AMERICAN IMMIGRATION LAW FOUNDATION

PRACTICE ADVISORY[1]
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STAYING THE VOLUNTARY DEPARTURE PERIOD WHEN FILING A MOTION TO REOPEN OR RECONSIDER

By AILF's Legal Action Center

Under *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996) *aff'd*, *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998), immigration judges (IJs) and the Board of Immigration Appeals (BIA or Board) generally have dismissed any motion to reopen for relief, for example, adjustment of status, if the voluntary departure period has run out while the motion was pending.[2] However, three Circuit Courts of Appeals in five precedent decisions recently have rejected *Shaar*. These decisions are: *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Barroso v. Gonzales*, 2005 U.S. App. LEXIS 24845 (9th Cir. Nov. 18, 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Barrios v. Attorney General*, 399 F.3d 272 (3d Cir. 2005); and *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); discussed in detail below.[3]

This advisory is a follow-up to AILF's July 2003 advisory entitled *Failure to Depart After a Grant of Voluntary Departure: The Consequences and Arguments to Avoid Them* (http://www.ailf.org/lac/lac_pa_072203.asp). The information in this advisory is accurate as of the date of this advisory, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

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[2] Throughout this advisory, "motion to reopen" refers to motions to apply for relief under INA § 240(c)(6) and does not refer to motions to reopen in *in absentia* cases or where there has been a changed circumstance affecting eligibility for asylum or withholding of removal. Motions to reconsider raise an error of fact or law committed by the IJ or BIA. 8 C.F.R. § 1003.23(b)(2).

[3] The separate issue of filing a motion to stay the voluntary departure period with the court of appeals while a petition for review is pending is addressed in AILF's Practice Advisory entitled *Protecting the Voluntary Departure Period During Court of Appeals Review* (http://www.ailf.org/lac/lac_pa_102505.pdf).

Background: Consequences of Failure to Depart and *Matter of Shaar*

Any person granted voluntary departure under the pre-IIRIRA law, INA § 244(e) (1995),[4] and "who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances" is ineligible for suspension of deportation, adjustment of status, change of status, registry, and voluntary departure *for five years*. Any person granted voluntary departure under the post-IIRIRA law, INA § 240B(d) (2005), and who does not depart on time is ineligible from these forms of relief *for ten years* and also is subject to a monetary fine. *See* INA § 240B(d). The post-IIRIRA voluntary departure statute does not contain the "exceptional circumstances" exception for failure to depart.[5] Moreover, once a person fails to voluntarily depart, the voluntary departure order becomes a removal order, and any subsequent departure is considered a self-removal. 8 C.F.R. § 1240.26(d); 8 C.F.R. § 241.7; 8 C.F.R. § 1241.7.

In *Matter of Shaar*, there were two primary holdings. The BIA held 1) that filing a motion to reopen proceedings does not constitute "exceptional circumstances" that would excuse the failure to depart, and 2) that filing a motion to reopen does not toll the voluntary departure period. *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996). The Ninth Circuit upheld the BIA's decision in *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998). *See Stewart v. INS*, 181 F.3d 587, 596 (4th Cir. 1999) (following *Shaar v. INS*); *see also Rojas-Reynoso v. INS*, 235 F.3d 26, 30 n.3 (1st Cir. 2000) (approving of *Shaar v. INS* in dictum). Therefore, under the BIA's interpretation, unless a motion to reopen is granted prior to the voluntary departure date, those who do not depart risk being subject to the penalties. Frequently, the BIA dismisses a motion because the person – having overstayed the voluntary departure – is no longer eligible for relief.

This means that a person who is granted voluntary departure may end up in a worse position than someone who is ordered removed. For example, if a person is granted voluntary departure and fails to depart voluntarily, but later becomes eligible to adjust his or her status, the person probably will be found ineligible for relief for ten years.[6]

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[4] Former INA § 244(e) applies to any person who was placed in deportation proceedings, that is proceedings initiated prior to April 1, 1997, or who was granted voluntary departure by INS before this date. *See* § 309 of IIRIRA.

[5] The Second Circuit, however, recently remanded a case to the BIA for consideration of whether the courts have equitable discretion to grant exceptions to the ten year bar. *See Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005).

[6] Arguably, if a person failed to post the voluntary departure bond pursuant to INA § 240B(b)(3), the voluntary departure order never went into effect. The posting of the bond is a condition precedent to receiving voluntary departure. 8 C.F.R. § 1240.26(c)(3). When that condition is not met, a removal order goes into effect the next day. *Id.* Therefore, the voluntary departure order is deemed to never have taken effect and therefore, INA § 240B(d) does not apply. *See Matter of Soto*, A72-516-255, Los Angeles (Pauley, concurring) *available at* http://www.lexisnexis.com/practiceareas/immigration/pdfs/web836.pdf (Since bond

However, if this same person had been ordered removed rather than granted voluntary departure, he or she would not be statutorily barred from adjustment and could file a motion to reopen his or her removal proceedings.[7]

Distinguishing *Shaar* in Post-IIRIRA Cases

Azarte v. Ashcroft – Ninth Circuit

Shaar, however, was a pre-IIRIRA case. As the Ninth Circuit recently noted in *Azarte*, major statutory changes to the motion to reopen and voluntary departure provisions forced the court to reexamine previous holdings. Specifically, the court pointed to three distinctions between the pre- and post-IIRIRA law regarding motions to reopen and voluntary departure:

> (1) prior to IIRIRA, there was no statutory authority for motions to reopen; authority derived from regulation;
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> (2) the pre-IIRIRA voluntary departure statute did not set any limits for the amount of time during which a person would be permitted to depart, whereas the current statute sets a 60 day limit in all cases where voluntary departure is granted at the end of removal proceedings and 120 days if voluntary departure is granted at the beginning of removal proceedings; and
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> (3) generally, prior to IIRIRA, voluntary departure periods were initially granted for generous amounts of time, and extensions were permitted,

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posting condition was not met, the voluntary departure order never went into effect); *Hegyi v. Gonzales*, 136 Fed. Appx. 777 (6th Cir. 2005) (unpublished) (Remanded to BIA based on a "strong argument" that Heygi did not overstay her voluntary departure period at all because one did not exist); *Hernandez-Rodriguez v. Gonzales*, 118 Fed. Appx. 115 (9th Cir. 2005) (unpublished) (Remanded to BIA based on a "strong argument" that Hernandez did not overstay the voluntary departure period at all since one did not exist); *but see Romero-Gamez v. Gonzales*, 104 Fed. Appx. 118 (9th Cir. 2005) (unpublished) (Failure to post bond automatically vacated their voluntary departure order, but the ten-year bar to relief still applies); *Beshay v. Gonzales*, 76 Fed. Appx. 420 (3d Cir. 2005) (unpublished) (240B(d) still applies when no bond is posted).

[7] Motions to reopen generally must be filed within 90 days of the final order of removal unless the government agrees to join in the motion or unless circuit law allows for equitable tolling in appropriate circumstances. INA § 240(b)(6)(C)(i); 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b). INS set forth guidelines for when it will join in a motion to reopen removal proceedings in order to apply for adjustment of status. *See* Memo, Cooper, G.C. HQCOU 90/16.22.1, *Motions to Reopen for Adjustment of Status* (May 17, 2001) (Posted on AILA InfoNet at Doc. No. 01070333 (July 3, 2001)). Motions to reconsider must be filed within 30 days of the final order of removal. INA § 240(c)(5)(B).

> but under the current statute strict limitations prevent grants beyond 60 or 120 days, including any extensions.

Thus, the current voluntary departure provision (INA § 240B), which permits a person to depart voluntarily for up to 60 days at the end of proceedings and bars relief if a person fails to depart, and the motion to reopen provision (INA § 240(c)(6)), which permits a person to file a motion to reopen within 90 days of the final decision, contain conflicting terms. Under the BIA's interpretation, if a person does depart the United States in compliance with the voluntary departure order, or files a motion from outside of the United States, the Board deems any pending motion to reopen invalid. *See* 8 C.F.R. § 1003.2(d), 8 C.F.R. § 1003.23(b)(1). However, if a recipient of voluntary departure does not depart the United States prior to expiration of the voluntary departure period, the BIA considers him or her ineligible for the very relief they are seeking in the motion, and the BIA will deny the motion solely on this basis without adjudicating the motion on the merits.

Therefore, the *Azarte* court found that "[b]ecause Congress now authorizes an alien to file a motion to reopen within 90 days and has sharply reduced the time period for voluntary departure and because the two statutory provisions currently contain potentially conflicting terms, *Shaar* does not control our decision here." *Azarte*, 394 F.3d at 1286.

The court went on to interpret the new IIRIRA provisions in the first instance. Citing traditional canons of statutory construction, the court noted that it must look at the statute as a whole and give meaning to all its provisions and that it should avoid interpretations that produce absurd results. The court found that the BIA's interpretation deprives the motion to reopen provision of meaning by eliminating the availability of motions to people granted voluntary departure. The court further found that it produces absurd results: "We find the notion nonsensical that Congress would have allowed aliens subject to voluntary departure to file motions to reopen but would have simultaneously precluded the BIA from issuing decisions on those motions." *Id*. at 1289. As a result, the court held that in cases in which a motion to reopen is filed within the voluntary departure period and a stay of removal or stay of voluntary departure is requested, the voluntary departure period is tolled during the pendency of the motion.

Barroso v. Gonzales – Ninth Circuit

In *Barroso*, the Ninth Circuit took "the next step which *Azarte*'s rationale demands" and held "that the filing of the motion to reopen or reconsider automatically tolls the voluntary departure period." *Barroso v. Gonzales*, 2005 U.S. App. LEXIS 24845, *28-9 (9th Cir., Nov. 18, 2005). The court expanded *Azarte's* holding in two ways: 1) by applying tolling of the voluntary departure period to the timely filing of a motion to reconsider and 2) by making the tolling automatic on the filing of a motion to reopen or reconsider.

First, the court noted that the statutory right to file a motion to reconsider within thirty days of the entry of an order of removal under INA § 240(c)(6)(B) conflicts with the bar to relief for overstaying a voluntary departure order under INA § 240B(d). The court observed that "the BIA ordinarily takes a significant period of time to decide the motion." *Id.* at *15. If a motion is pending longer than the voluntary departure period, compliance with the voluntary departure order results in abandonment of the pending motion under 8 C.F.R. § 1003.2(d). *Id*. Just as in *Azarte*, the court held that the BIA's denial of such a motion under INA Section 240B(d) "serves to deprive aliens who are afforded voluntary departure of their statutory right to a determination on the merits of motions to reconsider. *Id.* at *16.

Second, the *Barroso* court on its own raised and rejected the argument that the regulations require the filing of a motion to stay or toll the voluntary departure period. *Id*. at *33. In reaching this conclusion, the court found that 8 C.F.R. § 1003.2(f), the regulation which says that filing a motion to reopen does not stay the execution of the decision, does not apply to voluntary departure. *Id*. at *35. In addition, IIRIRA and the regulations contain no requirement that a person must file an affirmative request to stay voluntary departure. *Id*. at *31. Finally, the court also found that tolling the voluntary departure period while the BIA considers the merits of a motion to reopen or reconsider does not violate the statute or intrude on the district director's power to extend voluntary departure under 8 C.F.R. § 1240.26(f). *Id*. at *32.

Sidikhouya v. Gonzales – Eighth Circuit

The Eighth Circuit Court of Appeals adopted the *Azarte* court's reasoning in *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005). The Eighth Circuit found that the BIA erred when it denied a timely filed motion to reopen because the voluntary departure period had expired. Citing *Azarte*, the court noted that the BIA seldom resolves motions to reopen within the voluntary departure period, and as a result, all persons who elect to depart voluntarily are "functionally deprived of their statutory right to file a motion to reopen." *Id*. at 952.

The concurring/dissenting opinion pointed out that Sidikhouya filed a motion to stay the voluntary departure period along with his motion to reopen; however, the majority opinion did not make this fact a condition of its decision.

Kanivets v. Gonzales – Third Circuit

In *Kanivets*, the Third Circuit, like the Eighth Circuit, cited the reasoning in *Azarte* and rejected *Matter of Shaar*. *Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005). The court held that in post-IIRIRA cases, the voluntary departure period is tolled when a timely filed motion to reopen is pending before the BIA. The court cited the reasoning in *Azarte* that it is absurd to believe that Congress would provide 90 days to file a motion to reopen, yet bar many people from exercising the statutory right as a consequence of the

voluntary departure order leaving them in a "Catch-22." Although Kanivets had filed a motion for a stay of removal and reinstatement of his voluntary departure order, the court did not mention the motion as a factor in its decision.

Rejecting *Matter of Shaar's* Interpretation of "Exceptional Circumstances" Under Pre-IIRIRA Statutory Language

The Third Circuit Court of Appeals held that motions to reopen that have not been intentionally delayed and that are filed within the voluntary departure period, but not adjudicated by the immigration court or BIA prior to the expiration of the voluntary departure period, fall within the "exceptional circumstances" exception for failing to depart under former INA § 242B(e)(2) (1995). *Barrios v. Attorney General*, 399 F.3d 272 (3d. Cir. 2005). In doing so, *Barrios* rejected *Matter of Shaar*'s narrow reading of "exceptional circumstances." The court found that the "loss of a legitimate claim for relief from deportation, based solely on the INS's failure to act within the period in question, is . . . sufficiently compelling to invoke the exception provided in [former] section 1252b(e)(2)(A)." *Id*. at 277.

The court also found that *Matter of Shaar* did not persuasively explain why the date of adjudication is more important than the date the motion is filed. The court found instead that the date the motion to reopen is filed is more significant because it is consistent with Congress's intent to have persons pursue "valid claims to reopen their deportation proceedings." *Id*. *Barrios* also discounted *Matter of Shaar*'s distinction between the right to pursue a meritorious appeal and the right to pursue a motion to reopen. *Barrios*, citing the dissent in *Shaar*, reasoned that "such disparate treatment lack sufficient justification, especially in light of the shared 'critical similarity—Congress has authorized both.'" *Id*. Finally, the Third Circuit found that the Ninth Circuit's decision in *Azarte* lent additional support to the court's reasoning.

Filing A Motion to Reopen Within the Voluntary Departure Period

For respondents in removal proceedings filing motions to reopen or reconsider with the IJ or BIA within the Third, Eighth or Ninth Circuit, *Shaar* does not govern. The BIA should not dismiss the motion on the basis of *Shaar*.

In cases arising within other circuits, if the BIA dismisses the motion under *Matter of Shaar*, the respondent should be able to file a petition for review in the court of appeals to challenge the BIA's statutory interpretation. The respondent may argue that *Matter of Shaar* does not govern in removal proceedings (i.e., post-IIRIRA cases). The reasoning in the *Azarte* line of cases is helpful in explaining why *Shaar* does not control. It is unknown when the BIA will address its decision in *Shaar* in light of the five decisions in three circuit courts that reject *Shaar*. The BIA continues to apply *Shaar* to post-IIRIRA cases regularly without addressing the rationale of these recent circuit court decisions in a precedent decision.

Filing a Motion to Stay the Voluntary Departure Period

In the Ninth Circuit, the filing of a motion to reopen or reconsider with the IJ or BIA automatically tolls the voluntary departure period. The Eighth and Third Circuits did not base their decision to toll the voluntary departure period on the motion for a stay, even though motions were filed. Therefore, arguably, a motion to stay the voluntary departure period is not required to toll the voluntary departure period when filing a motion to reopen or reconsider in those circuits. Nevertheless, respondents whose immigration proceedings occurred outside of the Ninth Circuit may also want to file a motion for stay of removal and stay of voluntary departure period along with the motion to reopen or reconsider until the circuit where the motion is filed explicitly addresses whether automatic tolling applies.

Filing a motion to stay the voluntary departure period with the court of appeals while a petition for review is pending is addressed in AILF's Practice Advisory entitled *Protecting the Voluntary Departure Period During Court of Appeals Review* (http://www.ailf.org/lac/lac_pa_102505.pdf).

A Remedy for Respondents In *Deportation* (as Contrasted with Removal) Proceedings

In the Third Circuit, *Matter of Shaar* is no longer good law and *Barrios* governs. That means that the immigration courts and the BIA must adjudicate timely motions to reopen that have not been intentionally delayed and that are filed within the voluntary departure period.

Matter of Shaar continues to govern deportation (as contrasted with removal) proceedings held in immigration courts outside of the Third Circuit. Respondents in proceedings in circuits that have not upheld or addressed *Matter of Shaar* may challenge the BIA's decision, just as the petitioner did in *Barrios.* However, nothing in *Matter of Shaar* precludes a person from moving for a stay of deportation and stay of voluntary

departure[8] or seeking an extension from the DHS – which is authorized under 8 C.F.R. § 1240.57.

Expiration of the Voluntary Departure Period Before the Motion to Reopen Is Filed

Before deciding *Azarte*, the Ninth Circuit upheld the denial of motion to reopen based on § 240B(d) when the motion was filed after voluntary departure period expired. *See De Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004). However, the court failed to analyze the statutory conflict between § 240B(d) and § 240(c)(6). AILF believes that the reasoning in the *Azarte* line of cases may aid people who filed the motion to reopen within the 90 day statutory motion to reopen period, but after the shorter voluntary departure period, for example, 30 or 60 days, has expired. Furthermore, there may be arguments that the consequences of failing to depart do not apply in a particular case. AILF's July 2003 advisory entitled, *Failure to Depart After a Grant of Voluntary Departure: The Consequences and Arguments to Avoid Them* (http://www.ailf.org/lac/lac_pa_072203.asp) sets forth some of the potential arguments. If you have pending litigation or questions relating to this practice advisory contact Matt Downer at mdowner@ailf.org.

[8] Not surprisingly, the BIA did not mention stays of the voluntary departure period in *Matter of Shaar*. There was no need for them to address this given that under pre-IIRIRA law, the district director had authority to grant extensions or reinstate the voluntary departure period. 8 C.F.R. § 1240.57.