Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1240 and 1241

[EOIR Docket No. 163P; AG Order No. 2919–2007]

RIN 1125–AA60

Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule with request for comments.

SUMMARY: The immigration laws provide that an alien may request and receive a grant of voluntary departure in certain cases; such a grant allows an alien to depart voluntarily during a specified period of time after the order is issued, in lieu of being removed under an order of removal. Voluntary departure is an agreed upon exchange of benefits between the alien and the government that provides tangible benefits for aliens who do depart during the time allowed. There are severe statutory penalties, however, for aliens who voluntarily fail to depart during the time allowed for voluntary departure. This proposed rule would amend the Department of Justice (Department) regulations regarding voluntary departure to allow an alien to elect to file a motion to reopen or reconsider, but also to provide that the alien's filing of a motion to reopen or reconsider prior to the expiration of the voluntary departure period will have the effect of automatically terminating the grant of voluntary departure. Similarly, the rule also provides that the alien's filing of a petition for judicial review shall automatically terminate the grant of voluntary departure. In other words, the rule would afford the alien the option either to abide by the terms of the grant of voluntary departure, in lieu of an order of removal, or to forgo the benefits of voluntary departure and instead challenge the final order on the merits in a motion to reopen or reconsider or a petition for review. If the alien elects to seek further review and forgo voluntary departure, the alien will be subject to the alternate order of removal that was issued in conjunction with the grant of voluntary departure, similar to other aliens who were found to be removable. But this approach also means he or she will not be subject to the penalties for failure to depart voluntarily.

The rule also amends the bond provisions for voluntary departure to make clear that an alien's failure to post a voluntary departure bond as required will not have the effect of exempting the alien from the penalties for failure to depart under the grant of voluntary departure. Aliens who are required to post a voluntary departure bond remain liable for the amount of the voluntary departure bond if they do not depart as they had agreed. However, the rule clarifies the circumstances in which aliens will be able to get a refund of the bond amount upon proof that they are physically outside of the United States. In addition, the rule provides that, at the time the immigration judge issues a grant of voluntary departure, the immigration judge will also set a specific dollar amount of not less than $3,000 as a civil money penalty if the alien voluntarily fails to depart within the time allowed.

DATES: Written comments must be submitted on or before January 29, 2008.

ADDRESSES: You may submit comments, identified by EOIR Docket No. 163P, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference EOIR Docket No. 163P on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: Kevin Chapman, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041; telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. Comments that will provide the most assistance to the Department of Justice will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and EOIR Docket No. 163P. All comments received will be posted without change to *http://www.regulations.gov/,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To make an appointment, please contact EOIR at (703) 305–0470 (not a toll free call).

II. Background

The Immigration and Nationality Act (INA or Act) provides that, as an alternative to formal removal proceedings and entry of a formal removal order, ''[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense.'' INA 240B(a)(1), (b)(1) (8 U.S.C. 1229c(a)(1), (b)(1)).

Pursuant to the Homeland Security Act of 2002, Pub. L. 107–296, the functions previously exercised by the former Immigration and Naturalization Service were transferred to the Department of Homeland Security (DHS), while the immigration judges and the Board of Immigration Appeals (Board) were retained in the Department of Justice under the authority of the Attorney General. See 6 U.S.C. 521; 8 U.S.C. 1103(g). Accordingly, DHS now has the authority to grant voluntary departure under section 240B(a) of the Act in lieu of placing the alien in

removal proceedings, while the Attorney General has authority over grants of voluntary departure issued by an immigration judge or the Board, after removal proceedings have begun. This rule deals only with orders granting voluntary departure issued by immigration judges or the Board, and does not affect DHS's issuance of orders granting voluntary departure for aliens prior to the initiation of removal proceedings. See 8 CFR 240.25.

Prior to 1996, the authority for voluntary departure was found in former section 244(e) of the Act, which contained no time limitations on the period for which voluntary departure could be valid. However, in 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Public Law 104–208, Div. C, which significantly amended the Act, including provisions relating to voluntary departure. Reforms to voluntary departure included enacting restrictions limiting the time for which voluntary departure may be authorized, and enacting provisions to increase compliance by aliens who request grants of voluntary departure. The statutory changes made by IIRIRA to voluntary departure remain in effect.

Currently, prior to completion of removal proceedings an immigration judge may permit an alien to depart the United States voluntarily, if certain conditions are met, within a total period not to exceed 120 days. INA 240B(a)(2)(A) (8 U.S.C. 1229c(a)(2)(A)); 8 CFR 1240.26(b). Among these conditions is an agreement by the alien not to file an appeal. 8 CFR 1240.26(b)(1)(D).

At the conclusion of removal proceedings, additional conditions are applicable, but the alien is not required to waive the filing of an appeal to the Board. The immigration judge may permit an alien to depart the United States voluntarily only within a total period of no more than 60 days. INA 240B(b)(2) (8 U.S.C. 1229c(b)(2)); 8 CFR 1240.26(c). Where the period of voluntary departure granted by the immigration judge or the Board is less than the statutory maximum, DHS also has authority to grant an extension of voluntary departure up to the statutory maximum of 120 or 60 days.

Because the Act provides that the Attorney General ''may'' permit an alien to depart voluntarily, the determination whether to allow an alien in removal proceedings to depart voluntarily is within the discretion of the Attorney General and of the immigration judges and the Board, who act on his behalf. The Act further provides that ''[t]he 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.'' INA 240B(e) (8 U.S.C. 1229c(e)).

III. The Nature of Voluntary Departure

Voluntary departure ''is a privilege granted to an alien in lieu of deportation.'' *Iouri* v. *Aschroft,* 487 F.3d 76, 85 (2d Cir. 2007), pet. for cert. filed, No. 07–259 (Aug. 22, 2007) (citing *Ballenilla-Gonzalez* v. *INS,* 546 F.2d 515, 521 (2d Cir. 1976)). It is ''an agreed upon exchange of benefits between the alien and the Government.'' *Banda-Ortiz* v. *Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006), cert. denied, 127 S. Ct. 1874 (2007). This quid pro quo offers an alien ''a specific benefit—exemption from the ordinary bars to relief—in return for a quick departure at no cost to the government.'' *Id.* at 390 (quoting *Ngarurih* v. *Ashcroft,* 371 F.3d 182, 194 (4th Cir. 2004)). When choosing to seek voluntary departure, the alien agrees to take all the benefits and burdens of the statute together. *Ngarurih,* 371 F.3d at 194. In order to obtain voluntary departure at the conclusion of removal proceedings, an alien must establish to the immigration judge by clear and convincing evidence that he or she is both willing and able to depart voluntarily. See, *e.g.*, 8 U.S.C. 1229c(b)(1)(D); 8 CFR 1240.26(c)(1)(iv). Often, this involves the alien testifying under oath that he or she intends to depart the United States within the specific time period allotted, that he or she has the financial means to depart the United States, and that he or she has the necessary documentation—such as a valid passport—to do so. See 8 CFR 1240.26(c)(3).

''If an alien chooses to seek [voluntary departure]—and that choice is entirely up to the alien—it can produce a win-win situation.'' *Naeem* v. *Gonzales*, 469 F.3d 33, 36 (1st Cir. 2006) (citing *Bocova* v. *Gonzales*, 412 F.3d 257, 265 (1st Cir. 2005)). ''For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removal—and it facilitates the possibility of return to the United States.'' *Iouri,* 487 F.3d at 82–83 (citing *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)). ''For the government, it expedites departures and reduces the costs that are typically associated with deporting individuals from the United States.'' *Id.*, at 83 (citing *Thapa* v. *Gonzales*, 460 F.3d 323, 328 (2d Cir. 2006)); accord *Chedad* v. *Gonzales*, 497 F.3d 57, 63–64 (1st Cir. 2007), pet. for reh'g en banc filed (Oct. 15, 2007); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1284 (9th Cir. 2005). ''Where an alien departs within the specified time period, the alien is not regarded as having been deported and thus obtains the benefits of departure without deportation.'' *Iouri*, 487 F.3d at 85 (citing Gordon, Mailman & Yale-Loehr, *Immigration Law and Procedure* 72.08[1][a] (rev. ed. 2005)). In particular, the grant of voluntary departure enables an alien to avoid the five- or ten-year period of inadmissibility that would result from an order of removal. See 8 U.S.C. 1182(a)(9)(A).

However, ''[t]he benefits normally associated with voluntary departure come with corollary responsibilities. An alien who permits his voluntary departure period to run and fails to leave the country before the expiration date faces severe sanctions; these may include forfeiture of the required bond, a fine, and a ten-year interval of ineligibility for certain forms of immigration-related relief.'' *Naeem*, 469 F.3d at 37. These penalties, as well as the elimination of an ''exceptional circumstances'' exception previously available to aliens for failing to comply with a voluntary departure grant, were added to the voluntary departure provisions by Congress in 1996 to ensure that aliens who seek voluntary departure no longer abuse the privilege that is a grant of voluntary departure. Compare 8 U.S.C. 1229c(d) (2000 & supp.) with 8 U.S.C. 1252b(e)(2)(A) (repealed effective April 1, 1997).

Exceptions to or extensions of the voluntary departure period authorized by Congress run counter to the statutory purpose. The court in *Ngarurih* recognized this, noting ''an alien could request voluntary departure, overstay the specified period and deprive the government of a quick departure, wait out the appellate review process, and then demand the full benefits of voluntary departure.'' *Ngarurih*, 371 F.3d at 195. Delay in proceedings generally works in the alien's favor. See, e.g., *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (noting that ''every delay'' in deportation proceedings ''works to the advantage of the deportable alien who wishes merely to remain in the United States''); *Shaar* v. *INS*, 141 F.3d 953, 956 (9th Cir. 1998) (overruled on other grounds).

The Fourth Circuit summed up voluntary departure as follows:

> [V]oluntary departure is, from beginning to end, voluntary. The alien must request the relief; it is not offered as a matter of course. Even if he requests the relief and obtains it, the alien may later reject it by overstaying the

period specified for departure. If he rejects voluntary departure in this manner, then he is subject to removal from the United States in the ordinary course. The fact that his choice carries real consequences—a monetary penalty and subjection to the ordinary bars on subsequent relief—means that the alien has a real choice to make, not that he is * * * ''forced'' to leave.

Ngarurih, 371 F.3d at 194 n.12 (citation omitted).

This rule applies to all orders granting voluntary departure by an immigration judge, but the proposed changes relate primarily to orders granting voluntary departure to an alien at the conclusion of removal proceedings, pursuant to the provisions of section 240B(b) of the Act and 8 CFR 1240.26(c). At that stage of the proceedings, voluntary departure is not a relevant issue unless the immigration judge or the Board has already found that the alien is removable under section 212 or 237 of the Act (8 U.S.C. 1182, 1227). Moreover, voluntary departure is not a relevant issue unless the immigration judge or the Board is denying all of the alien's other applications for relief or protection of removal (such as asylum, withholding of removal, cancellation of removal, adjustment of status, waivers, etc.), as the issue of voluntary departure would be moot if the alien were granted any relief or protection from removal. Thus, at the request of the alien, and based on the alien's statement of his or her ability and intent to depart the United States within the period allowed for voluntary departure, the immigration judge's grant of voluntary departure permits the alien to depart voluntarily, within a fixed period of time, instead of subjecting the removable alien to an order of removal. However, a grant of voluntary departure issued at the conclusion of proceedings also includes an alternate order of removal, which takes effect automatically if the alien fails voluntarily to depart during the time allowed.

Under the current regulations, as well as under this proposed rule, an alien who is granted voluntary departure at the conclusion of proceedings before the immigration judge is still able to file an appeal to the Board and present any arguments with respect to the merits of the alien's removability and eligibility for any form of relief or protection from removal. If neither party appeals the immigration judge's decision, then the decision becomes final and the period of time for voluntary departure runs from the date of the immigration judge's grant of voluntary departure. However, in every case where the alien does file a timely appeal to the Board, the immigration judge's order is not final, and the time period for voluntary departure does not begin to run until after the conclusion of the Board's adjudication of the merits of the alien's appeal. If the Board reverses the immigration judge's decision on the merits or remands the case to the immigration judge for further proceedings, the grant of voluntary departure is rendered moot by virtue of the Board's decision. In the event of a remand, the issue of the alien's eligibility for and desire to receive voluntary departure will again be before the immigration judge as part of the remanded proceedings. Thus, it is only in those cases where the Board rejects all of the alien's arguments relating to removability and to relief or protection from removal that the order granting voluntary departure actually takes effect and the alien is obligated to depart from the United States within the specified period (no more than 60 days).

IV. Voluntary Departure and the Effect of Filing Motions To Reopen or Reconsider

Once the immigration judge or Board issues a final order in a case, regardless of whether it grants voluntary departure, the alien has the option under the Act and implementing regulations to file a motion to reopen or a motion seeking to have the decision reconsidered.

A. Motions To Reopen or Reconsider

Prior to the statutory codification of the regulatory provisions on reopening and reconsideration, the Board held in *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), aff'd, 141 F.3d 953 (9th Cir.1998), that the filing of a motion to reopen does not suspend the running of the period for voluntary departure or excuse the alien from the requirement to depart within that period.

In the 1996 legislation, Congress enacted section 240(c)(6) and (7) of the Act (8 U.S.C. 1229a(c)(6) and (7)), which substantially codified existing regulatory provisions. Paragraph (6) allows an alien in removal proceedings to file one motion to reconsider and provides that such a motion must be filed within 30 days of the date of entry of a final removal order in his or her removal proceedings. Paragraph (7) allows an alien to file one motion to reopen removal proceedings and provides that such a motion must be filed within 90 days of the date of entry of a final administrative order of removal.[1] The statutory provisions do not provide for a stay of removal upon the filing of a motion to reopen or a motion to reconsider, except in two quite limited circumstances (for motions to reopen seeking to rescind an in absentia removal order and certain motions filed by battered spouses, children and parents, as provided in subsections (b)(5)(C) and (c)(7)(C)(iv) of section 240 of the Act).

After publication of a proposed rule on January 3, 1997, the Department of Justice published an interim rule implementing the provisions of IIRIRA on March 6, 1997. See 62 FR 10312. The supplementary information for the interim rule requested comments on what position the final, permanent rules should take on the effect on the voluntary departure period of an appeal from an immigration judge to the Board, a petition for review of a Board decision in the court of appeals, or a motion to reopen or reconsider filed with an immigration judge or the Board:

> [S]everal commenters requested clarification regarding the effect of a motion or appeal to the Immigration Court, BIA, or a federal court on any period of voluntary departure already granted. Since an alien granted voluntary departure prior to completion of proceedings must concede removeability [sic] and agree to waive pursuit of any alternative form of relief, no such appeal or motion would be possible in this situation. Regarding post-hearing voluntary departure, the Department considered several options, but has not adopted any position or modified the interim rule. The Department has identified three possible options: no tolling of any period of voluntary departure; tolling the voluntary departure period for any

[1] After the issuance of a final decision by the Board, only motions to reopen and motions to reconsider are authorized under the immigration laws. 8 U.S.C. 1229a(c)(6) and (7). A separate kind of motion, a motion to remand, can be filed only during the pendency of an appeal, but not after the issuance of a final order. 8 CFR 1003.2(c)(4) states, ''A motion to reopen a decision rendered by an Immigration Judge or [DHS] officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the [DHS] officer from whose decision the appeal was taken.'' See also *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (discussing motions to remand considered by the Board during the pendency of the appeal). After the issuance of a final order, the Board sometimes receives motions styled as motions to ''remand'' or motions to ''reopen and remand.'' Such motions, however, presuppose reopening in order to have the case remanded and, accordingly, they are properly considered to be motions to reopen and are subject to the same requirements. *Id.* The Board and the immigration judges otherwise would lack authority to entertain such motions in the first instance. *Matter of C-W-L-*, 24 I&N Dec. 346, 350 (BIA 2007) (''[T]he regulations provide that to request further relief, a motion to reopen must be filed with the last body that issued an administratively final order of removal,'' and the filing of a motion to reopen proceedings is ''a prerequisite to our taking up any issue arising in [the respondent's] case, given the entry of the removal order against him.''). Accordingly, the provisions of this rule apply to all motions to reopen or reconsider that are filed after the issuance of a final administrative decision, however such motions are styled.

period that an appeal or motion is pending; or setting a brief, fixed period of voluntary departure (for example, 10 days) after any appeal or motion is resolved. The Department wishes to solicit additional public comments on these or other possible approaches to this issue so that it can be resolved when a final rule is promulgated.

62 FR 10312, 10325–26 (Mar. 6, 1997).

Although no final rule directly addressing those issues has been published, the current regulations are consistent with the Department's longstanding view that the filing of a motion to reopen does not suspend a period of voluntary departure. The regulations do not state that the conclusion reached by the Board in *Shaar* was incorrect or was to be superseded. To the contrary, they provide that the filing of a motion to reopen or a motion to reconsider ''shall not stay the execution of any decision made in the case,'' and that ''[e]xecution of such decision shall proceed unless a stay of execution is specifically granted by'' the Board or the immigration judge. 8 CFR 1003.2(f). In addition, the regulations expressly permit the reinstatement of voluntary departure in the context of reopening, but only in situations where the reopening was granted before the expiration of the period allowed for 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.

8 CFR 1240.26(h) (emphasis added). That rule necessarily rests on the assumption that the mere *filing* of the motion to reopen does not suspend or toll the running of the voluntary departure period. Finally, although the Board has not published a precedent decision since its 1996 decision in *Shaar* addressing the interplay between the provisions relating to voluntary departure and motions to reopen or reconsider a final order in removal proceedings, the Board has continued to conclude that the filing of such a motion does not suspend or toll the voluntary departure period, as evidenced by the number of court of appeals decisions reviewing such decisions by the Board.[2]

As a practical matter, it is often the case that an immigration judge or the Board cannot reasonably be expected to adjudicate a motion to reopen or reconsider during the voluntary departure period, particularly since the voluntary departure period under section 240B(b) of the Act is limited to no more than 60 days. Many motions to reopen are filed by the alien one or two days before the end of the 60-day voluntary departure period, thereby making it impossible to resolve the matter before the period allowed for voluntary departure expires.

Because of the relatively short period of time allowed for voluntary departure after a final administrative order (no more than 60 days), and the time needed as a practical matter to adjudicate motions to reopen or reconsider, aliens who file a motion to reopen or reconsider may face a choice. Some aliens may choose to remain in the United States beyond the voluntary departure period in order to await the decision of the Board on the motion, thereby incurring the statutory penalties because of their failure to depart as they had promised to do. For example, if a decision on the motion is not issued until after the period allowed for voluntary departure has expired, which is frequently the case, then the 10-year bar on obtaining adjustment of status may be deemed to apply by operation of 8 U.S.C. 1229c(d) because of the alien's failure to depart. Other aliens may choose to depart the United States in compliance with the grant of voluntary departure, even though they have not yet received a decision on their motion, in order to avoid the voluntary departure penalties. However, under the current regulations the alien's departure from the United States has the effect of automatically withdrawing the alien's motion. 8 CFR 1003.2(d); see also 8 CFR 1003.23(b)(1) (similar rule for departure after filing a post-decision motion with the immigration judge).[3]

B. Existing Circuit Split

The courts of appeals are divided on the question of how the filing of a motion to reopen impacts a grant of voluntary departure. Four circuits have held that the timely filing of a motion to reopen during the voluntary departure period automatically ''tolls'' the period allowed for voluntary departure. See *Kanivets* v. *Gonzales*, 424 F.3d 330, 331 (3d Cir. 2005); *Sidikhouya* v. *Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005); *Barrios* v. *United States Att'y General*, 399 F.3d 272 (3rd Cir. 2005) (pre-IIRIRA); *Azarte* v. *Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005); *Ugokwe* v. *United States Att'y Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006). In a similar context, the Ninth Circuit has held that the filing of a timely motion to reconsider tolls the voluntary departure period. *Barroso* v. *Gonzales*, 429 F.3d 1195 (9th Cir. 2005). The courts of appeals for the First, Fourth, and Fifth Circuits have reached the contrary conclusion, as a matter of law or by deference to the Board's authority to interpret the Act, finding that the filing of a motion to reopen does not toll the period allowed for voluntary departure. See *Chedad*, 497 F.3d at 63–64; *Banda-Ortiz*, 445 F.3d at 390; *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006), pet. for cert. filed (No. 06–1285).

Under current judicial precedents in some circuits the voluntary departure process as it is being applied bears little resemblance to the statutory mandate that the alien who requests and is granted voluntary departure at the conclusion of removal proceedings is expected to depart voluntarily no more than 60 days after the administrative order becomes final. In some circuits, as noted above, the filing of a motion to reopen or reconsider has the effect of automatically tolling the time period for voluntary departure, allowing the alien to remain in the United States until the motion is adjudicated. The result in these circuits is that some aliens who have received a final administrative order, after appealing to the Board, are able to remain in the United States to pursue the full panoply of means to challenge the final decision through administrative motions to reopen or reconsider (including in some cases the filing of a motion to reconsider the denial of a motion to reopen). Those processes, of course, can take many months to accomplish. Thus, contrary to the incentives and benefits of voluntary departure that result if an alien actually

[2] The Department's practice has remained consistent with respect to the other two subjects referenced in the 1997 request for comments as well. With respect to appeals from an immigration judge to the Board, the INA itself provides that an immigration judge's order does not become final until the Board issues its decision, see 8 U.S.C. 1101(a)(47)(B), and the Department's regulations provide that the voluntary departure period runs from that date, 8 CFR 1241.1(f). With respect to petitions for review, in contrast, the Department's position continues to be that the filing of such a petition does not by its own force create a stay of removal.

[3] We note that two courts of appeals have reached contrary conclusions with respect to section 1003.2(d). See *Li* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) (interpreting section 1003.2(d) only to bar the filing of a motion to reopen if the alien ''is'' in removal proceedings at the time of his or her departure, but not to bar the filing of a motion to reopen if the alien was already the subject of a final order of removal at the time of departure); *William* v. *Gonzales*, 499 F.3d 329 (4th Cir. 2007) (holding that section 1003.2(d) is inconsistent with the provisions of section 240(c)(7) of the INA). The Board at present is following those decisions only for cases arising in those two circuits. This proposed rule does not address the interpretation or applicability of section 1003.2(d).

departs within a short, fixed, period of time, the result in those areas of the country is that aliens who accept a grant of voluntary departure are nevertheless able to remain in the United States for an often lengthy period of time and are not obligated to depart voluntarily until after they have exhausted all opportunities for reconsideration, remand, or reopening. At that point, the government will already have borne much the same burdens that it would have faced if the alien had not agreed to depart voluntarily, and much of the benefit to the government will have been lost. *Banda-Ortiz*, 445 F.3d at 390. This result is also contrary to the clear congressional intent to limit the period of time allowed under the voluntary departure provisions, which before the 1996 amendments had allowed aliens to remain in the United States for many months or even years under grants of voluntary departure.

Contrary to the decisions of those courts of appeals, the Department's interpretation of the Act and the existing regulations is that the filing of a motion to reconsider or reopen under section 240(c)(6) or (7) of the INA (8 U.S.C. 1229a(c)(6) or (7)) does not automatically toll the voluntary departure period, and that such tolling is not necessary in order to give effect to both the INA's provision for an alien to file a motion to reopen and its provision authorizing the Attorney General to permit voluntary departure. As the Fourth Circuit has explained, the ''voluntary departure provision'' establishing the maximum departure period of 60 or 120 days ''applies to certain removable aliens'' who qualify for that relief, ''while the motion to reopen provision applies to all aliens subject to removal.'' *Dekoladenu*, 459 F.3d at 505–06. Indeed, only 11 percent of removable aliens were granted voluntary departure in 2005. See id. at 506 n.5. Accordingly, ''[f]ollowing the normal rule of statutory construction, the more specific voluntary departure provision governs in those limited situations in which it applies.'' *Id.* at 506. Motions to reopen are unaffected in other cases. Moreover, while the INA provides that an alien may file one motion to reopen, it confers no right to substantive relief. To the contrary, the granting of reopening is discretionary. Similarly, the granting of voluntary departure is discretionary with the Attorney General, and the Attorney General is expressly authorized to limit eligibility for additional classes of aliens pursuant to section 240B(e) of the INA (8 U.S.C. 1229c(e). Finally, although an alien who has obtained a grant of voluntary departure and is subject to an alternate order of removal may, after exhausting administrative remedies with the Board, file a petition for review with the court of appeals, it is well-established that the mere filing of such a petition does not automatically toll or suspend the voluntary departure period, as illustrated by the number of appellate decisions addressing whether it is appropriate to construe a motion for a stay of removal as necessarily encompassing a request for a stay of voluntary departure. It therefore is fully consistent with the Act that, under applicable procedures, an alien who files a motion to reopen and chooses to remain in the country until the Board acts upon it thereby gives up the benefits of voluntary departure.

That was the conclusion reached by the Board in Shaar under the reopening regulations that were codified in the 1996 amendments made by IIRIRA, and there is no indication in those amendments or their legislative history that they overturned the rule of Shaar. To the contrary, a rule of automatic tolling, with resulting delay, of voluntary departure would be contrary to Congress's decision in the 1996 amendments to impose strict time limits on the voluntary departure period. Indeed, ''mandat[ing] tolling of the voluntary departure period when an alien files a motion to reopen would have the effect of rendering the time limits for voluntary departure meaningless.'' *Dekoladenu*, 459 F.3d at 506; see *Banda-Ortiz*, 445 F.3d at 390 (''Automatic tolling would effectively extend the validity of [an alien's] voluntary departure period well beyond the sixty days that Congress has authorized.'').

The Supreme Court recently granted certiorari to review a decision by the Fifth Circuit with respect to the effect of filing a motion to reopen, in order to resolve the circuit split under existing law. *Dada* v. *Keisler,* 128 S. Ct. 6 (Sept. 25, 2007) (No. 06–1181).

C. The Attorney General's Authority To Promulgate a Different Regulatory Scheme in the Future

As a result of the varying judicial interpretations in the different regional circuits, there is a substantial geographic disparity with respect to how voluntary departure is administered, depending solely on the location of the hearing before the immigration judge. Experience also has shown that the current regulatory framework can lead to significant delays in promoting and effectuating voluntary departure after a final administrative order is entered. Though such disparities of interpretation among the circuits occur in other contexts as well, there are sound public policy reasons for the Attorney General to promote a greater measure of uniformity and expedition in the administration of the immigration laws. The goals of promoting uniformity of interpretation and assuring prompt voluntary departure underlie this proposed rule.

Circuit court decisions holding that the filing of motions to reopen or reconsider tolls the running of a voluntary departure period do not prevent the Department of Justice from rendering an authoritative construction of the Act that does not require tolling, as it does now in issuing these rules. ''Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.'' *National Cable & Telecom. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 982–83 (2005); *id.* at 983–84 (''A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.''). Certainly, nothing in the Act ''unambiguously'' requires that the mere filing of a motion to reopen or reconsider automatically tolls the voluntary departure period within which the alien has agreed to depart. And indeed the Board's practice under the 1996 amendments (as it was before those amendments as stated in Shaar) has been not to deem the voluntary departure period automatically tolled upon the filing of a motion to reopen or reconsider.

Nor do the various judicial decisions under the current regulatory framework preclude the Attorney General from adopting a different regulatory scheme for the future within the broad parameters of the statutory provisions enacted by Congress. Congress clearly provided for the Attorney General to have broad authority to implement the voluntary departure provisions of the Act and to limit eligibility for voluntary departure for specified classes or categories of aliens, as provided in section 240B(e) of the Act. The provisions of this rule are an exercise of these statutory authorities. These new rules will be applicable to grants of voluntary departure that will be made in the future, after these rules are finalized, and will not affect any cases in which a grant of voluntary departure was made prior to their adoption.

The voluntary departure statute does not unambiguously provide that permission to depart voluntarily is irrevocable once granted, such that aliens permitted to depart voluntarily by an immigration judge must always be viewed as having been ''permitted to depart voluntarily'' for purposes of 8 U.S.C. 1229c(d). Accordingly, the Attorney General retains discretion and authority to provide, by regulation, that permission to depart voluntarily is conditioned upon the alien's agreeing to accept the finality of the Board's order after it is issued (or the finality of the immigration judge's order if there is no appeal), and depart within the period allowed for voluntary departure thereafter, without seeking to challenge the final order by filing a motion to reopen or reconsider.

That is what these proposed rules would do, by providing that permission to depart voluntarily, following entry of a final order, will terminate if the alien files a motion to reopen or reconsider the final administrative order. A voluntary departure order reflects an agreement or bargain between the government and the alien, in which the alien represents that he or she is ready and able to depart voluntarily within a short, defined period of time, in exchange for receiving the favorable terms of a grant of voluntary departure. If the alien decides not to uphold his or her end of the bargain and instead chooses to challenge the final order rather than departing within the time allowed, these rules provide that the grant of voluntary departure is terminated and the alternate order of removal becomes effective. Moreover, unlike the current regulatory scheme for grants of voluntary departure prior to the conclusion of proceedings before an immigration judge, in which the alien is required irrevocably to waive the right to appeal as provided in 8 CFR 1240.26(b)(1)(i)(D), these proposed rules are more favorable to the alien because they do not irrevocably bar the alien from challenging the final order after it is entered by the Board. The alien will be free to forgo voluntary departure and instead to elect to challenge the final order through a motion to reopen or reconsider, or a petition for review. Or, put another way, these rules would allow the alien an opportunity to withdraw from the arrangement into which he or she effectively entered under the statute and the amended regulations at the time of seeking and accepting voluntary departure, and instead to pursue further challenges after issuance of the final order. And because the alien's act of filing an administrative motion to reopen or reconsider or a petition for judicial review would have the effect of terminating a period of voluntary departure granted in accordance with these regulations, no voluntary departure period would remain to be tolled or stayed.

This approach advances the legitimate interests of the government in preserving the purposes of the voluntary departure authority; it also enables aliens to avoid the consequences under section 240B(d) of the INA of an earlier decision to accept a grant of voluntary departure, in the event of a change of circumstances that may lead the alien to seek to avoid those consequences, including the alien's decision to challenge the validity of a removal order through a motion to reconsider or judicial review.

D. Motions To Reopen or Reconsider a Final Order Filed During the Voluntary Departure Period

This rule responds to one of the principal policy arguments offered in support of tolling. In many cases, the alien had sought relief or protection from removal, which was denied, and the filing of a motion to reopen or reconsider is a means for aliens to continue to contest the merits of the denied claims or to address eligibility for newly discovered relief. Under this rule, aliens who file administrative motions to reopen or reconsider prior to the expiration of the time allowed for voluntary departure would no longer be subject to the penalties for failure to depart, because the grant of voluntary departure will be terminated upon the filing of the motion. However, they will then be subject to a removal order, as is the case for other aliens who had been found to be removable and ineligible for any form of relief or protection from removal.

As noted by the Supreme Court, ''[m]otions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.'' *INS* v. *Abudu,* 485 U.S. 94, 107–08 (1988). This is ''especially true in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'' *Doherty,* 502 U.S. at 323.

However, the Department recognizes that Congress has provided that aliens may file a motion to reopen or motion to reconsider after a final order of removal has been entered in his or her case. Some of these aliens may have just received an immediate relative visa petition, for example, and wish to file a motion to reopen their case to pursue relief through adjustment of status before any adverse consequences for failing to timely depart attach under 240B(d) of the Act.[4] Other aliens may believe an error was made in their case, and timely seek reconsideration of their decision.

Under this rule, if an alien decides to contest a final administrative order by filing a motion to reopen or reconsider after having received a grant of voluntary departure, the grant of voluntary departure will be automatically terminated. Such aliens will no longer have the privilege and responsibility of departing voluntarily and will become subject to a removal order, just like other aliens at the conclusion of the removal proceedings who are not granted any form of relief or protection from removal. This means, however, that they will be able to pursue the administrative motion without the risk of being subject to the statutory penalties for failing to depart voluntarily.

This proposal is intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue administrative motions without risking the imposition of the voluntary departure penalties, to promote uniformity, and also to bring the voluntary departure process back to its statutory premises. The proposed rule further recognizes that although an alien may request voluntary departure in good faith before an immigration judge, the alien's circumstances may change while an appeal is pending before the Board, and ensures that the alien is not subsequently penalized when such change in circumstances occurs.

The Department accordingly proposes to amend 8 CFR 1240.26 to provide for the automatic termination of a grant of voluntary departure upon the timely filing of a motion to reopen or reconsider, as long as the motion is filed prior to the expiration of the voluntary departure period. By seeking to challenge the final administrative order through a post-decision motion to reopen or reconsider, the alien will be manifesting that he or she is no longer willing to depart voluntarily within the specific number of days as previously allowed by the immigration judge or the Board. Put another way, the alien is no longer willing to abide by the initial quid pro quo on which voluntary

[4] The Department strongly encourages aliens who are in removal proceedings when the visa petition is approved to file a motion for remand during the pendency of the proceedings, and not wait until after a final order of removal has been entered.

departure was predicated. Cf. *Banda-Ortiz,* 445 F.3d at 389. This means that the filing of a motion to reopen or reconsider within the time allowed for voluntary departure would terminate the privilege and responsibility of voluntary departure, and the alien would become subject to the alternate order of removal issued by the immigration judge or the Board. The alien, however, would still be able to pursue the relief sought through the post-decision motion, and if the motion to reopen or reconsider is successful, then such an alien would not be subject to the penalties for failing to depart (including the 10-year bars on eligibility for adjustment of status or cancellation of removal). Assuming the alien is otherwise eligible for new relief sought through the filing of a motion to reopen, and merits a favorable exercise of discretion, the terminated grant of voluntary departure would not pose an impediment to reopening to pursue such relief. Moreover, even if the motion to reopen or reconsider is unsuccessful, he or she would remain subject to the removal order but would not be subject to the penalties under section 240B(d) of the Act for failure to depart. Of course, as with any other alien who is subject to a final order of removal, DHS is authorized to detain and remove the alien from the United States at any time pursuant to section 241 of the Act, unless the order of removal has been stayed.

In the Department's view, extending the period allowed for voluntary departure by the filing of a motion to reopen or reconsider serves to undermine the basic statutory purpose of the voluntary departure agreements, and is not consistent with the Act. See Chedad, 497 F.3d at 64 (''These provisions [relating to limits on voluntary departure] reflect a coherent effort to ensure that voluntary departure does, in fact, result in the alien's expeditious departure from the United States. Reading [the provision allowing for one motion to reopen within 90 days of a final administrative order] as stopping the voluntary departure clock would contravene this purpose, allowing the filing of motions to reopen to delay voluntary departure dates.''). This proposed rule provides that aliens who file a motion to reopen or reconsider within the period allowed for voluntary departure are thereby exempted from the penalties for failure to depart voluntarily under section 240B(d) of the Act. This approach avoids any perceived tension between the statutory provisions relating to motions to reopen or reconsider and the statutory penalties for failure to depart voluntarily. Since the grant of voluntary departure is terminated automatically upon the filing of a motion to reopen or reconsider during the voluntary departure period, there is no period of voluntary departure to toll during the pendency of the motion to reopen or reconsider.

E. Motions To Reopen or Reconsider Filed After the Period for Voluntary Departure Has Elapsed

The issues are very different, however, if the alien's motion to reopen or reconsider is not filed until after the period of voluntary departure has elapsed, at a time when—because of the alien's failure to depart voluntarily within the time allowed—the penalties under 8 U.S.C. 1229c(d), including the 10-year bar on certain forms of discretionary relief, have already taken effect. If the alien already has failed to comply with his undertaking voluntarily to depart from the United States by the time his motion is filed, he is now properly barred from relief under that section.

In general, where an alien does not file a motion to reopen until after the expiration of the voluntary departure period, the Board's grant of reopening does not have the effect of relieving the alien from the consequences of having failed to depart before the voluntary departure period expired. See *Singh* v. *Gonzales,* 468 F.3d 135, 139–40 (2d Cir. 2006); *Dacosta* v. *Gonzales,* 449 F.3d 45, 50–51 (1st Cir. 2006). But cf. *Orichitch* v. *Gonzales,* 421 F.3d 595 (7th Cir. 2005) (holding that the Board's grant of reopening had the effect of vacating the underlying voluntary departure order where a joint motion to reopen was executed but not filed prior to expiration of the voluntary departure period).

With respect to motions to reopen filed after the expiration of the voluntary departure period, to conclude that the granting of such a motion would vitiate or vacate the penalties that had already taken effect because of the alien's previous failure to depart voluntarily would effectively undermine the relevance of such penalties in this context. Aliens who are subject to a final order of removal cannot seek relief from removal from an immigration judge or the Board (such as adjustment of status or cancellation of removal) unless they are successful in reopening their final orders. Thus, prior to the granting of a motion to reopen, such aliens are unable to obtain such relief for reasons independent of the voluntary departure penalties. However, if the mere fact of granting a motion to reopen had the effect of vacating the voluntary departure penalties, after those penalties had already taken effect as a result of the alien's failure to depart during the period allowed for the voluntary departure, then the intended effect of those penalties in deterring aliens from overstaying the period of voluntary departure would clearly be diminished. Accordingly, this proposed rule would provide that 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 does not have the effect of vitiating or vacating those penalties, except as provided in section 240B(d)(2) of the Act.

The Board recently concluded that there is no equitable basis for creating an exception to the statutory penalties for aliens who voluntarily fail to depart during the period allowed for voluntary departure. *Matter of Zmijewska,* 24 I&N Dec. 87, 93 (BIA 2007) (''The congressional repeal of the 'exceptional circumstances' exception to the voluntary departure penalty soon after our decision in *Matter of Grijalva,* [21 I&N Dec. 472 (BIA 1996)], and its replacement with a 'voluntariness' test strongly suggest that Congress did not intend to allow the Board and the courts to create and apply a set of equitable exceptions that would amount to a substitute version of the repealed 'exceptional circumstances' exception.'').[5]

The Board also noted that the statutory penalties do not apply if the alien was unaware of the voluntary departure order or was physically unable to depart. See Matter of Zmijewska, 24 I&N Dec. at 94 (finding that the ''voluntariness'' exception is ''limited to situations in which an alien, through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart. It would not include situations in which departure within the period granted would involve exceptional hardships to the alien or close family members. Nor would lack of funds for departure be considered an involuntary failure to depart.''). However, the Board's decision raises broader questions with respect to ineffective assistance of counsel that are not addressed in this rule.

[5] *Matter of Zmijewska* does note that Congress has provided one specific exception to the imposition of the statutory penalties for failure to depart, with respect to the recently enacted exception in cases of extreme cruelty or battery. *Id.* The enactment of one specific exception for this limited category of cases is evidence of congressional intent not to contemplate exceptions in other circumstances.

V. Voluntary Departure and Filing Petitions for Review

Section 242 of the Act (8 U.S.C. 1252) gives aliens the opportunity, with certain exceptions, to seek circuit court review of a final order of removal by filing a petition for review within 30 days of the final administrative order.

In the experience of the Department, aliens who have been granted voluntary departure routinely file petitions for review pursuant to section 242 of the Act and seek a stay, with the result of delaying the voluntary departure obligation for many months or even years, while the petition for review is adjudicated in the courts of appeals. This rule also proposes new measures to avoid such open-ended extensions of the period of time authorized by Congress for aliens to depart voluntarily. Again, as noted above, this proposal reflects an exercise of the Attorney General's authority to implement the voluntary departure provisions, as well as to limit eligibility for voluntary departure for certain classes or categories of aliens, as provided in section 240B(e) of the Act.

A. Divergent Circuit Motions Practice Concerning the Impact on the Voluntary Departure Period of Filing a Petition for Review

Extensive litigation has resulted from the question of whether a court of appeals may stay the running of the voluntary departure period while a petition for review is pending. These decisions have resulted in a non-uniform, patchwork system of motions practice in the courts of appeals concerning the effect of filing a petition for review on the voluntary departure period. No court of appeals has held that the mere filing of a petition for review automatically stays or tolls the running of the voluntary departure period. But several circuits have found that not only do they have authority to stay voluntary departure periods provided by statute, but that an alien need not even make a specific request for such a stay, if they file a motion for a stay of removal. The Sixth, Eighth and Ninth Circuits now follow this course, construing a request for a stay of removal as a request for a stay of the voluntary departure period. See *Macotaj* v. *Gonzales,* 424 F.3d 464, 466 (6th Cir. 2005); *Rife* v. *Ashcroft,* 374 F.3d 606, 614–15 (8th Cir. 2004); *Desta* v. *Ashcroft,* 365 F.3d 741, 743 (9th Cir. 2004).

Other circuit courts have allowed for a stay of the voluntary departure period if it is explicitly requested within the time period. See *Vidal* v. *Gonzales,* 491 F.3d 250 (5th Cir. 2007); *Iouri,* 487 F.3d at 85; *Obale* v. *United States Att'y Gen.,* 453 F.3d 151, 156 (3d Cir. 2006); *Bocova,* 412 F.3d at 268; *Lopez-Chavez* v. *Ashcroft,* 383 F.3d 650 (7th Cir. 2004). The Seventh Circuit has required a petitioner to file a request to extend the voluntary departure period with the district director to meet the exhaustion requirement. See *Alimi* v. *Ashcroft,* 391 F.3d 888, 893 (7th Cir. 2004).

The Fourth Circuit has held that it does not have authority to toll the period. *Ngarurih,* 371 F.3d at 194. The Eleventh and Tenth Circuits have not directly addressed the tolling issue, but have held, as have all other circuits that have addressed this issue, that the courts of appeals do not have authority to reinstate or extend the voluntary departure period. See *Nkacoang* v. *INS,* 83 F.3d 353, 357 (11th Cir. 1996); *Castaneda* v. *INS,* 23 F.3d 1576, 1578 (10th Cir. 1994).

The circuit courts that held they have authority to stay the voluntary departure period have based their decision either on the equitable power of the courts of appeals to issue a stay or on the theory that 28 U.S.C. 2349 contains a statutory grant of authority. See, e.g., *Obale,* 453 F.3d at 155 n.1.

Over the last four fiscal years, in roughly 40% of the cases in which the alien was granted voluntary departure with an alternate order of removal, the aliens have filed petitions for review with the courts of appeals. Voluntary departure is intended as a benefit to both the alien and the government, operating as an agreement whereby both sides receive benefits. *Chedad,* supra. Like tolling during the pendency of a motion to reopen, suspending the voluntary departure period and the alien's obligation to depart, during the pendency of a petition for review, deprives the government of one of the principal considerations of the underlying voluntary departure agreement—a quick departure without the considerable expense of protracted litigation. Moreover, the delays attributable to the pendency of judicial review frequently result in extending the period allowed for voluntarily departure much longer than the delays attributable to the filing of administrative motions with the Board, in some cases allowing an additional two or three years before the alien is required to depart.

Where the court has stayed the period for voluntary departure, the alien is not required to depart the United States until the very end of the litigation process, after exhausting all opportunities for administrative or judicial relief. But *all* aliens who have been ordered removed and have exhausted all opportunities for overturning the final order are under a legal obligation to depart the United States. Aliens who benefit from automatic tolling or judicial stays and are permitted to remain in the United States until the conclusion of all litigation challenges are effectively allowed to render nugatory the statutory premise that aliens who seek and are granted voluntary departure are expected to depart promptly from the United States upon issuance of a final order, in exchange for the benefits of voluntary departure, which was granted to them at their own request and was based on their proof of their intention and ability to depart the United States within the time allowed.

Moreover, as a legal matter, petitions for judicial review differ from post-order administrative motions, in that an alien is not precluded from pursuing such a petition after the alien has departed from the United States. See, e.g., *Zazueta-Carrillo* v. *Ashcroft,* 322 F.3d 1166 (9th Cir. 2003) (''We now may entertain a petition after the alien has departed. See 8 U.S.C. 1252(b)(3)(B) (replacing 8 U.S.C. § 1105a(c)).''); *Mendez-Alcaraz* v. *Gonzales,* 464 F.3d 842, 844 n.8–13 (9th Cir. 2006). This contrasts with motions to reopen or reconsider, which generally cannot be filed after an alien's departure and are deemed to be withdrawn by the alien's departure, whether voluntary or not. Cf. 8 CFR 1003.2(d) and 1003.23(b)(1) (motions before the Board and immigration judges are deemed withdrawn upon an alien's departure from the United States).[6] Thus, an alien is able to depart from the United States after filing a petition for review without impairing his or her opportunity to obtain judicial review.[7] This means that aliens are able to pursue judicial review while at the same time also complying with the grant of voluntary departure (though it is evidently rare as a matter of fact for an alien to depart the United States within the period allowed for

[6] But see *William* v. *Gonzales,* 499 F.3d 329, 333 (4th Cir. 2007) (concluding that 8 U.S.C. 1229a(c)(7)(A) ''clearly and unambiguously grants an alien the right to file one motion to reopen, regardless of whether he is present in the United States when the motion is filed.''); *Li,* 473 F.3d at 982 (interpreting section 1003.2(d) not to bar the filing of a motion to reopen if the alien was the subject of a final order of removal at the time of departure).

[7] See *Mendez-Alcaraz,* 464 F.3d at 844 nn.8–13 (holding that IIRlRA's permanent rules, effective April 1, 1997, ''do not include the old jurisdiction-stripping provision for excluded, deported, or removed aliens'' under former 8 U.S.C. 1105a(c); that the court retains jurisdiction over a petition for review after an alien has departed; and that a petitioner's removal does not render a case moot).

voluntary departure after filing a petition for review).

B. The Proposed Rule

This rule would respond to one of the principal policy arguments offered in support of a stay during the pendency of judicial review. Under this rule, if an alien decides to contest a final administrative order by filing a petition for review before departing the United States, the grant of voluntary departure will be terminated automatically. Such aliens will no longer have the privilege or responsibility of departing voluntarily and will become subject to a removal order, just like every other alien at the conclusion of the removal proceedings who is not granted any form of relief or protection from removal. This means, however, that they will be able to pursue judicial review without the risk of being subject to the statutory penalties for failing to depart voluntarily.[8] Again, as with any other alien who is subject to a final order of removal, DHS is authorized to detain and remove the alien from the United States at any time pursuant to section 241 of the Act, unless the order of removal has been stayed, but the alien's removal would not impair the availability of judicial review.

Again, this proposal is intended to allow an opportunity for aliens who have been granted voluntary departure to be able to pursue judicial review without risking the imposition of the voluntary departure penalties, to promote uniformity, and also to bring the voluntary departure process back to its statutory premises. It further recognizes that although an alien may request voluntary departure in good faith before an immigration judge, the alien's circumstances may change by the time the case is decided by the Board, and ensures that the alien is not subsequently penalized when such change in circumstances occurs.

The Department proposes to amend 8 CFR 1240.26 to provide for the automatic termination of a grant of voluntary departure upon the filing of a petition for review. This rule is intended to result in a uniform application of the effect of the voluntary departure period in all the circuit courts of appeals. Under this rule, since the grant of voluntary departure would be terminated automatically if the alien elects to file a petition for review, there would no longer be any period of voluntary departure to be stayed or tolled during the pendency of the judicial review. This rule is consistent with the congressional intent, as expressed in the 1996 changes to the Act, that aliens may no longer remain in a period of voluntary departure for years, but instead are strictly limited to a discrete period of time for voluntary departure.

The termination of the grant of voluntary departure upon the filing of a petition for review (or an administrative motion to reopen or reconsider) does not have the effect, however, of altering the date on which the Board's decision became administratively final. Existing regulations provide that a decision by the Board dismissing an alien's appeal becomes administratively final upon issuance of the Board's decision, see 8 CFR 1003.1(d)(7), 1241.1, and that is the relevant date for purposes of section 242 of the Act (8 U.S.C. 1252). The termination of voluntary departure on account of the alien's actions means that the alternate order of removal that was entered at the time of the grant of voluntary departure pursuant to 8 CFR 1240.26(d) takes effect automatically. The date of the final order remains the date the Board issued its decision.

We also seek public comment on a related issue relating to inadmissibility under section 212(a)(9)(A) of the Act (8 U.S.C. 1182(a)(9)(A)). In general, an alien who has been ordered removed is inadmissible under that section if the alien seeks admission again within a specified period of five or ten years after the alien's departure or removal. An alien who leaves under a grant of voluntary departure has not been ''removed'' and so is not subject to these grounds of inadmissibility (though he or she may be subject to other grounds of inadmissibility). As noted above, this rule provides that the filing of a petition for review would terminate the grant of voluntary departure, with the result that any alien who files a petition for review, and does not prevail, thus may be subject to inadmissibility under section 212(a)(9)(A) of the Act. However, we note that the Act also allows an alien to maintain his or her petition for judicial review after departing from the United States, as discussed above. The Department's general experience is that the number of aliens who accept a grant of voluntary departure, file a petition for judicial review, and then actually depart the United States within the time specified for voluntary departure is very small indeed, but we recognize the possibility that at least some aliens might do so. Though we do not make a specific proposal here, we seek public comment on whether or not it might be advisable (and the possible means for accomplishing such a result) to consider adopting a rule that those aliens who do depart the United States during the period of time specified in the grant of voluntary departure, after filing a petition for review, would not be deemed to have departed under an order of removal for purposes of section 212(a)(9)(A) of the Act. Such a provision may provide an incentive for the alien to pursue his or her challenge to the validity of the removal order from abroad.

VI. Notice to the Alien Under the Proposed Rule

The provisions of this proposed rule will be applied prospectively only, that is, only with respect to immigration judge orders issued on or after the effective date of the final rule that grant a period of voluntary departure. The existing regulations and precedents will continue to apply to any order granting voluntary departure issued prior to the effective date of the final rule.

Currently, an immigration judge's decision advises the alien of the right to file an appeal with the Board within 30 days of the decision, and this rule makes no change in that respect since aliens accepting a grant of voluntary departure will still be able to appeal to the Board on the merits of the alien's claims of relief or protection from removal.

To ensure that aliens are aware of the consequences of filing a motion to reopen or reconsider prior to the expiration of voluntary departure, the rule amends 8 CFR 1240.11 to provide that the immigration judge will advise the alien of the consequences of accepting a grant of voluntary departure and the effect of any subsequent post-decision motion to reopen or reconsider. In particular, the alien will be advised that an order of voluntary departure shall be automatically terminated upon filing a motion to reopen or reconsider, as long as such a motion is filed before the voluntary departure period has expired.

Currently, aliens are advised in the notice of decision of the consequences of failing to depart under section 240B(d) of the Act (8 U.S.C. 1229c(d)) pursuant to an order of voluntary departure. See 8 CFR 1240.13(d). The additional notice proposed by this rule should help to avoid practical concerns that the alien was not fully aware of the consequences of filing a motion to reopen or reconsider during the voluntary departure period. By providing such notice to the alien at the time of the granting of voluntary

[8] The Board does not grant voluntary departure for a period of less than 30 days, which is the same period allowed for the filing of a petition for judicial review. Thus, we do not foresee any situation in which an alien would be filing a timely petition for review after overstaying the period allowed for voluntary departure.

departure at the conclusion of removal proceedings, the immigration judge can ensure that the alien understands the relevant principles applicable to the grant of voluntary departure. The proposed rule also provides that, if the alien appeals the immigration judge's decision to the Board, the Board's decision will provide notice to the alien with respect to the impact of filing a post-order administrative motion to reopen or reconsider.

In addition, this rule provides that the Board's decision will provide notice to the alien with respect to the impact of filing a petition for review. Since the immigration judge's order is appealable to the Board, an adverse immigration judge decision is not subject to a direct petition for review to the courts of appeals without a prior Board decision. See INA 242(d)(1) (8 U.S.C. 1252(d)(1)) (requiring exhaustion of all administrative remedies available to the alien as of right). Therefore, there is no reason to require the immigration judge to advise the alien of the consequences of filing a subsequent petition for review. However, once the Board has issued its final decision denying the alien's substantive claims and issuing a final order granting voluntary departure, this rule provides that the Board's final order will advise the alien that if the alien files a petition for review of the order before departing the United States, that will have the effect of terminating the grant of voluntary departure. At that point, the alien would be in the same legal position as other aliens who have been found to be removable and denied relief. The alien will no longer have the benefit and responsibility of voluntary departure, but the alien will be able to challenge the merits of the Board's decision before the court of appeals. If the court stays the execution of removal order, the alien would be able to remain while the petition for review is pending. If the alien does not prevail before the court, then, because the voluntary departure grant was terminated by filing the petition for review, he or she will not be subject to the penalties for failing to depart voluntarily.

VII. Other Issues Relating to Voluntary Departure

A. Voluntary Departure Bond

When the immigration judge grants voluntary departure at the conclusion of the removal proceedings, section 240B(b)(3) of the Act requires that the alien 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.'' The current regulation at 8 CFR 1240.26(c)(3) provides that the voluntary departure bond shall be no less than $500 and must be posted with the district director within 5 business days of the immigration judge's order.

DHS is responsible for administering the bond process. In view of the transfer of authority to DHS, and the establishment of different adjudicatory and enforcement offices, this rule makes conforming changes to include references to the Immigration and Customs Enforcement (ICE) Field Office Director rather than the former terminology of district director.

Because a voluntary departure bond must be posted promptly after the issuance of the immigration judge's order granting voluntary departure, the Department recognizes that some aliens may post a voluntary departure bond and then later have their grant of voluntary departure automatically terminated under this rule because the alien has subsequently filed a motion to reopen or a petition for review. In all cases, as provided in section 240B(b)(3) of the Act, the purpose of the voluntary departure bond is to ''ensure that the alien will depart, to be surrendered upon proof that the alien has departed the United States within the time specified.'' Accordingly, this rule includes new provisions addressing the alien's liability for the voluntary departure bond depending on whether or not the alien does depart the United States within the time allowed. The fact that the grant of voluntary departure is subsequently terminated on account of the alien's own actions to challenge the final administrative order does not undo the purpose for the posting of the bond. Under any circumstances, the purpose of the bond is to encourage the alien to depart promptly as promised.

Thus, in any case where the alien can show he or she is physically outside the United States within the time allowed, the alien's voluntary departure bond will not be forfeited, and the bond can be cancelled or cash can be reclaimed by the alien after his or her departure from the United States. Once an alien departs the United States, the alien may follow the rules set forth by DHS for the voluntary departure bond, which may include proof that the alien departed within the time allowed even though the grant of voluntary departure was terminated pursuant to these rules. An alien who posted a bond will not forfeit it upon the filing of a petition for review, if the alien can establish that within 30 days after the filing of the petition for review he or she is physically outside the United States.

However, the proposed rule specifies that the alien's failure to depart during the time allowed will result in forfeiture of the alien's bond posted pursuant to a grant of voluntary departure. The purpose of the bond was to ensure that the alien does depart during the time allowed, as the alien had promised to do at the time of the immigration judge's order granting voluntary departure, and the alien's decision not to depart within that period would preclude the alien from recouping the amount of the bond. This is currently the result if the alien simply remains in the United States in violation of the grant of voluntary departure. This rule would further provide that the same result would continue to apply if the alien files a post-order motion to challenge the final order or a petition for review.[9] However, we are seeking public comment on this aspect of the rule.

Finally, the rule provides an exception if the alien is ultimately successful in overturning, reopening, or remanding the final administrative order that had denied the alien's claims on the merits relating to the alien's removability or eligibility for relief. Since, as discussed above, a grant of voluntary departure at the conclusion of removal proceedings is only relevant if the alien has already been found to be removable and ineligible for relief, a subsequent decision overturning, reopening, or remanding the denial of the alien's claims on the merits means that the issue of voluntary departure is rendered moot with respect to the voluntary departure bond.

B. Failure To Post the Mandatory Voluntary Departure Bond

The existing regulations provide that, if the required voluntary departure bond is not posted within 5 business days, the grant of voluntary departure shall vacate automatically and the alternate order of removal will take effect on the following day. 8 CFR 1240.26(c)(3).

Recently, the Board addressed issues relating to the failure to post a voluntary departure bond in *Matter of Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). In that case, the alien was granted voluntary departure but failed to post the voluntary departure bond. The Board denied the alien's appeal and reinstated the period for voluntary departure. Then, after the time allowed

[9] This rule provides that the filing of a motion to reopen, motion to reconsider, or a petition for review (within the time allowed for voluntary departure) automatically terminates the grant of voluntary departure. The rule does not provide that the granting of voluntary departure is void ab initio; it merely means that the continuing obligation to depart within the time allowed is terminated.

for voluntary departure had already expired, the alien filed a motion to reopen in order to submit additional evidence in support of his unsuccessful application for cancellation of removal. Initially, the Board denied the motion because the alien's failure to depart meant that the alien had become subject to the statutory 10-year bar on eligibility for cancellation of removal.

In its precedent decision in *Diaz-Ruacho*, the Board held that, because the alien failed to post the voluntary departure bond as required, the order granting voluntary departure never took effect. In its decision, the Board concluded that posting of the bond is a condition precedent, and therefore the consequences and benefits of voluntary departure did not attach until the bond was posted. The Board found additional support for this conclusion in the language of the immigration judge's order and in the regulation, which provided that the order granting voluntary departure ''shall vacate automatically'' upon the failure to timely post bond. See 8 CFR 1240.26(c)(3). This meant that the alien was not subject to penalties under section 240B(d) of the Act for failure voluntarily to depart, and thus he is still eligible for cancellation of removal.

Though it may be a permissible reading of the language of the current regulations, this result is not consistent with the statutory purpose and is not a sound policy approach because the alien's own default in failing to post a voluntary departure bond, as the alien was just ordered to do in connection with the order granting voluntary departure, should not be the trigger that exempts the alien from the penalties for failure to depart. The purpose of the bond requirement, as stated in the statute, is to ''ensure that the alien departs within the time specified,'' and the bond requirement should not be interpreted to stand this statutory purpose on its head by providing a ready means for aliens to exempt themselves from the penalties for failure to depart. Moreover, using the failure to post a bond as the trigger that vitiates the grant of voluntary departure does not make practical sense because it is not an open, discrete, affirmative step and there is no ready process for highlighting the absence of a bond. In particular, there is no reason to believe that the government counsel or the immigration judge would be made aware at the time in many or most cases that a default had even occurred and that the grant of voluntary departure had been vacated. In many such cases, the Board may be unaware at the time of a final order reinstating the period of voluntary departure that the alien's voluntary departure grant had already been terminated by default even before the alien filed the appeal with the Board. Under the approach of *Diaz-Ruacho*, it is entirely likely in many cases that an alien may depart from the United States within the time allowed even though the grant of voluntary departure had already been vacated because of the alien's failure to post a bond. Later, when it is determined that the alien had failed to post the bond at the time as required, then there would be an issue whether such aliens may end up being subject to the 10-year bar on admissibility under section 212(a)(9)(A)(ii) of the Act because they actually departed under the alternate order of removal rather than a grant of voluntary departure.

The Attorney General has decided to amend the language regarding failure to post bond to make clear that the failure to post a voluntary departure bond does not exempt the aliens from the obligation to depart nor does it exempt them from the penalties for failure to depart voluntarily. An alien who is granted voluntary departure remains liable for the amount of the bond if he or she voluntarily fails to depart during the period of time allowed—whether or not the alien files a motion to reopen or reconsider or a petition for judicial review, or simply remains in the United States in violation of the grant of voluntary departure, except as noted above.

It is important, however, to have other provisions in place to ensure that the voluntary departure bond, when required, is posted within the period of 5 business days. Since the purpose of the voluntary departure bond is to ensure that the alien does depart from the United States, as promised, this proposed rule provides that the failure to post the bond, when required, within 5 business days is a violation of the requirement of section 240B(b)(3) of the Act and may be considered (i) in evaluating whether the alien should be detained based on risk of flight, and (ii) as a negative discretionary factor with respect to any discretionary form of relief.

In addition, we seek public comment on whether the rule should also provide additional sanctions for aliens who fail to post the required voluntary departure bond by the fifth business day. One such possibility may be to provide that an alien who posts a required voluntary departure bond after the fifth business day will not be able to get a full refund of the bond amount—e.g., a 20% reduction of the amount to be returned to the alien on account of a late posting of a required voluntary departure bond.

Finally, this proposal also amends 8 CFR 1241.1(f) with respect to an alien who waives appeal at the conclusion of the immigration judge proceedings, but fails to post the required voluntary departure bond within five business days, as he or she had agreed to do in connection with the grant of voluntary departure. The waiver of appeal by both parties means that the immigration judge's order is an administratively final order. If an alien who has waived appeal fails to post the required voluntary departure bond within the time allowed, the alternate order of removal will then take effect after the failure to timely post bond. This proposal ensures that aliens who waive appeal before the immigration judge still have an incentive to post bond as they agreed to do, since the alien's failure to do so would result in a final order after the fifth business day, and it preserves DHS's authority to detain an alien who fails to timely post bond, as he or she is then under a final order of removal. However, if the alien thereafter does depart within the voluntary departure period, the alien will not be subject to the penalties under 240B(d) of the Act (8 U.S.C. 1229a(c)(4)(B)) or inadmissibility under 212(a)(9)(A) of the Act.

C. Providing Notice to the Board That the Voluntary Departure Bond Has Been Posted

As noted above, an alien whose request for voluntary departure is granted by an immigration judge at the conclusion of removal proceedings is required to post a voluntary departure bond within five business days in an amount necessary to ensure that the alien does depart the United States within the time allowed. The bond is posted at a DHS office, so under current practice neither the immigration judge nor the Board is aware of whether an alien has complied with the obligation to post a bond as he or she had promised to do at the time of the grant of voluntary departure.

This proposed rule would require that aliens who have been granted voluntary departure submit proof of having posted the required voluntary departure bond in connection with the filing of an appeal with the Board. Since the alien is obligated to post a bond within five business days of the immigration judge's order, but the appeal to the Board is due within 30 days of the immigration judge's order, the alien will have ample time available to obtain proof of the posting of the bond.

As in other respects, the burden of proof is on an alien to establish eligibility for a discretionary form of relief from removal, see section 240(c)(4)(B) of the Act; 8 CFR 1240.8(d), so it is reasonable to provide that aliens who are granted voluntary departure are expected to provide proof of compliance with one of the key obligations under the grant of voluntary departure. If the alien does not provide timely proof to the Board that the required voluntary departure bond has been posted, the Board will not include a grant of voluntary departure in its final order.[10]

D. Amount of the Monetary Penalty for Failure To Depart Voluntarily

Section 240B(d)(1) of the Act provides that, in addition to being barred from eligibility for certain discretionary forms of relief for a period of 10 years, an alien who fails to depart voluntarily as required ''shall be subject to a civil penalty of not less than $1,000 and not more than $5,000.'' However, there is no process for the immigration judge to set the specific amount of the penalty, and the DHS regulations also do not provide a means to calculate the specific amount of the penalty. Thus, though the grants of voluntary departure issued by immigration judges and the Board routinely include warnings about the imposition of a civil penalty for failure to depart voluntarily, as a practical matter there appears to have been very little means actually to impose and collect such civil penalties on aliens who overstay their period of voluntary departure.

In order to give effect to the statutory provision providing for a civil penalty, and to simplify the administrative process and provide clear advance notice to the aliens who are seeking voluntary departure, the proposed rule would set a presumptive amount of $3,000 as the civil penalty for failure to depart. This amount—which is identical to provisions in the immigration bills passed by the House and Senate in the 109th Congress (S. 2611 and H.R. 4437)—would be applicable in every case in the future unless the immigration judge specifically set a higher figure at the time of granting voluntary departure.

The collection of the civil penalty is within the enforcement responsibility of DHS, and not the immigration judge or the Board. However, in any case where an alien is later seeking discretionary relief, the immigration judge or the Board may properly take account of evidence that the alien has failed to pay the required civil penalty, as a relevant discretionary factor.

[10] As noted in the previous section of this supplementary information, however, an alien's failure to post a voluntary departure bond does not exempt the alien from liability for the amount of the bond. An alien who fails to post the required bond but appeals the immigration judge's decision will not be granted voluntary departure by the Board, but such an alien does remain liable for the amount of the voluntary departure bond that he or she had expressly agreed to post.

VIII. Regulatory Requirements

A. Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects individual aliens and does not affect small entities, as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and also will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 (Regulatory Planning and Review)

The Attorney General has determined that this rule is a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, accordingly, this rule has been submitted to the Office of Management and Budget for review.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

List of Subjects

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons stated in the preamble, chapter V of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

1. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1229(c)(e), 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100, (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

2. Section 1240.11 is amended by adding a new sentence at the end of paragraph (b) to read as follows:

§ 1240.11 Ancillary matters, applications.

* * * * *

(b) * * * The immigration judge shall advise the alien of the consequences of filing a post-decision motion to reopen or reconsider prior to the expiration of the time specified by the immigration judge for the alien to depart voluntarily.

* * * * *

3. Section 1240.26 is amended by:

a. Adding new paragraphs (b)(3)(iii) and (b)(3)(iv);

b. Revising paragraph (c)(3);

c. Adding new paragraphs (e)(1) and (e)(2);

d. Adding a new sentence at the end of paragraph (f); and by

e. Adding new paragraphs (i) and (j), to read as follows:

§ 1240.26 Voluntary departure—authority of the Executive Office for Immigration Review.

* * * * *

(b) * * *

(3) * * *

(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. 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) * * *

(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 applicable conditions, including the provisions of this paragraph (c)(3). 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. 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), provided that if the alien does depart the United States during the period allowed for voluntary departure, he or she shall not be subject to the penalties at INA 240B(d)(1) or to inadmissibility under section 212(a)(9)(A) of the Act.

(ii) An alien who has been granted voluntary departure shall, in connection with the filing of an appeal with the Board, submit timely 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 include a grant of voluntary departure in its final order.

(iii) 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. 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.

(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, and if proof of the alien's departure is timely furnished to the ICE Field Office Director, the bond may be canceled. The bond also may be cancelled if, after filing a petition for review, the alien can establish that within 30 days after such filing he or she is physically outside the United States. In order for the bond to be cancelled, the alien must provide proof of departure by such methods as the ICE Field Office Director may prescribe.

(vi) Because the purpose of the voluntary departure bond is to ensure that the alien departs the United States within the time allowed, the automatic termination of a grant of voluntary departure, on account of a post-order motion to reopen or reconsider or a petition for review filed by the alien, does not result in the cancellation of the voluntary departure bond if the alien fails to depart within the time allowed. However, 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, reopening, or remanding the final administrative order.

* * * * *

(e) * * *

(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.

(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) * * * The filing of a motion to reopen or reconsider or a petition for review 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.

* * * * *

(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) shall immediately take effect. The Board shall advise the alien of the condition provided in this paragraph in writing as part of an order reinstating 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) *Penalty for failure to depart.* 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 amount at the time of granting voluntary departure. The immigration judge shall advise the alien of the amount of this civil penalty at the time of granting voluntary departure.

* * * * *

PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

4. The authority citation for part 1241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

5. Section 1241.1 is amended by revising paragraph (f), to read as follows:

§ 1241.1 Final order of removal.

* * * * *

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except as provided in the following sentence, or upon the failure to post a required voluntary departure bond if the respondent has waived appeal. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

Dated: November 27, 2007.

Michael B. Mukasey,

Attorney General.

[FR Doc. E7–23289 Filed 11–29–07; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0258; Directorate Identifier 2007–CE–090–AD]

RIN 2120–AA64

Airworthiness Directives; Air Tractor, Inc. Models AT–400, AT–500, AT–600, and AT–800 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2007–13–17, which applies to all Air Tractor, Inc. (Air Tractor) Models AT–602, AT–802, and AT–802A airplanes. AD 2007–13–17 currently requires you to repetitively inspect the engine mount for any cracks, repair or replace any cracked engine mount, and report any cracks found to the FAA. Since we issued AD 2007–13–17, Air Tractor has learned of a Model AT–502B with a crack located where the lower engine mount tube is welded to the engine mount ring. In addition, Snow Engineering Co. has developed gussets that, when installed according to their service letter, terminate the repetitive inspection requirement. Consequently, this proposed AD would retain the inspection actions of AD 2007–13–17 for Model AT–602, AT–802, and AT–802A airplanes, including the compliance times and effective dates; establish new inspection actions for the AT–400 and AT–500 series airplanes; incorporate a mandatory terminating action for all airplanes; and terminate the reporting requirement of AD 2007–13–17. We are proposing this AD to detect and correct cracks in the engine mount, which could result in failure of the engine mount. Such failure could lead to separation of the engine from the airplane.

DATES: We must receive comments on this proposed AD by January 29, 2008.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Air Tractor Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; fax: (940) 564–5612.

FOR FURTHER INFORMATION CONTACT: Andy McAnaul, Aerospace Engineer, ASW–150, FAA San Antonio MIDO–43, 10100 Reunion Pl, San Antonio, Texas 78216; phone: (210) 308–3365; fax: (210) 308–3370.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2007–0258; Directorate Identifier 2007–CE–090–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive concerning this proposed AD.

Discussion

Two reports of Model AT–802A airplanes with cracked engine mounts (at 2,815 hours time-in-service (TIS) and 1,900 hours TIS) caused us to issue AD 2007–13–17, Amendment 39–15121 (72 FR 36863, July 6, 2007). AD 2007–13–17 currently requires the following on all Air Tractor Models AT–602, AT–802, and AT–802A airplanes:

- Inspect (initially and repetitively) the engine mount for any cracks;
- Repair or replace any cracked engine mount; and
- Report any cracks found to the FAA.