notes that 60 calendar days from

The BIA's determination is further supported by the policy rationale underpinning voluntary departure. As the Supreme Court described it, inherent in the voluntary departure agreement is a "quid pro quo." Dada, 54 U.S. at 11. The immigrant fulfills his interest in departing to his destination of choice and avoids the stigma and legal consequences associated with deportation and subsequent reentry following removal.[11] In exchange, the government benefits from an expedited removal process and avoids the administrative expenses involved in removal and pre-removal detention. By electing to remain in the country and pursue an administrative motion, Mr. Velázquez chose to forgo the benefits of voluntary departure. Dada, 554 U.S. at 21 ("[T]he 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.").

The Ninth Circuit rejected the BIA's interpretation on analogous facts in Meza-Vallejos, finding the

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March 5 was May 4, which fell on a Saturday. In his view, the fact that the IJ allowed him until Monday, May 6, indicates that the immigration court agrees with his interpretation. Given this argument was not presented to the BIA, or in Mr. Velázquez's opening brief, it is waived. See United States v. Leffler, 942 F.3d 1192, 1197 (10th Cir. 2019); Torres de la Cruz v. Maurer, 483 F.3d 1013, 1022–23 (10th Cir. 2007) (same waiver rules that generally apply to appellate practice apply to review of proceedings conducted by the BIA).

[11] Removed aliens face significant barriers to reentry and in certain circumstances, may receive up to 20 years' imprisonment for unlawfully reentering the United States. 8 U.S.C. § 1326(a)(1)-(2), (b)(2).

ruling's effect was to unfairly "shorten" the statutory departure window. 669 F.3d at 927. Accordingly, it held

> where the last day of a period of voluntary departure falls on a day on which an immigrant cannot file a motion for affirmative relief with the BIA, that day does not count in the voluntary departure period if, as here, the immigrant files on the first available day a motion that would either have tolled, automatically withdrawn, or otherwise affected his request for voluntary departure . . . . [Petitioner's] motion to reopen was timely filed on Monday . . . .

Id. The court reasoned, as does Mr. Velázquez, that by its holding it was "not extending the voluntary departure period, but rather determining on which day the sixtieth day falls." Id. But despite this creative reasoning, construing a motion filed after the lapse of the voluntary departure period as "timely" necessarily extends the time an alien has to depart, thus exceeding the scope of relief permitted by statute. Cf. 8 U.S.C. § 1229c. In other words, according to the Ninth Circuit's construction, the alien has not 60 days to depart, as he would if he had not filed a motion, but 61 (or 62, should the voluntary departure period lapse on a Saturday which happens to precede a federal holiday) if he elects to file a motion but waits until the last moment to do so.

To construe "day" in the Ninth Circuit's and Mr. Velázquez's preferred manner would require the statute to specify that although "permission to depart voluntarily . . . shall not be valid for a period exceeding 60 days," 8 U.S.C. § 1229c(b)(2), such permission may exceed 60 days when the removable alien (a) elects to file

a motion to reopen and (b) the 60th day would fall on a Saturday, Sunday, or federal holiday. We cannot reconfigure the statute in this manner. See Dada, 554 U.S. at 5 (rejecting the proposition that voluntary departure should be tolled pending resolution of a motion to reopen when that interpretation "would reconfigure the voluntary departure scheme in a manner inconsistent with the statutory design.").

We acknowledge that though voluntary departure shields an individual from the harsh consequences of a removal order, accepting relief in this form requires careful consideration, given the significant consequences for failure to timely depart. If an alien elects to pursue an administrative motion, he may remain in the United States for 30 days, 8 C.F.R. § 1240.26(i), there being no guarantee his motion will be resolved within that period. If he stays longer in hopes the motion will be successful, he is subject to removal for overstaying the voluntary departure period — and becomes ineligible for the very form of relief sought — if it is not. In either scenario, the alien faces significant legal consequences. However, although the statutory scheme forces an alien to weigh two less-than-desirable courses of action, it cannot be said that once one route is selected, the consequences for failure to follow through are unreasonable. While perhaps harsh, they are compelled by statute. See 8 U.S.C. § 1229c(d)(1).

REVIEW DENIED.

APPENDIX C

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Hugo Abisai MONSALVO VELAZQUEZ, A201-221-431

Respondent

FILED
Oct 04, 2022

ON BEHALF OF RESPONDENT:
Henry D. Hollithron, Esquire

IN REMOVAL PROCEEDINGS

On Motion from a Decision of the Board of Immigration Appeals

Before: Mahtabfar, Appellate Immigration Judge

MAHTABFAR, Appellate Immigration Judge

The respondent has filed a timely motion to reconsider the Board's May 4, 2022, decision, in which we denied his motion to reopen. The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be denied.

In the prior decision, the Board denied the respondent's motion to reopen, which sought to apply for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(b)(1), on two grounds. First, the respondent could have applied for cancellation of removal at his hearing before the Immigration Judge based on

Pereira v. Sessions, 138 S. Ct. 2105 (2018), yet he did not do so. Second, when the motion to reopen was filed, the respondent was ineligible for cancellation of removal under section 240B(d) of the INA 8 U.S.C. § 1229c(d), because the motion to reopen was filed on December 13, 2021, after the 60-day period of voluntary departure already expired on December 11, 2021.

In the motion, the respondent does not address the first ground noted in the Board's prior decision, and states he "is not asking the Board to grant the Motion to Reopen" (Motion at 2 ¶ 7). Thus, regardless of whether the second ground noted was in error, the respondent does not argue that a different outcome was warranted for his motion to reopen.

The respondent argues that the second ground for denying his motion was in error, and urges us to reconsider that part of the decision. Specifically, the respondent notes that the last day of the 60-day voluntary departure period, December 11, 2021, was a Saturday, thus the voluntary departure period should be deemed to end on Monday, December 13, 2021, the same day his motion to reopen was filed.

The respondent cites no provision statute or regulation extending the last day of the voluntary departure period felling on a weekend or a legal holiday to the next business day. The regulation on voluntary departure provides that authority to extend the voluntary departure is only within the jurisdiction of the DHS. 8 C.F.R § 1240.26(f). The respondent relies on EOIR Policy Manual for the proposition that a deadline date that falls on a Saturday, Sunday, or legal holiday is construed to fall on the next business day (Motion at 1). EOIR Policy Manual, Part II: Immigration Court Practice Manual § 3.1(c)(2); EOIR Policy Manual, Part

III: BIA Practice Manual § 3.1(b)(2); *see also* 8 C.F.R § 1003.38(b). However, these provisions govern filing of appeals, motions, or other documents with the Immigration Court or the Board, and do not govern the voluntary departure period. Thus, the period of voluntary departure in the respondent's case expired on Saturday, December 11, 2021, as noted in the Board's prior decision.

We are not persuaded of any "errors of law or fact in the previous order," as required for a motion to reconsider. INA § 240(c)(6)(C), 8 U.S.C. § 1229a(c)(6)(C); *see also* 8 C.F.R § 1003.2(b)(1). Accordingly, the respondent's motion will be denied.

ORDER: The motion to reconsider is denied.

APPENDIX D

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF: Hugo Abisai MONSALVO VELAZQUEZ, A201-221-431 Respondent	**FILED** May 04, 2022

ON BEHALF OF RESPONDENT:
Henry D. Hollithron, Esquire

IN REMOVAL PROCEEDINGS

On Motion from a Decision of the Board of Immigration Appeals

Before: Mahtabfar, Appellate Immigration Judge

MAHTABFAR, Appellate Immigration Judge

This matter was last before the Board on October 12, 2021, when we dismissed the respondent's appeal and reinstated the 60-day period of voluntary departure granted by the Immigration Judge. On December 13, 2021, the respondent filed a timely motion to reopen, seeking to apply for cancellation of removal under 240A(b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security has not responded to the motion. The motion will be denied.

The Notice to Appear ("NTA") in the respondent's case was issued and served on September 19, 2011,

but it did not include the date and time of the initial hearing. In the motion, the respondent argues that, since he entered the United States on October 15, 2005, he has the requisite 10 year period of continuous physical presence under *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), and he is eligible for cancellation of removal. Therefore, he argues that his proceedings should be reopened to allow him to apply for cancellation of removal. In support of the motion, the respondent has submitted an application for cancellation of removal and supporting documents.

However, based on his October 15, 2005, entry date, the respondent already satisfied the 10 year period of continuous physical presence at the time of his previous hearing on March 5, 2019. Therefore, the fact that the respondent satisfies the 10 year period of continuous physical presence is not a "new fact" supported by "new evidence" that was not available and could not have been discovered or presented at the previous hearing. INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R § 1003.2(c)(1). Yes, the respondent did not apply for cancellation of removal at his hearing.

The respondent argues in the motion that "[u]nder the law existing at the time, Respondent was deemed to have stopped accruing physical presence as of September 19, 2011," i.e., when the NTA was issued and served, thus he could not then qualify for cancellation of removal (Motion at 1 ¶ 3). However, at the time of the respondent's previous hearing on March 5, 2019, the Supreme Court of the United States had already issued its decision *in Pereira* v. *Sessions,* 138 S. Ct. 2105 (2018), addressing the application of the stop-time rule in section 240A(d)(1) of the INA, 8 U.S.C. § 1229b(d)(1). Thus, the respondent could have

applied for cancellation of removal *under Pereira,* yet he did not do so. Furthermore, the Board's October 12, 2021, decision was issued after the Supreme Court's decision in *Niz-Chavez,* yet the respondent did not address the effect of *Niz- Chavez* on appeal.

In addition, the respondent has not shown that he is now eligible for cancellation of removal under section 240B(d) of the INA, 8 U.S.C. § 1229c(d). As noted above, on October 12, 2021, the Board reinstated the 60-day period of voluntary departure granted by the Immigration Judge. The 60-day period of voluntary departure terminated on December 11, 2021. The respondent's motion to reopen was filed on December 13, 2021, after the 60-day period of voluntary departure expired. 8 C.F.R. § 1240.26(e)(2) (providing that the filing of a motion to reopen or a motion to reconsider after the period of voluntary period already expired does not affect the voluntary departure period or civil penalties for failure to depart). The respondent has not explained in the motion why the provisions in section 240B(d) of the INA, 8 U.S.C. § 1229c(d), do not apply in his case. Therefore, as noted in the Board's prior decision, under section 240B(d) of the INA, 8 U.S.C. § 1229c(d), the respondent is ineligible for certain forms of discretionary relief, including cancellation of removal under section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). Based on the above, the respondent's motion will be denied.

ORDER: The motion to reopen is denied.

APPENDIX E

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF: Hugo Abisai MONSALVO VELAZQUEZ, A201-221-431 Respondent	**FILED** Oct 12, 2021

ON BEHALF OF RESPONDENT:
Pro se[1]

ON BEHALF OF DHS:
Elizabeth Puskar, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS

On Appeal from a Decision of the
Immigration Court, Denver, CO

Before: Owen, Appellate Immigration Judge

Opinion by Appellate Immigration Judge Owen

OWEN, Appellate Immigration Judge

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's decision, dated March 5, 2019, denying his requests for withholding of removal under section 241(b)(3) of the Immigration and

[1] We deem the respondent to be pro se as his former counsel, Weldon S. Caldbeck, has been disbarred from practice before the Board and the Immigration Judges. Please see the attached copy of the Board's order suspending Mr. Caldbeck from practice.

Nationality Act, 8 U.S.C. § 1231(b)(3), and protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) ("CAT"), and granting his alternative request for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b).[2] The respondent's appeal, which is opposed by the Department of Homeland Security, will be dismissed. We will provide the respondent with an additional 60 days to voluntarily depart this country, the maximum period allowed by section 240B(b)(2) of the Act.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). It is the respondent's burden to establish eligibility for relief from removal. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d).

We affirm the Immigration Judge's decision. The respondent has not established eligibility for

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[2] It is undisputed that the respondent is subject to removal from the United States as charged in the Notice to Appear (IJ at 1-2; Exh. 1). *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). While, on appeal, he refers to a request for asylum, he previously withdrew such request, acknowledging that he did not have a valid reason for its untimeliness (IJ at 2; Tr. at 29-30). *See* section 208(a)(2)(B), (D) of the Act, 8 U.S.C. § 1158(a)(2)(B), (D). Moreover, he has also withdrawn a request for withholding of removal on the basis of his political opinion (IJ at 4; Tr. at 28).

withholding of removal. The Immigration Judge properly rejected the respondent's proposed particular social group, i.e., "Mexican citizens returning from the United States who are perceived as having money and resources based upon their stay in the United States," as lacking in particularity (IJ at 4). *See Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014) ("Deportees are too broad and diverse a group to satisfy the particularity requirement for a particular social group under the Act."); *see also Perez-Garcia v. Barr*, 814 F.App'x 356, 361 (10th Cir. 2020) (rejecting a particular social group of "Mexican citizens who are returning from the United States and perceived as wealthy."). Thus, lacking membership in a cognizable particular social group, the respondent is unable to establish the requisite nexus between the claimed persecution and a protected ground for purposes of establishing eligibility for withholding of removal. *See Matter of C-T-L-*, 25 I&N Dec. 341, 347 (BIA 2010).

The respondent has also not established eligibility for protection under the CAT (IJ at 5). While we recognize that he fears crime and violence in Mexico, he has presented an overall speculative fear that, upon his return, he will be tortured with the requisite degree of state action. Even though not entirely successful, the Mexican government is actively trying to combat crime and corruption (IJ at 6). Overall, he has not established, upon his removal to Mexico, it is more likely than not he will be tortured by or at the instigation of or with the consent or acquiescence (including "willful blindness") of a public official or other person acting in an official capacity. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006) (holding that a claim to

protection under the CAT cannot be granted by stringing together a series of suppositions).

Ultimately, we recognize that, like many other Mexican nationals, the respondent may genuinely fear crime and violence in his home country. However, for the reasons set forth above, we affirm the Immigration Jude's decision to deny his requests for withholding of removal and protection under the Convention Against Torture and conclude these proceedings by entering a voluntary departure order in this case. Accordingly, the following orders are entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent(s) is (are) permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. § 1240.26(c), (f). In the event a respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If a respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute, and shall be ineligible for a period of 10 years for any further relief under

section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If a respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R § 1240.26(e)(1).

WARNING: If, prior to departing the United States, a respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R § 1240.26(i).

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DENVER, COLORADO

File: A201-221-431 March 5, 2019

In the Matter of

HUGO ABISAI MONSALVO VELAZQUEZ RESPONDENT	)	**IN REMOVAL PROCEEDINGS**

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act

APPLICATIONS: Withholding of removal pursuant to INA Section 241(b)(3); protection under the United Nations Convention Against Torture; voluntary departure pursuant to INA Section 240B(b).

ON BEHALF OF RESPONDENT:
Weldon Caldbeck, Esquire
Law Office of Weldon Caldbeck
5350 Leetsdale Drive, Suite G-110
Denver, CO 80246

ON BEHALF OF DHS:
Elizabeth Puskear, Assistant Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

ORAL DECISION OF THE IMMIGRATION JUDGE

I. FACTS AND PROCEDURAL HISTORY

Hugo Abisai Monsalvo Velazquez (respondent) is a 28-year-old native and citizen of Mexico who entered the United States at or near El Paso, Texas, on or about October 15, 2005, without being admitted or paroled after inspection by an immigration officer. Based on these allegations, on September 19, 2011, the Department of Homeland Security issued and served respondent a Notice to Appear charging him as being inadmissible to the United States pursuant to Section 212(a)(6)(A)(i) of the Act. Exhibit 1. On September 21, 2011, the Department filed respondent's NTA with the court, which, in turn, served the respondent pursuant to regulation with a notice of hearing in removal proceedings on the same day that the Notice to Appear was filed with the court. I, therefore, find that the court has jurisdiction over these removal proceedings. See Exhibit 1, Exhibit 1A; see also Matter of Bermudez-Cota, 27 I&N Dec. 441 (BIA 2018).

On January 30, 2013, respondent, through counsel, admitted the allegations in his NTA and conceded the charge of admissibility before a different immigration judge. Based on respondent's admissions and concession, I concur with the prior immigration judge's finding that respondent is clearly subject to removal as charged. The court directs Mexico as the country of removal should that be necessary.

By way of relief, on January 15, 2014, respondent filed a Fform I-589 application Application for asylum Asylum and for withholding Withholding of removalRemoval. Exhibit 2. Today, he withdrew his application for asylum, acknowledging he did not have a

valid excuse such that he would qualify for an exception to the one-year filing requirement. Thus, he is requesting withholding of removal protection under the Act and under the Torture Convention. He also requests voluntary departure in the alternative.

Respondent testified in support of his application today. Neither party called additional witnesses. For the reasons set forth below, the court denies respondent's requests for protection relating to his I-589 application, but grants his request for voluntary departure.

II. DOCUMENTARY EVIDENCE

The record of proceeding includes four exhibits, which were admitted into the record. DHS objected to the admission of Exhibit 4, because it was untimely filed. The court acknowledges that the documents were filed late. They were filed today, and the court ordered that they be filed 30 days in advance of the hearing. Counsel for respondent explained that it was his fault he had not properly, or his office had not, properly noted the date of the hearing. These documents do appear to be relevant to the issue of country conditions, and despite their late filing, there are only three articles. It isThey are not particularly lengthy, and I will admit themat into the record. All of the evidence has been considered regardless of whether it is specifically mentioned in the decision.

III. INSERT LANGUAGE FROM THE STANDARD LANGUAGE AND ADDENDUM

A. CREDIBILITY

Based on a totality of the evidence, the court finds respondent is credible. The court was able to observe his demeanor and his testimony appeared authentic

and genuine. Thus, based on consideration of his consistent testimony, the court will find that he is a credible witness.

B. WITHHOLDING OF REMOVAL UNDER THE IMMIGRATION AND NATIONALITY ACT

Respondent claims fear of return to Mexico, not because he has ever suffered any harm, but because he has heard from his sister and grandmother and has seen on the news reports of criminal violence against members of his community. No one in his family, and that includes his sister or grandmother, has~~ve~~ been physically harmed. Yet, criminal groups have extorted money from them, especially as it relates to the operation of their business. Respondent has a friend who lived in the United States and departed for Mexico, and that friend told respondent that his cousin was kidnapped and killed in Mexico after this cousin returned from the United States. Respondent's sister and grandmother also told the respondent about a shop owner they know who was killed by criminal organizations in Mexico.

The 10th Circuit and the Board have consistently held that those targeted for violence and extortion or even forced recruitment by criminals are not typically being targeted because of any protected ground. See Rodas-Orellano, 780 F.3d at 993; Rivera-Barrientos v. Holder, 658 F.3d 1222 (10th Cir. 2011); Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008). Respondent on his application indicates that the harm he fears would be motivated because he belongs to a particular social group or because of his political opinion. However, at the start of his hearing, counsel for respondent clearly withdrew the protected ground of political opinion,

and instead respondent is only arguing that he fears he would be harmed on account of his membership in a particular social group, which he defined as Mexican citizens returning from the United States who are perceived as having money and resources based upon their stay in the United States. The characteristics of being a "deportee," or someone who has returned from living in the United States, has not been recognized as a cognizable social group to qualify for refugee status. In W-G-R-, the Board of Immigration Appeals found that the proposed group of "deportees from the United States" is overbroad and not sufficiently particular, because the group could include men or women of all ages regardless of the length of time that they were in the United States, the reasons for their removal or the recency of their removal, 26 I&N Dec. at 223. Like the group analyzed in W-G-R-, the group respondent proposes is not sufficiently particular, and he did not submit evidence to substantiate his perception that his proffered group is socially distinct in Mexico. The group he offers does not describe a class of persons defined with particularity such that it "provides a clear benchmark for determining who falls within the group.," Id. at 214. See also Rivera-Barrientos, 666 F.3d at 649 (noting that a group is particular if society would recognize it as "a discreet class of persons").

Rather than being singled out for harm on account of any particular social group or any other protected ground, it is clear that the impetus for the harm respondent claims to fear rises out of pure criminal incentives: to expand the criminal organization's power in Mexico and to increase its profits. See Matter of A-B-, 27 I&N Dec. 316, 322 (A.G. 2018). ("Evidence consistent with acts of private violence or that merely

shows that an individual has been a victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground") (Citing Velasquez v. Sessions, 866 F.3d 188, 194 (4th Cir. 2017);- Matter of M-E-V-G-, 26 I&N Dec. at 235. Thus, the court does not find ~~that~~ respondent has demonstrated that he meets the definition of refugee such that he is entitled to protection under INA Section 241(b)(3). Accordingly, the court will deny him that request for protection.

C. PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Respondent has not presented sufficient evidence to show that he will more likely than not fall victim to torture at the hands of his government or at the hands of any private individuals that his government will fail to protect him from. He has never suffered torture in the past. His family members have not been tortured in the past. Though there are some instances that he described in which people were kidnapped and killed, there is no evidence in the record to show that the respondent would be targeted in the same way. He imagines he would be targeted because of reports of general violence that he hears. But other than secondhand reports from family members and friends and from news reports, there is insufficient evidence in the record to show that he would face an individualized risk of torture. The court recognizes that there are documents in the record that show high rates of crime in Mexico. See Exhibits 3 and 4. There also is evidence of corruption, and the respondent has explained that he has heard instances of corrupt police officers asking for money on behalf of criminal organizations. However, on the whole, the record does not

show that the Mexican government is unwilling to protect its citizens from harm. In fact, the evidence does show that the authorities are trying to rout out crime and corruption in the country. Therefore, based on a totality of the evidence in the record, the court does not find respondent has met his burden to show he more likely than not will suffer torture if he returns to Mexico such that he is entitled to protection under the torture convention.

D. VOLUNTARY DEPARTURE

Respondent has been living in the United States for at least a year before the NTA was served on him. The evidence in the record shows that the respondent has been a person of good moral character despite his having a criminal record. He has expressed a willingness and an ability to depart the United States if the court grants him voluntary departure. And it does not appear that he is deportable under Sections 237(a)(2)(A)(3) of the Act or 237(a)(4) such that he would be ineligible for voluntary departure. DHS is unopposed to a grant of voluntary departure, and the court in an exercise of its discretion will grant him this minimal form of relief. Therefore, the following orders shall enter.

ORDERS

It is hereby ordered that respondent's application for asylum be deemed withdrawn.

__It is further ordered that respondent's application for withholding of removal under Section 241(b)(3) of the Act be denied.

__It is further ordered that respondent's request for protection under the Convention Against Torture be denied.

__It is further ordered that respondent be granted voluntary departure under Section 240B(b) of the Act in lieu of removal without expense to the government on or before 60 calendar days from the date of service of this order.

__It is further ordered that respondent post a voluntary departure bond in the amount of $500 with the Department of Homeland Security within five business days.

__It is further ordered that respondent shall provide to the Department of Homeland Security his passport to demonstrate that he can lawfully return to Mexico within 60 days of this order or within any timeframe set by the Department of Homeland Security.

__It is further ordered that if any of the above ordered conditions are not met as required or if respondent fails to depart as required, the above grant of post-conclusion voluntary departure shall be withdrawn without further notice or proceedings, and the following order shall be entered pursuant to 8 C.F.R. §1240.26(d): respondent shall be removed to Mexico on the charge in his Notice to Appear.

__Respondent is hereby advised that if he fails to voluntarily depart the United States within the timeframe specified or within any extensions granted by DHS, he will be subject to the following penalties: (1) respondent will be subject to a civil monetary penalty of not less than $1,000 and not more than $5,000. The court sets the presumptive monetary penalty in the amount of $3,000; (2) respondent will be ineligible for a period of 10 years to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status.

__Respondent is further advised that if he appeals the decision, he must provide to the Board of Immigration Appeals within 30 days of filing the appeal, sufficient proof of having posted a voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if respondent does not submit timely proof that the voluntary departure bond was paid.

__Respondent is further advised that if he does not appeal the decision and instead files a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended. The grant of voluntary departure will be terminated automatically. The alternate order of removal to Mexico will take effect immediately and the above penalties for failing to depart voluntarily under Section 240B(d) of the Act will not apply.

Date: March 5, 2019

Please see the next page for electronic signature

KANE, ALISON R.
Immigration Judge

//s//

Immigration Judge KANE, ALISON R.

i:0e.t|eoir federation services|alison.kane@usdoj.gov on July 13, 2020 at 2:23 PM GMT

STANDARD LANGUAGE ADDENDUM:

The following statements of law should be incorporated into the Immigration Judge's oral decision as indicated. These statements are not the sole legal basis for the decision and are meant to be read in conjunction with any law cited in the oral decision itself.

[*Insert Roman numeral* III.] **STATEMENT OF LAW AND ANALYSIS OF ELIGIBILITY FOR RELIEF**

An applicant bears the burden of proof to demonstrate he or she is eligible for relief under the Act and for protection under the Convention Against Torture. The provisions of the REAL ID Act of 2005 apply to his or her application since it was filed after May 11, 2005.

[*Insert subsection* A.] **Credibility and Corroboration**

In all asylum, withholding of removal, and Convention Against Torture (CAT) cases, the Court must first determine whether the testimony of the applicant is credible. INA §§ 208(b)(1)(B)(iii), 241(b)(3)(C); *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998) (asylum and withholding of removal); *Ismaiel v. Mukasey*, 516 F.3d 1198 (10th Cir. 2008) (CAT eligibility). The applicant's testimony is of the utmost importance in proving an asylum, withholding of removal, or CAT claim because of the difficulty of procuring documentary evidence after having fled one's country. *Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004). Thus, an applicant's testimony, standing alone, may be sufficient to meet the burden of proof if it is demonstrably credible, persuasive, and probative of facts sufficient to demonstrate the applicant is a refugee. *Id.; Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

A credibility determination must be made based on the "totality of the circumstances" and "all relevant factors," including: demeanor, candor, responsiveness, inherent plausibility of the claim, the consistency between oral and written statements, the internal consistency of such statements, the consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, regardless of whether it goes to the heart of the applicant's claim. INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). While minor and isolated discrepancies in the applicant's testimony are not necessarily fatal to credibility, the omission of key events coupled with numerous inconsistencies and other indications of unreliable testimony may lead to a finding that the applicant is not credible. *Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998). An adverse credibility finding must be supported by "specific and cogent" reasons that have a legitimate nexus to the finding in the case, and cannot be based on speculation, conjecture, or unsupported personal opinion. *Id.* at 1110; *see Uanreroro v, Gonzales*, 443 F.3d 1197, 1205 (10th Cir. 2006); *see also Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005).

Corroborating evidence is generally not required to demonstrate eligibility for asylum, withholding of removal, and protection under the CAT, as a valid claim may be established through the applicant's own testimony. INA § 208(b)(1)(B); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987). However, if the applicant's testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the applicant to submit corroborative evidence. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998). Where the Court determines that the applicant should provide evidence

that corroborates the testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain it. INA § 208(b)(1)(B). If the evidence is unavailable, the Court must give the applicant an opportunity to explain its unavailability and ensure that the explanation is included in the record. *Matter of S-M-J-*, 22 I&N Dec. 722, 724 (BIA 1997). The Court, however, is neither required to identify the specific corroborating evidence that would be persuasive nor obligated to grant an automatic continuance for the applicant to present corroborating evidence. *Id.* The Court's corroboration finding is valid unless a "reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." 8 U.S.C. § 1252(b)(4).

[*Insert subsection* B.] **Withholding of Removal under the Immigration and Nationality Act**

Withholding of removal is mandatory relief that must be granted if the applicant establishes a "clear probability" of persecution by showing it is "more likely than not" that his "life or freedom would be threatened" because of race, religion, nationality, membership in a particular social group, or political opinion if he returns to her homeland. INA § 241(b)(3); 8 C.F.R. § 1208.16; *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Ismaiel v. Mukasey*, 516 F.3d 1198, 1204 (10th Cir. 2008). This standard is more stringent than the well-founded fear of persecution standard for asylum eligibility. *See Cardoza-Fonseca*, 480 U.S. at 430-31; *Krastev* v. *INS*, 292 F.3d 1268, 1271 (10th Cir. 2002).

1. Persecution

Persecution is a threat to life or freedom or the infliction of suffering or harm upon those who differ, in a manner regarded as offensive. *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001); *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). In order for acts to rise to the level of persecution, they must be "more than just restrictions or threats to life and liberty." *Woldemeskel*, 257 F.3d at 1188; *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337 (10th Cir. 2008); *see also Vatulev v. Ashcroft*, 354 F.3d 1207, 1210 (10th Cir. 2003) ("Threats alone generally do not constitute actual persecution for purposes of demonstrating entitlement to asylum."). In determining whether an applicant has shown harm rising to the level of persecution, the Court considers incidents in the aggregate. *See Hayrapetyan*, 534 F.3d at 1337-38; *see also Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998).

2. Nexus to Protected Ground

An applicant must demonstrate past persecution or a well-founded fear of persecution "*on account of* race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42) (emphasis added); 8 C.F.R. §§ 1208.13(b)(1), (b)(2)(i)(A). The Court examines the persecutor's motives and will find a nexus between the persecution and harm if a protected ground is "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i); *see also Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211-12 (BIA 2007). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th

Cir. 2013) (citations omitted). The persecutor's views and motives for inflicting harm upon the applicant are a question of fact to be determined in light of the circumstances surrounding the persecution. *See Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014); *see also Matter of N-M-*, 25 I&N 526, 532 (BIA 2011).

[*Insert subsection* a.] <u>*Membership in a Particular Social Group*</u>

To establish persecution account of membership in a particular social group, an applicant must demonstrate the existence of a cognizable particular social group, establish his or her membership in the group, and show a nexus between the persecution and membership in that group. *Matter of W-G-R-*, 26 I&N Dec. 208, 223 (BIA 2014). To be cognizable, a particular social group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *see also Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1229 (10th Cir. 2011). An immutable characteristic is one the applicant cannot change, or is so fundamental to his or her identity or conscience that he or she should not be required to change it. *Matter of W-G-R-*, 26 I&N Dec. at 213. Particularity requires that a proposed group be defined by characteristics that "provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). The terms used to describe the group must have commonly accepted definitions and defined boundaries within the society in question, and may not be amorphous, overbroad, diffuse, or subjective. *Id.* at 239 (citation

omitted). Social distinction requires that there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I&N Dec. at 217.

3. Government Unwillingness or Inability to Control the Persecutor

To be considered a refugee, an also must demonstrate that he or she is unable or unwilling to return to, or avail himself or herself of the protection of the government of his or her country. 8 C.F.R. § 1208.13(b)(2)(i)(C). Thus, an applicant must establish persecution by the government or by groups the government is unwilling or unable to control. *Niang v. Gonzalez*, 422 F.3d 1187, 1193 (10th Cir. 2005) (quoting *Vatulev v. Ashcroft*, 354 F.3d 1207, 1209 (10th Cir. 2003)).

[*Insert subsection* C.] **Protection under the Convention Against Torture**

To qualify for relief under the Convention Against Torture (CAT), an applicant must establish it is more likely than not that he or she will be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2). Torture is "an extreme form of cruel and inhuman treatment," which "does not include lesser forms of cruel, inhuman or degrading treatment or punishment." 8 C.F.R. § 1208.18(a)(2). Torture is defined as (A) an intentional infliction of severe pain or suffering, whether physical or mental; (B) for the purpose of obtaining information or a confession, punishment of an act or a suspected act, intimidation, coercion, or for any reason based on discrimination of any kind; provided that (C) "such pain or suffering is

inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1); *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity," 8 C.F.R. § 1208.18(a)(7); *see also Karki v. Holder*, 715 F.3d 792, 806 (10th Cir. 2013) (stating that "willful blindness suffices to prove acquiescence").

In assessing whether it is more likely than not that an applicant would be tortured, all relevant evidence must be considered, including, but not limited to: (A) evidence of past torture inflicted upon the applicant; (B) evidence that the applicant could relocate to a part of the country where he or she will not likely be tortured; (C) evidence of gross, flagrant, or mass violations of human rights within the proposed country of removal; and (D) other relevant information regarding country conditions in the proposed country of removal. 8 C.F.R. § 1208.16(c)(3). Yet, eligibility cannot be established by simply stringing together a series of suppositions to show that torture is more likely than not to occur, unless the evidence shows that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

[*Insert subsection* D.] **Voluntary Departure Pursuant to INA § 240B(b)**

Section 240B(b)(l) of the Act permits an alien to voluntarily depart the United States at his or her own expense if he or she meets certain conditions. He or she must show he or she has been present in the

United States for one year preceding the date the NTA was served under section 239(a) of the Act, was a person of good moral character for the preceding five years, is not deportable under sections 237(a)(2)(A)(iii) or 237(a)(4)(B) of the Act, and has the means to depart the United States and intends to do so. INA § 240B(b)(1).

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DENVER, COLORADO

File: A201-221-431 March 5, 2019

In the Matter of

HUGO ABISAI MONSALVO VELAZQUEZ RESPONDENT	)	**IN REMOVAL PROCEEDINGS**

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act

APPLICATIONS: Withholding of removal pursuant to INA Section 241(b)(3); protection under the United Nations Convention Against Torture; voluntary departure pursuant to INA Section 240B(b).

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
Elizabeth Puscar, Assistant Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

ORAL DECISION OF THE IMMIGRATION JUDGE

I. FACTS AND PROCEDURAL HISTORY

Hugo Abisai Monsalvo Velazquez (respondent) is a 28-year-old native and citizen of Mexico who entered the United States at or near El Paso, Texas, on or about October 15, 2005 without being admitted or paroled after inspection by an immigration officer. Based on these allegations on September 19, 2011, the Department of Homeland Security issued and served respondent a Notice to Appear charging him as being inadmissible to the United States pursuant to Section 212(a)(6)(A)(i) of the Act. Exhibit 1. On September 21, 2011, the Department filed respondent's NTA with the court, which in turn, served the respondent pursuant to regulation with a notice of hearing in removal proceedings on the same day that the Notice to Appear was filed with the court. I, therefore, find that the court has jurisdiction over these removal proceedings. See Exhibit 1, Exhibit 1A; see also Matter of Bermudez-Cota, 27 I&N Dec. 441 (BIA 2018).

On January 30, 2013, respondent, through counsel, admitted the allegations in his NTA and conceded the charge of admissibility before a different immigration judge. Based on respondent's admissions and concession, I concur with the prior immigration judge's finding that respondent is clearly subject to removal as charged. The court directs Mexico as the country of removal should that be necessary.

By way of relief, on January 15, 2014, respondent filed a form I-589 application for asylum and for withholding of removal. Exhibit 2. Today he withdrew his application for asylum, acknowledging he did not have a valid excuse such that he would qualify for an

exception to the one-year filing requirement. Thus, he is requesting withholding of removal protection under the Act and under the Torture Convention. He also requests voluntary departure in the alternative.

Respondent testified in support of his application today. Neither party called additional witnesses for the reasons set forth below. The court denies respondent's requests for protection relating to his I-589 application, but grants his request for voluntary departure.

II. DOCUMENTARY EVIDENCE

The record of proceeding includes four exhibits, which were admitted into the record. DHS objected to the admission of Exhibit 4, because it was untimely filed. The court acknowledges that the documents were filed late. They were filed today, and the court ordered that they be filed 30 days in advance of the hearing. Counsel for respondent explained that it was his fault he had not properly, or his officer had not properly noted the date of the hearing. These documents do appear to be relevant to the issue of country conditions, and despite their late filing, there are only three articles. It is not particularly lengthy, and I will admit that into the record. All of the evidence has been considered regardless of whether it is specifically mentioned in the decision.

III. STANDARD LANGUAGE AND ADDENDUM

A. CREDIBILITY

Based on a totality of the evidence, the court finds respondent is credible. The court was able to observe his demeanor and his testimony appeared authentic and genuine. Thus, based on consideration of his consistent testimony, the court will find that he is a credible witness.

B. WITHHOLDING OF REMOVAL UNDER THE IMMIGRATION AND NATIONALITY ACT

Respondent claims fear of return to Mexico, not because he has ever suffered any harm, but because he has heard from his sister and grandmother and has seen on the news reports of criminal violence against members of his community. No one in his family, and that includes his sister or grandmother have been physically harmed. Yet, criminal groups have extorted money from them, especially as it relates to the operation of their business. Respondent has a friend who lived in the United States and departed for Mexico, and that friend told respondent that his cousin was kidnapped and killed in Mexico after this cousin returned from the United States. Respondent's sister and grandmother also told the respondent about a shop owner they know who was killed by criminal organizations in Mexico.

The 10th Circuit and the Board have consistently held that those targeted for violence and extortion or even forced recruitment by criminals are not typically being targeted because of any protected ground. See Rodas-Orellano, 780 F.3d at 993; Rivera-Barrientos v. Holder, 658 F.3d 1222 (10th Cir. 2011); Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008); Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008). Respondent on his application indicates that the harm he fears would be motivated because he belongs to a particular social group or because of his political opinion. However, at the start of his hearing, counsel for respondent clearly withdrew the protected ground of political opinion, and instead respondent is only arguing that he fears he would be harmed on account of his membership in a particular social group, which he defined as Mexican

citizens returning from the United States who are perceived as having money and resources based upon their stay in the United States. The characteristics of being a "deportee" or someone who has returned from living in the United States has not been recognized as a cognizable social group to qualify for refugee status. In W-G-R-, the Board of Immigration Appeals found that the proposed group of "deportees from the United States" is overbroad and not sufficiently particular, because the group could include men or women of all ages regardless of the length of time that they were in the United States, the reasons for their removal or the recency of their removal, 26 I&N Dec. at 223. Like the group analyzed in W-G-R-, the group respondent proposes is not sufficiently particular, and he did not submit evidence to substantiate his perception that his proffered group is socially distinct in Mexico. The group he offers does not describe a class of persons defined with particularity such that it "provides a clear benchmark for determining who falls within the group," Id. at 214. See also Rivera-Barrientos, 666 F.3d at 649 (noting that a group is particular if society would recognize it as "a discreet class of persons").

Rather than being singled out for harm on account of any particular social group or any other protected ground, it is clear that the impetus for the harm respondent claims to fear rises out of pure criminal incentives: to expand the criminal organization's power in Mexico and to increase its profits. See Matter of A-B-, 27 I&N Dec. 316, 322 (A.G. 2018). ("Evidence consistent with acts of private violence or that merely shows that an individual has been a victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground") (Citing Velasquez v.

Sessions, 866 F.3d 188, 194 (4th Cir. 2017). Matter of M-E-V-G-, 26 I&N Dec. at 235. Thus, the court does not find that respondent has demonstrated that he meets the definition of refugee such that he is entitled to protection under INA Section 241(b)(3). Accordingly, the court will deny him that request for protection.

C. PROTECTION UNDER THE CONVENTION AGAINST TORTURE

Respondent has not presented sufficient evidence to show that he will more likely than not fall victim to torture at the hands of his government or at the hands of any private individuals that his government will fail to protect him from. He has never suffered torture in the past. His family members have not been tortured in the past. Though there are some instances that he described in which people were kidnapped and killed, there is no evidence in the record to show that the respondent would be targeted in the same way. He imagines he would be targeted because of reports of general violence that he hears. But other than secondhand reports from family members and friends and from news reports, there is insufficient evidence in the record to show that he would face an individualized risk of torture. The court recognizes that there are documents in the record that show high rates of crime in Mexico. See Exhibits 3 and 4. There also is evidence of corruption, and the respondent has explained that he has heard instances of corrupt police officers asking for money on behalf of criminal organizations. However, on the whole, the record does not show that the Mexican government is unwilling to protect its citizens from harm. In fact, the evidence does show that the authorities are trying to rout out

crime and corruption in the country. Therefore, based on a totality of the evidence in the record, the court does not find respondent has met his burden to show he more likely than not will suffer torture if he returns to Mexico such that he is entitled to protection under the torture convention.

D. VOLUNTARY DEPARTURE

Respondent has been living in the United States for at least a year before the NTA was served on him. The evidence in the record shows that the respondent has been a person of good moral character despite his having a criminal record. He has expressed a willingness and an ability to depart the United States if the court grants him voluntary departure. And it does not appear that he is deportable under Sections 237(a)(2)(A)(3) of the Act or 237(a)(4) such that he would be ineligible for voluntary departure. DHS is unopposed to a grant of voluntary departure, and the court in an exercise of its discretion will grant him this minimal form of relief. Therefore, the following orders shall enter.

ORDERS

It is hereby ordered that respondent's application for asylum be deemed withdrawn. It is further ordered that respondent's application for withholding of removal under Section 241(b)(3) of the Act be denied. It is further ordered that respondent's request for protection under the Convention Against Torture be denied. It is further ordered that respondent be granted voluntary departure under Section 240B(b) of the Act in lieu of removal without expense to the government on or before 60 calendar days from the date of service of this order. It is further ordered that respondent post

a voluntary departure bond in the amount of $500 with the Department of Homeland Security within five business days. It is further ordered that respondent shall provide to the Department of Homeland Security his passport to demonstrate that he can lawfully return to Mexico within 60 days of this order or within any timeframe set by the Department of Homeland Security. It is further ordered that if any of the above ordered conditions are not met as required or if respondent fails to depart as required, the above grant of post-conclusion voluntary departure shall be withdrawn without further notice or proceedings, and the following order shall be entered pursuant to 8 C.F.R. §1240.26(d): respondent shall be removed to Mexico on the charge in his Notice to Appear. Respondent is hereby advised that if he fails to voluntarily depart the United States within the timeframe specified or within any extensions granted by DHS, he will be subject to the following penalties: (1) respondent will be subject to a civil monetary penalty of not less than $1,000 and not more than $5,000. The court sets the presumptive monetary penalty in the amount of $3,000; (2) respondent will be ineligible for a period of 10 years to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change in nonimmigrant status. Respondent is further advised that if he appeals the decision, he must provide to the Board of Immigration Appeals within 30 days of filing the appeal, sufficient proof of having posted a voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if respondent does not submit timely proof that the voluntary departure bond was paid. Respondent is further advised that if he does not appeal the decision and instead files a motion to reopen or reconsider

during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended. The grant of voluntary departure will be terminated automatically. The alternate order of removal to Mexico will take effect immediately and the above penalties for failing to depart voluntarily under Section 240B(d) of the Act will not apply.

Date: March 5, 2019

KANE, ALISON R.
Immigration Judge

APPENDIX H

IMMIGRATION COURT
1961 STOUT STREET, STE. 3101
DENVER, CO 80294

In the Matter of

MONSALVO VELAZQUEZ, HUGO ABISAI

RESPONDENT

Case No.: A201-221-431

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on March 5, 2019. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO.

[X] Respondent's application for voluntary departure was granted until *May 6, 2019* upon posting a bond in the amount of $ *500* with an alternate order of removal to MEXICO.

Respondent's application for:

[X] Asylum was ( ) granted ( ) denied (X) withdrawn.

[X] Withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] A Waiver under Section _____ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[X] Respondent's application of (X) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decisión.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Mar 5, 2019

[*signature*]
KANE, ALISON R.
Immigration Judge

Appeal: Waived/Reserved *by Respondent*

Appeal Due By: *April 4, 2019*

ALIEN NUMBER: 201-221-431
NAME: MONSALVO VELAZQUEZ, HUGO ABISAI

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M)
PERSONAL SERVICE (XX)

TO:
[ ] ALIEN
[ ] ALIEN c/o Custodial Officer
[XX] ALIEN'S ATT/REP
[XX] DHS

DATE: *3-15-19*
BY: COURT STAFF [*initials*]

Attachments:
[ ] EOIR-33
[ ] EOIR-28

[ ] Legal Services List
[ ] Other

NOTICE TO RESPONDENTS
GRANTED VOLUNTARY DEPARTURE

You have been granted the privilege of voluntarily departing from the United States of America. The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will automatically be entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to the following penalties:

1. You will be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises you that:

☐ **You have been granted pre-conclusion voluntary departure.**

1. If you file a motion to reopen or reconsider during the voluntary departure period, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. § 1240.26(b)(1)(iii),(e)(1).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000

(or _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

☒ **You have been granted post-conclusion voluntary departure.**

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).

2. The Court set a specific bond amount. You were advised of the bond amount, and were given an opportunity to accept or decline it. As you have accepted it, you have a duty to post that bond with the Department of Homeland Security, Immigration and Customs Enforcement, Field Office Director within 5 business days of the Court's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).

3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision. If you do appeal, you must provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if you do not submit timely proof to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).

4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or

extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).

5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000 (or _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

APPENDIX I

8 U.S.C. §1229c. Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

(2) Period

(A) In general

Subject to subparagraph (B), permission to depart voluntarily under this subsection shall not be valid for a period exceeding 120 days.

(B) Three-year pilot program waiver

During the period October 1, 2000, through September 30, 2003, and subject to subparagraphs (C) and (D)(ii), the Attorney General may, in the discretion of the Attorney General for humanitarian purposes, waive application of subparagraph (A) in the case of an alien—

(i) who was admitted to the United States as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) under the provisions of the visa waiver pilot program established pursuant to section 1187 of this title, seeks the waiver for the purpose of continuing to receive medical treatment in the United States from a

physician associated with a health care facility, and submits to the Attorney General—

(I) a detailed diagnosis statement from the physician, which includes the treatment being sought and the expected time period the alien will be required to remain in the United States;

(II) a statement from the health care facility containing an assurance that the alien's treatment is not being paid through any Federal or State public health assistance, that the alien's account has no outstanding balance, and that such facility will notify the Service when the alien is released or treatment is terminated; and

(III) evidence of financial ability to support the alien's day-to-day expenses while in the United States (including the expenses of any family member described in clause (ii)) and evidence that any such alien or family member is not receiving any form of public assistance; or

(ii) who—

(I) is a spouse, parent, brother, sister, son, daughter, or other family member of a principal alien described in clause (i); and

(II) entered the United States accompanying, and with the same status as, such principal alien.

(C) Waiver limitations

(i) Waivers under subparagraph (B) may be granted only upon a request submitted by a Service district office to Service headquarters.

(ii) Not more than 300 waivers may be granted for any fiscal year for a principal alien under subparagraph (B)(i).

(iii)

(I) Except as provided in subclause (II), in the case of each principal alien described in subparagraph (B)(i) not more than one adult may be granted a waiver under subparagraph (B)(ii).

(II) Not more than two adults may be granted a waiver under subparagraph (B)(ii) in a case in which—

(aa) the principal alien described in subparagraph (B)(i) is a dependent under the age of 18; or

(bb) one such adult is age 55 or older or is physically handicapped.

(D) Report to Congress; suspension of waiver authority

(i) Not later than March 30 of each year, the Commissioner shall submit to the Congress an annual report regarding all waivers granted under subparagraph (B) during the preceding fiscal year.

(ii) Notwithstanding any other provision of law, the authority of the Attorney General under subparagraph (B) shall be suspended during any period in which an annual report under clause (i) is past due and has not been submitted.

(3) Bond

The Attorney General may require an alien permitted to depart voluntarily under this subsection to

post a voluntary departure bond, to be surrendered upon proof that the alien has departed the United States within the time specified.

(4) Treatment of aliens arriving in the United States

In the case of an alien who is arriving in the United States and with respect to whom proceedings under section 1229a of this title are (or would otherwise be) initiated at the time of such alien's arrival, paragraph (1) shall not apply. Nothing in this paragraph shall be construed as preventing such an alien from withdrawing the application for admission in accordance with section 1225(a)(4) of this title.

(b) At conclusion of proceedings

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of a proceeding under section 1229a of this title, the immigration judge enters an order granting voluntary departure in lieu of removal and finds that—

(A) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the notice to appear was served under section 1229(a) of this title;

(B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure;

(C) the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4) of this title; and

(D) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so.

(2) Period

Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days.

(3) Bond

An alien permitted to depart voluntarily under this subsection shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.

(c) Aliens not eligible

The Attorney General shall not permit an alien to depart voluntarily under this section if the alien was previously permitted to so depart after having been found inadmissible under section 1182(a)(6)(A) of this title.

(d) Civil penalty for failure to depart

(1) In general

Subject to paragraph (2), if an alien is permitted to depart voluntarily under this section and voluntarily fails to depart the United States within the time period specified, the alien—

(A) shall be subject to a civil penalty of not less than $1,000 and not more than $5,000; and

(B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title.

(2) Application of VAWA protections

The restrictions on relief under paragraph (1) shall not apply to relief under section 1229b or 1255 of this title on the basis of a petition filed by a VAWA self-petitioner, or a petition filed under section 1229b(b)(2) of this title, or under section 1254(a)(3) of this title (as in effect prior to March 31, 1997), if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure.

(3) Notice of penalties

The order permitting an alien to depart voluntarily shall inform the alien of the penalties under this subsection.

(e) Additional conditions

The Attorney General may by regulation limit eligibility for voluntary departure under this section for any class or classes of aliens. No court may review any regulation issued under this subsection.

(f) Judicial review

No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure under subsection (b), nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure.

8 C.F.R. §1001.1. Definitions

As used in this chapter:

(a) The terms defined in section 101 of the Immigration and Nationality Act (66 Stat. 163) shall have the meanings ascribed to them in that section and as supplemented, explained, and further defined in this chapter.

(b) The term *Act* means the Immigration and Nationality Act, as amended.

(c) The term *Service* means the Immigration and Naturalization Service, as it existed prior to March 1, 2003. Unless otherwise specified, references to the Service on or after that date mean the offices of the Department of Homeland Security to which the functions of the former Service were transferred pursuant to the Homeland Security Act, Public Law 107–296 (Nov. 25, 2002), as provided in 8 CFR chapter I.

(d) The term *Commissioner* means the Commissioner of the Immigration and Naturalization Service prior to March 1, 2003. Unless otherwise specified, references to the Commissioner on or after that date mean those officials of the Department of Homeland Security who have succeeded to the functions of the Commissioner of the former Service, as provided in 8 CFR chapter I.

(e) The term *Board* means the Board of Immigration Appeals.

(f) The term *attorney* means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under

any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.

(g) Unless the context otherwise requires, the term *case* means any proceeding arising under any immigration or naturalization law, Executive order, or Presidential proclamation, or preparation for or incident to such proceeding, including preliminary steps by any private person or corporation preliminary to the filing of the application or petition by which any proceeding under the jurisdiction of the Service or the Board is initiated.

(h) The term *day* when computing the period of time for taking any action provided in this chapter including the taking of an appeal, shall include Saturdays, Sun days, and legal holidays, except that when the last day of the period so computed falls on a Saturday, Sunday or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, nor a legal holiday.

(i) The term *practice* means exercising professional judgment to provide legal advice or legal services related to any matter before EOIR. Practice includes, but is not limited to, determining available forms of relief from removal or protection; providing advice regarding legal strategies; drafting or filing any document on behalf of another person appearing before EOIR based on an analysis of applicable facts and law; or appearing on behalf of another person in any matter before EOIR.

(j) The term *representative* refers to a person who is entitled to represent others as provided in §§

1292.1(a) (2), (3), (4), (5), (6), and 1292.1(b) of this chapter.

(k) The term *preparation* means the act or acts consisting solely of filling in blank spaces on printed forms with information provided by the applicant or petitioner that are to be filed with or submitted to EOIR, where such acts do not include the exercise of professional judgment to provide legal advice or legal services. When this act is performed by someone other than a practitioner, the fee for filling in blank spaces on printed forms, if any, must be nominal, and the individual may not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure.

(l) The term *immigration judge* means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 of the Act. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

(m) The term *representation* before the Board and the Service includes practice and preparation as defined in paragraphs (i) and (k) of this section.

(n) The term *Executive Office* means Executive Office for Immigration Review.

(o) The term *Director*, unless otherwise specified, means the Director of the Executive Office for Immigration Review. For a definition of the

term *Director* when used in the context of an official with the Department of Homeland Security, *see* 8 CFR 1.1(o).

(p) The term *lawfully admitted for permanent residence* means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, removal, or rescission.

(q) The term *arriving alien* means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section 235(b)(1)(A)(i) of the Act.

(r) The term *respondent* means a person named in a Notice to Appear issued in accordance with section 239(a) of the Act, or in an Order to Show Cause issued

in accordance with § 242.1 of 8 CFR chapter I as it existed prior to April 1, 1997.

(s) The terms *government counsel* or *DHS counsel,* in the context of proceedings in which DHS has appeared, mean any officer assigned to represent DHS in any proceeding before an immigration judge or the Board of Immigration Appeals.

(t) The term *aggravated felony* means a crime (or a conspiracy or attempt to commit a crime) described in section 101(a)(43) of the Act. This definition is applicable to any proceeding, application, custody determination, or adjudication pending on or after September 30, 1996, but shall apply under section 276(b) of the Act only to violations of section 276(a) of the Act occurring on or after that date.

(u) The term *Department*, unless otherwise specified, means the Department of Justice.

(v) The term *Secretary*, unless otherwise specified, means the Secretary of Homeland Security.

(w) The term *DHS* means the Department of Homeland Security. These rules incorporate by reference the organizational definitions for components of DHS as provided in 8 CFR 1.1.

(x)–(aa) [Reserved]

(bb) The term *transition program effective date* as used with respect to extending the immigration laws to the Commonwealth of the Northern Mariana Islands means November 28, 2009.

(cc) The term *case eligible for electronic filing* means any case that DHS seeks to bring before an immigration court after EOIR has formally established an electronic filing system for that court, or any case

before an immigration court or the Board of Immigration Appeals that has an electronic record of proceeding. Any reference to a record of proceeding in this chapter shall include an electronic record of proceeding.

(dd) The term *filing* means the actual receipt of a document by the appropriate immigration court or the Board of Immigration Appeals. An electronic filing that is accepted by the Board or an immigration court will be deemed filed on the date it was submitted. A paper filing that is accepted by the Board or an immigration court will be deemed filed on the date it was received by the Board or the immigration court. A filing that is rejected by the Board or the immigration court as an improper filing will not be deemed filed on the date it was submitted or received.

(ee) The term *service* means physically presenting, mailing, or electronically providing a document to the appropriate party or parties; except that an Order to Show Cause or Notice of Deportation Hearing shall be served in person to the alien, or by certified mail to the alien or the alien's attorney, and a Notice to Appear shall be served to the alien in person, or if personal service is not practicable, shall be served by regular mail to the alien or the alien's attorney of record.

(ff) The term *practitioner* means an attorney as defined in paragraph (f) of this section who does not represent the Federal Government, or a representative as defined in paragraph (j) of this section.

8 C.F.R. §1240.26. Voluntary departure—authority of the Executive Office for Immigration Review

(a) ***Eligibility: general.*** An alien previously granted voluntary departure under section 240B of the Act, including by DHS under § 240.25, and who fails to depart voluntarily within the time specified, shall thereafter be ineligible, for a period of ten years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act.

(b) ***Prior to completion of removal proceedings —***

(1) ***Grant by the immigration judge.***

(i) An alien may be granted voluntary departure by an immigration judge pursuant to section 240B(a) of the Act only if the alien:

(A) Makes such request prior to or at the master calendar hearing at which the case is initially calendared for a merits hearing;

(B) Makes no additional requests for relief (or if such requests have been made, such requests are withdrawn prior to any grant of voluntary departure pursuant to this section);

(C) Concedes removability;

(D) Waives appeal of all issues; and

(E) Has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4).

(ii) The judge may not grant voluntary departure under section 240B(a) of the Act beyond 30 days after the master calendar hearing at which the case is initially calendared for a merits hearing,

except pursuant to a stipulation under paragraph (b)(2) of this section.

(2) ***Stipulation.*** At any time prior to the completion of removal proceedings, the DHS counsel may stipulate to a grant of voluntary departure under section 240B(a) of the Act.

(3) ***Conditions.***

(i) The judge may impose such conditions as he or she deems necessary to ensure the alien's timely departure from the United States, including the posting of a voluntary departure bond to be canceled upon proof that the alien has departed the United States within the time specified. The alien shall be required to present to DHS, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing, unless:

(A) A travel document is not necessary to return to his or her native country or to which country the alien is departing; or

(B) The document is already in the possession of DHS.

(ii) DHS may hold the passport or documentation for sufficient time to investigate its authenticity. If such documentation is not immediately available to the alien, but the immigration judge is satisfied that the alien is making diligent efforts to secure it, voluntary departure may be granted for a period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to DHS. DHS in its discretion may extend the period within which the

alien must provide such documentation. If the documentation is not presented within the 60-day period or any extension thereof, the voluntary departure order shall vacate automatically and the alternate order of removal will take effect, as if in effect on the date of issuance of the immigration judge order.

(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) ***At the conclusion of the removal proceedings—***

(1) ***Required findings.*** An immigration judge may grant voluntary departure at the conclusion of the removal proceedings under section 240B(b) of the Act, if he or she finds that:

(i) The alien has been physically present in the United States for period of at least one year preceding the date the Notice to Appear was served under section 239(a) of the Act;

(ii) The alien is, and has been, a person of good moral character for at least five years immediately preceding the application;

(iii) The alien has not been convicted of a crime described in section 101(a)(43) of the Act and is not deportable under section 237(a)(4); and

(iv) The alien has established by clear and convincing evidence that the alien has the means to depart the United States and has the intention to do so.

(2) ***Travel documentation.*** Except as otherwise provided in paragraph (b)(3) of this section, the clear and convincing evidence of the means to depart shall include in all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. DHS shall have full opportunity to inspect and photocopy the documentation, and to challenge its authenticity or sufficiency before voluntary departure is granted.

(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.

(d) ***Alternate order of removal.*** Upon granting a request made for voluntary departure either prior to the completion of proceedings or at the conclusion of proceedings, the immigration judge shall also enter an alternate order or removal.

(e) ***Periods of time.*** If voluntary departure is granted prior to the completion of removal proceedings, the immigration judge may grant a period not to exceed 120 days. If voluntary departure is granted at the conclusion of proceedings, the immigration judge may grant a period not to exceed 60 days.

(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) ***Extension of time to depart.*** Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may

reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act. 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.

(g) ***Administrative Appeals.*** No appeal shall lie regarding the length of a period of voluntary departure (as distinguished from issues of whether to grant voluntary departure).

(h) ***Reinstatement of voluntary departure.*** An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making application for voluntary departure, if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B of the Act and paragraph (a) of this section.

(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) [Reserved]

(k) ***Authority of the Board to grant voluntary departure in the first instance.*** The following procedures apply to any request for voluntary departure reviewed by the Board:

(1) The Board shall not remand a case to an immigration judge to reconsider a request for voluntary departure. If the Board first finds that an immigration judge incorrectly denied an alien's request for voluntary departure or failed to provide appropriate advisals, the Board shall consider the alien's request for voluntary departure de novo and, if warranted, may enter its own order of voluntary departure with an alternate order of removal.

(2) In cases which an alien has appealed an immigration judge's decision or in which DHS and the alien have both appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge, the immigration judge denied the request, and the alien timely appealed;

(ii) The alien's notice of appeal specified that the alien is appealing the immigration judge's denial of voluntary departure and identified the specific factual and legal findings that the alien is challenging;

(iii) The Board finds that the immigration judge's decision was in error; and

(iv) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(3) In cases in which DHS has appealed an immigration judge's decision, the Board shall not grant voluntary departure under section 240B of the Act unless:

(i) The alien requested voluntary departure under that section before the immigration judge and provided evidence or a proffer of evidence in support of the alien's request;

(ii) The immigration judge either granted the request or did not rule on it; and,

(iii) The Board finds that the alien meets all applicable statutory and regulatory criteria for voluntary departure under that section.

(4) The Board may impose such conditions as it deems necessary to ensure the alien's timely departure from the United States, if supported by the record on appeal and within the scope of the Board's authority on appeal. Unless otherwise indicated in this section, the Board shall advise the alien in writing of the conditions set by the Board, consistent with the conditions set forth in paragraphs (b), (c), (d), (e), (h), and (i) of this section (other than paragraph (c)(3)(ii) of this section), except that the Board shall advise the alien of the duty to post the bond with the ICE Field Office Director within 10 business days of the Board's order granting voluntary departure if that order was served by mail and shall advise the alien of the duty to post the bond with the ICE Field Office Director within five business days of the Board's order granting voluntary departure if that order was served electronically. If documentation sufficient to assure lawful entry into the country to which the alien is departing is not contained in the record, but the alien continues to assert a request for voluntary departure under section 240B of the Act and the Board finds that the alien is otherwise eligible for voluntary departure under the Act, the Board may grant voluntary departure for a

period not to exceed 120 days, subject to the condition that the alien within 60 days must secure such documentation and present it to DHS and the Board. If the Board imposes conditions beyond those specifically enumerated, the Board shall advise the alien in writing of such conditions. The alien may accept or decline the grant of voluntary departure and may manifest his or her declination either by written notice to the Board within five days of receipt of its decision, by failing to timely post any required bond, or by otherwise failing to comply with the Board's order. The grant of voluntary departure shall automatically terminate upon a filing by the alien of a motion to reopen or reconsider the Board's decision, or by filing a timely petition for review of the Board's decision. The alien may decline voluntary departure if he or she is unwilling to accept the amount of the bond or other conditions.

(l) ***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.