



## AMERICAN IMMIGRATION LAW FOUNDATION

---

PRACTICE ADVISORY<sup>1</sup>

*Amended June 17, 2005*

### STAYING THE VOLUNTARY DEPARTURE PERIOD WHEN FILING A MOTION TO REOPEN

By Beth Werlin<sup>2</sup>

Three Circuit Courts of Appeals recently have decided cases involving the interplay between voluntary departure and motions to reopen. These cases have reviewed both the applicability and validity of the Board of Immigration Appeals' pre-IIRIRA decision *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996) *aff'd*, *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998). Under *Matter of Shaar*, the immigration courts and the Board of Immigration Appeals (BIA or Board) generally dismissed any motion to reopen for relief if the voluntary departure period had run out while the motion was pending.

In *Azarte v. Ashcroft*, the Ninth Circuit held that *Matter of Shaar* does not govern post-IIRIRA cases. *See Azarte*, 394 F.3d 1278 (9th Cir. 2005). Furthermore, 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. The Eighth Circuit Court of Appeals upheld the Ninth Circuit's reasoning, *Sidikhouya v. Gonzalez*, 407 F.3d 950 (8th Cir. 2005), as did the Third Circuit, in dicta, *Barrios v. Attorney General*, 399 F.3d 272 (3d Cir. 2005). In light of these three decisions, respondents in removal and deportation proceedings in all circuits may request for stay of removal and voluntary departure when they submit their motion to reopen within the voluntary departure period.<sup>3</sup>

---

<sup>1</sup> Copyright (c) 2005, American Immigration Law Foundation. *See* [www.aifl.org/copyright](http://www.aifl.org/copyright) for information on reprinting this practice advisory.

<sup>2</sup> AILF thanks Emily Creighton, AILF intern and law student at American University, for her contributions to this advisory.

<sup>3</sup> 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 absentia cases or where there has been a changed circumstance affecting eligibility for asylum or withholding of removal.

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](http://www.ailf.org/lac/lac_pa_072203.asp)). The information in this advisory is accurate and authoritative, but does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. Additionally, the cases included here are cited as examples only and do not represent an exhaustive search of the case law in all federal circuits.

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

Any person granted voluntary departure under the pre-IIRIRA law, INA § 244(e) (1995),<sup>4</sup> 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 242B(e)(2). The post-IIRIRA voluntary departure statute does not contain the “exceptional circumstances” exception for failure to depart. 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.

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 (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. 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.<sup>5</sup>

---

<sup>4</sup> 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.

<sup>5</sup> 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

## **Distinguishing *Shaar* in Post-IIRIRA Cases**

*Azarte v. Ashcroft*

*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 force the courts 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;
- (2) the pre-IIRIRA voluntary departure statute did not set any time 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
- (3) generally, prior to IIRIRA, voluntary departure periods were initially granted for generous amounts of time, and extensions were permitted, 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 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 potentially conflicting terms. Under the BIA's interpretation, if a person complies with the voluntary departure order, he or she may forfeit the right to file a motion to reopen because motions from people who have departed the U.S. are purportedly barred by regulation (8 C.F.R. § 1003.2(d)). However, if the person fails to depart, he or she also forfeits the right to file a motion to reopen because he may no longer be eligible for the relief requested by virtue of overstaying the voluntary departure order.

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

---

for equitable tolling in appropriate circumstances. INA § 240(b)(6)(C)(i); 8 C.F.R. §§ 1.003.2(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)).

departure and because the two statutory provisions currently contain potentially conflicting terms, *Shaar* does not control our decision here.”

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 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.” 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.

#### *Sidikhouya v. Gonzalez*

The Eighth Circuit Court of Appeals adopted the *Azarte* court’s reasoning. *Sidikhouya v. Gonzalez*, 407 F.3d 95 (8th Cir. 2005). The court 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.”

The concurring 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.

#### **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).”

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.” *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.’”

Finally, the Third Circuit found that the Ninth Circuit’s decision in *Azarte* lent additional support to the court’s reasoning. The Third Circuit, noted that it was not deciding whether *Shaar* could apply to a post IIRIRA case. However, the decision strongly implies that the court will reach a similar result in a post-IIRIRA case.

### **Filing A Motion to Reopen Within the Voluntary Departure Period**

Respondents in removal proceedings filing motions to reopen within the voluntary departure period may submit a motion for stay of removal and stay of voluntary departure along with the motion. If the removal proceedings were held in an immigration court that falls within the Eighth Circuit or Ninth Circuit, *Sidikhouya* and *Azarte* govern. For *removal* proceedings that were held in an immigration court in the Third Circuit, respondents may argue that though *Barrios* involved a *deportation* case, its reasoning is applicable to removal cases as well.

Respondents whose immigration proceedings were held in immigration courts outside of the Third, Eighth or Ninth may also file a motion for stay of removal and stay of voluntary departure along with the motion to reopen. The respondent may argue that *Matter of Shaar* does not govern in removal proceedings (i.e., post-IIRIRA cases) – the Ninth Circuit’s reasoning in *Azarte* is helpful in explaining why *Shaar* does not control. Although it is unknown whether the BIA will reconsider its decision in *Shaar* in light of *Azarte*, the BIA has been applying *Shaar* to post-IIRIRA cases regularly. If the BIA dismisses the motion to reopen under *Matter of Shaar*, the respondent may be able to file a petition for review in the court of appeals to challenge the BIA’s statutory interpretation.

### **Is There a Remedy for Respondents In *Deportation* 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 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 removal and voluntary departure<sup>6</sup> or seeking an extension from the ICE district director – which is authorized under 8 C.F.R. § 1240.57.

### **What if the Voluntary Departure Period Expired Before the Motion to Reopen Is Filed?**

At least in the Ninth Circuit, the court's reasoning does not apply directly to people whose voluntary departure period expired before the motion to reopen is filed. *See De Martinez v. Ashcroft*, 374 F.3d 759 (9th Cir. 2004) (upholding denial of motion to reopen where motion filed after voluntary departure period expired). However, 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](http://www.ailf.org/lac/lac_pa_072203.asp)) sets forth some of the potential arguments. Furthermore, AILF believes that *Azarte* may aid people who filed the motion to reopen within the 90 day statutory motion to reopen period, but after the 60 day voluntary departure period has expired.

---

<sup>6</sup> Not surprisingly, the BIA did not mention stays of the voluntary departure period in *Matter of Shaar*. There was no need to 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.