

Voluntary Departure

Voluntary departure is a benefit whereby the individual avoids an order of removal and is allowed to leave the United States at his or her own financial expense, and generally of his or her own accord (*i.e.*, based on one’s own plans). Note in certain circumstances, voluntary departure is conducted “under safeguards” (with an agent observing or facilitating and confirming the departure) or even from a detention facility, whereby the individual is taken to the port of departure by ICE. Theoretically, an individual who departs according to all set requirements pursuant to a grant of voluntary departure leaves with a “clean record,” and is free to return to the United States with proper admission documents. In comparison, removal (or departure) from the United States under an order of removal carries a bar to returning; the length of the bar depends upon the reasons for removal.¹ Voluntary departure is not a panacea in all cases. Sometimes, an individual is in removal proceedings for a minor reason—a minor, technical violation—and will be able to obtain a visa and return to the United States without much ado, based on the voluntary departure order. In other cases, however, a grant of voluntary departure is not enough to resolve other immigration issues, such as a long period of unlawful presence in the United States, or a record of criminal or immigration law violations. Whether voluntary departure is a successful strategy depends upon the facts of the case; in certain circumstances, voluntary departure will have significant negative consequences.

In some cases, voluntary departure is the only relief sought in proceedings; this situation will often arise when the person has a strong basis for immediately returning to the United States with a visa. In other cases, persons may request voluntary departure at the conclusion of proceedings as an alternative form of relief to the main waiver or benefit (*i.e.*, asylum) requested. An individual who is removed from the United States (or departs under an order of removal) is barred from returning for five years if proceedings commenced upon the individual’s arrival in the United States; *i.e.*, he or she is classified as an “arriving alien.”² An individual who is removed from the United States after being charged under INA §237(a) (the “deportability track”) is barred from returning for 10 years.³ An individual removed for an aggravated felony faces a lifetime bar.⁴ Note that there is a waiver of these bars, entitled “consent to reapply for admission,” discussed later in this chapter.⁵

In any event, there are many circumstances in which an individual may desire an order of voluntary departure rather than an order of removal. However, there are severe consequences

¹ INA §212(a)(9); 8 USC §1182(a)(9). An individual classified as an “arriving alien” who is ordered removed under either INA §235(b)(1) or INA §240 is inadmissible for five years. This classification corresponds to the previous “exclusion” cases (*i.e.*, persons ordered excluded, as opposed to deported) under the statutory scheme prior to April 1, 1997. Persons who are ordered removed under §240 as “deportable” aliens under INA §237, or persons who are ordered removed for charges under INA §212(a) who are not arriving aliens (*i.e.*, persons who entered without inspection), are inadmissible for 10 years. Persons who are removed for an aggravated felony conviction are permanently inadmissible. Note, however, that in reference to these bars, including aggravated felony convictions, the person may seek a combination of waivers to overcome inadmissibility, included permission to reapply [Form I-212] combined with a waiver such as those available under INA §§212(h), 212(d)(3), etc., as discussed further in this chapter and the next chapter.

² INA §212(a)(9)(A)(i); 8 USC §1182(a)(9)(A)(i).

³ INA §212(a)(9)(A)(ii); 8 USC §1182(a)(9)(A)(ii).

⁴ INA §212(a)(9)(A)(ii); 8 USC §1182(a)(9)(A)(ii).

⁵ INA §212(a)(9)(A)(iii); 8 USC §1182(a)(9)(A)(iii).

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for failing to timely depart under an order of voluntary departure. The consequences for failure to depart under an order of voluntary departure are in some ways more severe than failing to depart pursuant to an order of removal. It is extremely difficult to reopen a case when voluntary departure has been given and the recipient did not depart. An individual who remains in the United States and allows voluntary departure to expire is barred from applying for adjustment of status, cancellation of removal, registry, or a change of status for 10 years; for this reason (because relief is not available), these individuals will rarely see their court cases reopened.⁶

In the previous chapter, voluntary departure was discussed as a benefit that one may or may not be eligible for, depending upon the classification of the crime. This section now goes over the specific requirements for voluntary departure.

Precommencement or preliminary stage of proceedings

Pursuant to INA §240B(a) [8 USC §1229c(a)], an individual can request voluntary departure from DHS agents in lieu of being placed in removal proceedings. In addition, an individual can request voluntary departure from an immigration judge at the preliminary stages of the removal hearing; in other words, at the master calendar stage.⁷ This precommencement/preliminary stage of voluntary departure is not available to an “arriving alien” (someone arriving at a port of entry who is placed in proceedings at that time.)⁸ Note that an individual who is arriving at a port of entry and is facing removal from the United States may withdraw the application for admission;⁹ this is the counterpart to voluntary departure for arriving aliens.

An individual with a criminal record is still eligible to seek voluntary departure; however, eligibility requires that he or she not be “deportable” for an aggravated felony offense or on national security grounds.¹⁰ He or she cannot request any other form of relief, and must concede deportability and waive appeal.¹¹ Unlike an individual who applies for voluntary departure at the conclusion of proceedings, an individual applying for precommencement or preliminary stage voluntary departure need not show the financial ability to pay for one’s own passage.¹²

At this stage the individual may be granted up to 120 days to voluntarily depart.¹³ If the immigration judge grants less than 120 days, but the individual desires more time, he or she can request an extension from the Detention and Removal Unit of ICE. However, from any and all sources combined, the period for voluntary departure cannot exceed 120 days.¹⁴ Furthermore, the immigration judge may, in the exercise of discretion, require the posting of

⁶ Motions to reopen are beyond the scope of this book. For a good discussion of motions to reopen before the immigration court, see J. Vail, *Essentials of Removal and Relief* (AILA 2006 Ed.), available from AILA Publications, www.ailapubs.org, (800) 982-2839.

⁷ 8 CFR §1240.26(b)(1)(i)(A).

⁸ INA §240B(a)(4); 8 USC §1229c(a)(4).

⁹ INA §240B(a)(4); 8 USC §1229c(a)(4).

¹⁰ INA §240B(a)(1); 8 USC §1229c(a)(1).

¹¹ 8 CFR §1240.26(b)(1)(i)(B)–(D); *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).

¹² *Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999).

¹³ INA §240B(a)(2)(A); 8 USC §1229c(a)(2)(A); 8 CFR §1240.26(e).

¹⁴ See 8 CFR §§1240.26(f), (h).

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a voluntary departure bond.¹⁵ The Detention and Removal Unit may request inspection of the individual’s passport.¹⁶

There is a definite “check out” procedure; if not followed, compliance with voluntary departure will not be entered in the DHS computer system and the individual’s case may appear in the data system as a removal (deportation). With the immigration judge’s voluntary departure order in hand, the individual should report to the local Detention and Removal Office (D&R) within a few days of the judge’s order. D&R will provide the person with a verification of departure form. This form should be handed in at the American embassy in the person’s home country or the country to which he or she departed. This form is then sent back to the United States as verification of the departure. An individual who departs on voluntary departure is encouraged to independently retain proof of departure, such as the airline ticket and a stamp in the passport.

If a person fails to comply with the voluntary departure requirements, the order is converted to an order of removal, with all the contingent consequences. It cannot be stressed strongly enough that an individual should request voluntary departure only if he or she plans to depart the United States within the time allotted.

Conclusion of proceedings voluntary departure

The requirements for voluntary departure at the conclusion of removal proceedings are more strict. An individual seeking voluntary departure at the end of an individual hearing, generally as an alternative or second form of requested relief, must have been physically present in the United States for at least one year prior to service of the notice to appear.¹⁷ An individual in removal proceedings charged under INA §212(a) may request voluntary departure, but only if the proceedings did not begin at the time of arrival in the United States, and he or she has been present for at least one year.¹⁸ An example of this would be someone who is paroled into the United States, and is subsequently placed in proceedings, or an individual who entered without inspection. Likewise, an individual charged under INA §237(a) is eligible for voluntary departure, but must have one year physical presence.

Voluntary departure at this stage requires five years of “good moral character.” Good moral character is a term defined at INA §101(f). The definition makes reference, among other things, to INA §212(a)(2): an individual who is inadmissible because he or she has been convicted of a crime involving moral turpitude or a controlled substance violation cannot show good moral character. There is an exception for an offense involving less than 30 grams of marijuana. Section 101(f) also dictates that a person whose income is derived from illegal gambling, who has been convicted of two or more gambling offenses, or has been involved in (or comes to the United States to engage in) prostitution or commercialized vice-type enterprises cannot show good moral character. Anyone involved in (or convicted of) any of these activities within the five-year statutory period would be ineligible for voluntary departure.

In addition, §101(f) states that an individual who has been convicted of an aggravated felony at any time is permanently barred from ever establishing good moral character, hence eligibility for voluntary departure. However, this aggravated felony bar was added to the

¹⁵ INA §240B(a)(3); 8 USC §1229c(a)(3).

¹⁶ See 8 CFR §1240.26(b)(3)(i).

¹⁷ INA §240B(b)(1)(A); 8 USC §1229c(b)(1)(A).

¹⁸ See the unpublished BIA decision at Appendix 7A.

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definition of “good moral character” by IMMACT90 and does not apply to convictions for aggravated felonies entered before November 29, 1990.

When requested at the conclusion of proceedings, receiving voluntary departure requires the applicant to establish the financial means to depart (*i.e.*, buy a ticket) and presentation of the passport.¹⁹ There is a mandatory voluntary departure bond (to be paid to D&R) to be set by the judge, but no less than \$500.²⁰ If the individual does not timely post this bond, the voluntary departure is automatically revoked and the order becomes one of removal.²¹ At this stage the individual may be granted up to 60 days to voluntarily depart.²²

Voluntary departure at the conclusion of proceedings does not require conceding removability or foregoing other forms of relief. An individual may contest the charges of removability, and/or request a waiver, asylum, or some other benefit, as well as voluntary departure. If the primary form of relief is denied, the individual can file an appeal to the BIA without forfeiting the grant of voluntary departure (keeping in mind that the bond must be posted, notwithstanding the filing of an appeal). If the appeal is not sustained, the BIA routinely reinstates voluntary departure for 30 days.

As mentioned above in the discussion of precommencement/early stage voluntary departure, it is critically important that a voluntary departure recipient report to the D&R local office and present the immigration judge’s order, so that the information may be entered into the DHS computer system and the verification form obtained. Then, the individual must report to an American embassy (or consulate, if there is a procedure available) to hand in the verification form. The American Embassy staff will note the appearance of the individual on the form and send the form back to the United States. And again, it is advisable to retain independent proof—aside from this procedure—as evidence of timely departure.

¹⁹ See 8 CFR §§1240.26(c)(1)(iv), (2).

²⁰ 8 CFR §1240.26(c)(3).

²¹ *Id.*

²² INA §240B(b)(2); 8 USC §1229c(b)(2); 8 CFR §1240.26(e).