Matter of Daniel ONTIVEROS-DIAZ, Respondent

Decided November 5, 2026

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

(1) A violation of a voluntary departure agreement renders an alien ineligible for certain immigration benefits for a 10-year period.

(2) Filing a motion to reopen to submit new evidence pertaining to a prior application for cancellation of removal does not relieve an alien of the consequences of failing to voluntarily depart.

FOR THE RESPONDENT: David L. Wilson, Esquire, Minneapolis, Minnesota

FOR THE DEPARTMENT OF HOMELAND SECURITY: Theresa A. Reiss, Counsel

BEFORE: Board Panel: GEMOETS and CHABAN, Appellate Immigration Judges; PICOS, Temporary Appellate Immigration Judge.

GEMOETS, Appellate Immigration Judge:

This matter was last before the Board on April 4, 2025, when we dismissed the respondent's appeal from the Immigration Judge's decision denying his application for cancellation of removal for nonpermanent residents under section 240A(b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(b)(1) (2024), and denied his request for remand. Concurrently, we reinstated the Immigration Judge's voluntary departure order for a period of 60 days: on or before June 3, 2025. On June 17, 2025, the respondent filed a motion to reopen to submit additional evidence in support of his application for cancellation of removal. *See* INA § 240(c)(7)(C)(i); 8 U.S.C. § 1229a(c)(7)(C)(i) (2024) (setting a 90-day deadline for motions to reopen). The Department of Homeland Security ("DHS") opposes the respondent's motion.

We requested supplemental briefing to address whether reopening of removal proceedings relieves an alien of the consequences of violating a voluntary departure agreement. The parties responded to the Board's request, and we have considered their arguments in full. The respondent's motion will be denied.

The decision to reopen proceedings is discretionary, and motions to reopen are generally disfavored in immigration proceedings. *See*

INS v. Abudu, 485 U.S. 94, 107 (1988); 8 C.F.R § 1003.2(a) (2026). A motion to reopen must state new facts and be supported by material, previously unavailable evidence demonstrating prima facie eligibility for relief. *See* INA § 240(c)(7)(B), 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 (BIA 2015) ("A motion to remand for the purpose of presenting additional evidence must conform to the same standards as a motion to reopen and will only be granted if the evidence was previously unavailable and would likely change the result in the case."). An alien requesting reopening of proceedings to seek relief that was previously denied must establish a "heavy burden" that if proceedings were reopened, the new evidence would likely change the result in the case. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992).

I. CONSEQUENCES OF VIOLATING A VOLUNTARY DEPARTURE AGREEMENT

The respondent seeks reopening to further pursue his application for cancellation of removal. The primary issue on appeal is whether the respondent remains statutorily eligible for this relief given he did not comply with the voluntary departure agreement requiring his departure by June 3, 2025, and did not file his motion until after the voluntary departure date passed. The INA mandates that an alien who fails to voluntarily depart "within the time period specified" is ineligible, for a period of 10 years, "to receive any further relief" under certain sections of the INA, including cancellation of removal under section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). INA § 240B(d)(1)(B), 8 U.S.C. § 1229c(d)(1)(B) (2024).

A motion to reopen that is properly filed prior to the expiration of the voluntary departure period automatically terminates the prior grant of voluntary departure and its related consequences for noncompliance. 8 C.F.R. § 1240.26(c)(3)(iii), (e)(1) (2026); *see also Dada v. Mukasey*, 554 U.S. 1, 21–22 (2008) (discussing the significance of filing a request to withdraw an application for voluntary departure before the expiration of the voluntary departure period). The respondent, however, submitted his motion after the expiration of the voluntary departure period.[1] "The filing of a motion to reopen . . . after the time allowed for voluntary departure has already expired does not in any way impact the period of time allowed for voluntary departure . . . ." 8 C.F.R. § 1240.26(e)(2). He is therefore subject

[1] The respondent has neither alleged nor submitted evidence establishing that his failure to depart was involuntary. *See Matter of Zmijewska*, 24 I&N Dec. 87, 94–95 (BIA 2007) (holding that an alien has not voluntarily failed to depart the United States when the "alien, through no fault of his or her own, is unaware of the voluntary departure order or is physically unable to depart").

to the penalties for failing to depart, including ineligibility for certain forms of relief. *See* INA § 240B(d)(1)(B), 8 U.S.C. § 1229c(d)(1)(B); 8 C.F.R. § 1240.26(e)(2); *see also Taveras-Duran v. Holder*, 767 F.3d 120, 123 (1st Cir. 2014) (affirming that an alien who files a motion to reopen after failing to voluntarily depart within the time period specified is ineligible for various forms of relief for a period of 10 years).

The respondent argues that the bar to relief for failing to voluntarily depart does not preclude him from seeking reopening to introduce new evidence related to a previously filed application for cancellation of removal, as opposed to seeking new relief. He contends that the statutory bar "is simply irrelevant" to his circumstances. He further argues that where a motion to reopen is granted, failure to comply with a prior voluntary departure agreement does not preclude eligibility to pursue previously requested relief because once removal proceedings are reopened, such proceedings are no longer concluded nor is there an order of removal. We are unpersuaded by the respondent's arguments.

An order granting voluntary departure, by its nature, constitutes an agreement by the respondent to voluntarily depart the United States and by the government to refrain from entering an order of removal if the respondent complies with the agreement. *See* INA § 240B(b), 8 U.S.C. § 1229c(b). Section 240B(d)(1) of the INA, 8 U.S.C. § 1229c(d)(1), precludes "any further relief" if an alien fails to comply with a voluntary departure agreement. Under traditional canons of statutory construction, we give commonly used terms their ordinary meaning. *See Mullin v. Doe*, 609 U.S. 324, 342–43 (2026).

The respondent's argument that the statutory limitation on "further relief" applies only to additional or new applications is contrary to the ordinary meaning of the language and the intended purpose of the statutory provision. *See* INA § 240B(d)(1), 8 U.S.C. § 1229c(d)(1); *cf. Jennings v. Rodriguez*, 583 U.S. 281, 298 (2018) (observing that under canons of statutory interpretation, courts may choose between plausible constructions of language but may not rewrite a statute). Congress contemplated voluntary departure as an immigration benefit, and while there is no fee or formal written application, the statute mandates that aliens who seek and are granted voluntary departure comply with the terms of the agreement. *See* INA § 240B(b), (d)(1), 8 U.S.C. § 1229c(b), (d)(1). To this end, the statutory language, as written, identifies voluntary departure as the relief and precludes "any further relief" if the alien violates the voluntary departure agreement. INA § 240B(d)(1)(B), 8 U.S.C. § 1229c(d)(1)(B).

An alien cannot avoid the consequences of failing to voluntarily depart by filing a motion to reopen. *See* 8 C.F.R. § 1240.26(e)(2). We find it significant that the INA lays out the consequences for failure to depart, including ineligibility for further relief, within the statute authorizing voluntary departure, and that nothing in the motion to reopen provision suggests that reopening vitiates these consequences. *Compare* INA § 240B(d)(1), 8 U.S.C. § 1229c(d)(1), *with* INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7). *See generally Dada*, 554 U.S. at 19–21 (discussing the tension between voluntary departure and motions to reopen).

The plain language of section 240B(d)(1) of the INA, 8 U.S.C. § 1229c(d)(1), attaches consequences to the alien's failure to voluntarily depart "within the time period specified." The statute requires an Immigration Judge to provide an alien with notice of the penalties for violating a voluntary departure agreement. INA § 240B(d)(3); 8 U.S.C. § 1229c(d)(3). While an alien may seek to reopen his or her removal proceedings, a violation of a voluntary departure agreement renders the alien ineligible for certain immigration benefits for a 10-year period. *See* INA § 240(B)(d)(1); 8 U.S.C. § 1229c(d)(1); 8 C.F.R. § 1240.26(e)(2).

Section 240B(d)(1) of the INA, 8 U.S.C. § 1229c(d)(1), forecloses the respondent's application for cancellation of removal because he "voluntarily fail[ed] to depart the United States," and we lack equitable authority to disregard the statute. The conduct that triggers statutory ineligibility is the violation of the voluntary departure agreement and reopening these proceedings would not invalidate the respondent's prior violation. *See* 8 C.F.R. § 1240.26(e)(2); *see also* Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76927, 76931 (Dec. 18, 2008) (stating that 8 C.F.R. § 1240.26(e)(2) "explicitly declines to follow an interpretation that may have been reflected in prior court decisions to the effect that the Board's grant of reopening would have the effect of vacating the underlying voluntary departure order and the penalties attributable to the alien's voluntary failure to depart during the time allowed").

Congress carved out specific statutory exceptions to the penalties for failing to voluntary depart. For example, the restrictions on relief do not apply to cancellation of removal or adjustment of status "on the basis of a petition filed by a VAWA self-petitioner . . . if the extreme cruelty or battery was at least one central reason for the alien's overstaying the grant of voluntary departure." INA § 240B(d)(2); 8 U.S.C. § 1229c(d)(2). If Congress wished to establish an exception for aliens seeking reopening based on the same relief as in prior proceedings or, more specifically, aliens seeking

cancellation of removal, it could have done so. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (citation omitted)). *See generally Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). Thus, filing a motion to reopen to submit new evidence pertaining to a prior application for cancellation of removal does not relieve the alien of the consequences of failing to voluntarily depart.

II. MOTION TO REOPEN

Even assuming the respondent were not barred from relief for noncompliance with the voluntary departure agreement, he has not established that the evidence presented in support of his motion would likely alter the outcome of his case. *See Caballero-Martinez v. Barr*, 920 F.3d 543, 548 (8th Cir. 2019). The respondent seeks to submit evidence that his eldest child received a new Individualized Education Plan ("IEP"), his second child was diagnosed with autism and received a specialized accommodation plan, and his youngest child was diagnosed with post-traumatic stress disorder ("PTSD") related to a dog attack. The respondent also submits additional evidence on a previously documented cardiac defect for which his second child receives ongoing medical care.

The evidence the respondent presents in his motion is supplemental to evidence previously presented. In a prior motion to remand, the respondent submitted evidence of his youngest child's PTSD and his second child's screening for autism, diagnoses with Other Specified Neurodevelopmental Disorder, and need for further therapy and psychological testing. The respondent also previously provided medical records relating to his second child's treatment and observation for a cardiac condition. Both the Immigration Judge and the Board also considered evidence that the respondent's eldest child was receiving specialized educational services through school.

The respondent has not demonstrated that the supplemental evidence provided with his motion would likely change the outcome of his case. *See Matter of Coelho*, 20 I&N Dec. at 473. The Immigration Judge denied cancellation of removal because the respondent did not establish that his qualifying relatives—his United States citizen children—would suffer exceptional and extremely unusual hardship upon his removal. *See*

Matter of Monreal, 23 I&N Dec. 56, 62 (BIA 2001) (recognizing that the hardship to a respondent's qualifying relatives "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country").

In making her determination, the Immigration Judge thoroughly considered the educational, medical, emotional, and financial needs of the respondent's children and found that the resources they required would not be impacted by the respondent's removal, as the children would remain in the United States with their mother. *See Matter of Buri Mora*, 29 I&N Dec. 186, 187–88 (BIA 2025) (concluding that the respondent did not establish the requisite hardship based on economic detriment and family separation where the qualifying relatives will remain in the United States and medical treatment will not be affected by the respondent's removal), *denying petition for review*, No. 25-2526, 2026 WL 1864353 (3d Cir. Jun. 29, 2026); *see also Matter of Calderon-Hernandez*, 25 I&N Dec. 885, 886 (BIA 2012) (explaining that it is reasonable to assume that a child will be cared for and supported by a parent who remains in the United States, absent evidence to the contrary). The respondent's new evidence is of a similar nature to the evidence previously presented and considered by the Immigration Judge, and it is unlikely to change the outcome of the respondent's case. Accordingly, we would alternatively deny the respondent's motion to reopen on this basis.

ORDER: The respondent's motion to reopen is denied.

NOTICE: If a respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, or to present himself or herself at the time and place required for removal by DHS, or conspires to or takes any action designed to prevent or hamper the respondent's departure pursuant to the order of removal, the respondent shall be subject to a civil monetary penalty of up to $998 for each day the respondent is in violation. *See* INA § 274D, 8 U.S.C. § 1324d (2024); 8 C.F.R. § 280.53(b)(14) (2026). Further, any respondent that has been denied admission to, removed from, or has departed the United States while an order of exclusion, deportation, or removal is outstanding and thereafter enters, attempts to enter, or is at any time found in the United States shall be fined or imprisoned not more than 2 years, or both. *See* INA § 276(a), 8 U.S.C. § 1326(a) (2024).