

Catholic University Law Review

Volume 57
Issue 2 *Winter 2008*

Article 6

2008

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Recommended Citation

Michael P. Bracken, *The Proper Interplay of the Voluntary Department and Motion to Reopen Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 57 Cath. U. L. Rev. 511 (2008).
Available at: <https://scholarship.law.edu/lawreview/vol57/iss2/6>

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COMMENTS

THE PROPER INTERPLAY OF THE VOLUNTARY DEPARTURE AND MOTION TO REOPEN PROVISIONS OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

Michael P. Bracken^{*}

The United States' identity as the great melting pot¹ has been built by a steady stream of immigrants.² While the first Congress enacted laws for naturalization,³ the government waited almost a hundred years to begin restricting voluntary immigration.⁴ In 1952, Congress passed the Immigration and Nationality Act (INA), also known as the McCarran-Walter Act.⁵ This became the central immigration statute for the United States. Since its enactment there have been several significant

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1. Molly Hazel Sutter, Note, *Mixed-Status Families and Broken Homes: The Clash Between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 *Transnat'l L. & Contemp. Probs.* 783, 799 (2006).

2. See Chelsea Walsh, Note, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 *FORDHAM L. REV.* 2857, 2859-60 (2005).

3. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

4. See Won Kidane, *Committing a Crime While a Refugee: Rethinking the Issue of Deportation in Light of the Principle Against Double Jeopardy*, 31 *HASTINGS CONST. L.Q.* 383, 387 (2007) ("By 1875, however, a combination of social and economic conditions prompted Congress to enact the first systematic national immigration act ever."). Other such acts followed. *E.g.*, Immigration Act of 1924, ch. 190, § 11(b), 43 Stat. 153, 159 (restricting immigration to an "annual quota of any nationality . . . [at] the same ratio to 150,000 as the number of inhabitants in [the] continental United States in 1920 having that national origin"), *repealed by* Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 403(a)(23), 66 Stat. 163, 279 (1952); *see also* BUREAU OF FOREIGN AND DOMESTIC COMMERCE, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1929, at 102 (1929) (displaying immigration quotas for 1925-1927 by country).

5. Immigration and Nationality Act, 66 Stat. 163 (current version at 8 U.S.C. §§ 1101-1537 (2000)); Walsh, *supra* note 2, at 2862 (noting that the INA "consolidated previous immigration laws into one [coordinated] statute" and that it "replaced all earlier immigration laws but has been amended frequently since its inception") (alteration in original) (footnote omitted) (quoting THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION: PROCESS AND POLICY* 56 (3d ed. 1995)).

amendments,⁶ including the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996.⁷

Congress passed the IIRIRA to improve certain aspects of the INA,⁸ specifically it amended both the voluntary departure and motion to reopen sections of the INA.⁹ The IIRIRA established time limits for both sections, thereby making the rules that guide them much stricter.¹⁰

Voluntary departure and motions to reopen are key procedural components in removing an illegal alien from the United States.¹¹ When an alien is brought before an immigration judge (IJ) for removal proceedings, the IJ is allowed to grant the alien up to 120 days to voluntarily depart from the United States, rather than having U.S. officials forcefully remove him.¹² If voluntary departure is granted and the alien abides, then he or she receives certain privileges not given to those that are forcefully removed.¹³ However, if the alien does not voluntarily depart when the privilege is granted (a privilege which he must request during his hearing), certain penalties apply.¹⁴ The Board of

6. *E.g.*, Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (eliminating national quotas) (codified as amended in scattered sections of 8 U.S.C.).

7. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of U.S.C. titles 8 and 18).

8. Sutter, *supra* note 1, at 806 (noting that the IIRIRA was passed in response to public concern “over the increasing number of illegal immigrants coming into the United States”).

9. See 8 U.S.C.A. § 1229a(c)(7) (West 2005) (motions to reopen); *id.* § 1229c (West 2005 & Supp. 2007) (voluntary departure).

10. See 8 U.S.C. §§ 1229a(c)(7)(C)(i), 1229c(b)(2) (West 2005).

11. See Walsh, *supra* note 2, at 2866 (summarizing deportation procedures). As Walsh explained:

The filing of a notice to appear begins the removal process. The notice to appear informs the alien of “the nature of the proceedings,” the factual allegations underlying the charge of deportability, and the “statutory provisions alleged to have been violated.” The IJ [immigration judge] decides whether the alien is deportable and, if so, whether he is eligible for a discretionary relief measure. The IJ is bound by a substantial evidence standard at the hearing. If the alien is found deportable, the final order may then be appealed to the BIA [Board of Immigration Appeals]. Upon a determination of the BIA, the case may be appealed to a federal court.

Id. (footnotes omitted) (quoting 8 U.S.C. § 1229(a)(1)).

12. 8 U.S.C. §§ 1229c(a)(2), (b)(2).

13. Walsh, *supra* note 2, at 2868-70 (stating that the most important benefit is that the alien can apply for a readjustment of his status immediately and also avoid other penalties, such as monetary fines, that a deportee normally incurs).

14. 8 U.S.C.A. § 1229c(d)(1) (West Supp. 2007) (providing that an alien who has been permitted to depart voluntarily, but refuses to depart, “(A) shall be subject to a civil

Immigration Appeals (BIA)¹⁵ has decided that one such consequence is that an alien loses his opportunity to pursue a motion to reopen.¹⁶

Through a motion to reopen, an alien “seeks fresh consideration [of his status] on the basis of newly discovered facts or a change in circumstances since the hearing, or solicits an opportunity to apply for discretionary relief.”¹⁷ An alien who loses a removal hearing and a subsequent appeal is permitted to file a single motion to reopen.¹⁸ However, if an alien voluntarily departs, his motion to reopen is considered automatically rescinded.¹⁹ Therefore, a conundrum exists because the BIA has ruled that if an alien does not leave within his allotted voluntary departure time,²⁰ he gives up his right to reopen,²¹ yet, if he does depart, his right to reopen is automatically lost.²² Therefore, the motion to reopen is effectively unavailable to an alien who is granted voluntary departure.²³

penalty of not less than \$1,000 and not more than \$5,000; and (B) shall be ineligible, for a period of 10 years, to receive any further relief under this section and sections 1229b, 1255, 1258, and 1259 of this title”).

15. The BIA is the appellate court for immigration hearings. The majority of voluntary departure decisions ruled on by immigration judges are subsequently appealed to the BIA. The BIA is also responsible for ruling on the majority of the motion to reopen appeals. 1 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 3.05[1]-[3] (rev. ed. 2007).

16. *Cf. Azarte v. Ashcroft*, 394 F.3d 1278, 1281-82 (9th Cir. 2005) (relating circumstances of the Azartes’ failure to voluntarily depart during the pendency of their motion to reopen, and the BIA’s summary dismissal of the motion).

17. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 15, § 3.05[7][a].

18. *See* 8 U.S.C.A. § 1229a(c)(7) (West 2005).

19. *See* 8 C.F.R. § 1003.2 (2007) (governing procedures before the BIA). The relevant provision reads:

A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.

Id. § 1003.2(d). The BIA has interpreted this regulation to mean that if an alien voluntarily departs, his motion to reopen is effectively lost. *E.g., Azarte*, 394 F.3d at 1281-82.

20. 8 U.S.C. § 1229c(a)(2)(A) (2000) (stating that aliens may be granted up to 120 days to voluntarily depart).

21. *E.g., Shaar*, 21 I. & N. Dec. 541, 548-49 (1996) (interim decision) (finding that the appropriate regulations may force an alien granted voluntary departure “to depart the United States while a motion [to reopen] is pending”), *aff’d sub nom. Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998).

22. *See* § 1003.2(d).

23. *See, e.g., Azarte*, 394 F.3d at 1282.

This conundrum has made its way to the U.S. circuit courts, seven of which have weighed in on the matter.²⁴ The Ninth Circuit was the first to address the issue in *Azarte v. Ashcroft*, where it overruled the BIA's decision and held that it would be contrary to Congress' intent not to toll the voluntary departure time while a motion to reopen is pending.²⁵ The Third, Eighth, and Eleventh Circuits have since adopted this position.²⁶ On the other side, the First, Fourth, and Fifth Circuits have taken a drastically different approach to the proper interrelationship of these two statutory provisions by refusing to toll the voluntary departure period, thus creating a circuit split.²⁷

This Comment begins by discussing the development of the voluntary departure and motion to reopen provisions in U.S. immigration law. The Comment then explores the circuit split on whether the voluntary departure period should be tolled while a motion to reopen is pending. Next, the Comment analyzes the statutory interpretation methods the circuit courts have applied in their attempts to construct the proper interpretation of the two provisions. Finally, this Comment argues in favor of a recently proposed Department of Justice rule providing that a grant of voluntary departure would automatically terminate if a motion to reopen is filed. The proposed rule is consistent with the language of the statute, and still obtains a reasonable and just result for aliens.

I. THE CREATION AND EVOLUTION OF VOLUNTARY DEPARTURES AND MOTIONS TO REOPEN

A. *The History and Development of the Motion to Reopen*

Motions to reopen and voluntary departures are two concepts that have been a part of U.S. immigration law since the early twentieth century.²⁸ Evidence of the Immigration Bureau applying the concept of a

24. *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285); *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325 (11th Cir. 2006); *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007); *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005) (*per curiam*); *Azarte*, 394 F.3d 1278.

25. *Azarte*, 394 F.3d at 1286-89.

26. *Ugokwe*, 453 F.3d at 1330-31; *Kanivets*, 424 F.3d at 335-36; *Sidikhouya*, 407 F.3d at 952.

27. *Chedad*, 497 F.3d at 62-65; *Dekoladenu*, 459 F.3d at 505-07; *Banda-Ortiz*, 445 F.3d at 389-91.

28. See *Azarte*, 394 F.3d at 1283-84; David S. Rubenstein, *Restoring the Quid Pro Quo of Voluntary Departure*, 44 HARV. J. ON LEGIS. 1, 10 (2007) ("The voluntary departure program was formally introduced to the law in 1940."); S. Anthony Silva, Comment, *Immigration - Banda-Ortiz v. Gonzales: The Fifth Circuit Refuses to Automatically Toll Voluntary Departure While a Motion to Reopen is Pending, Creating*

motion to reopen can be found as early as 1916.²⁹ The purpose of a motion to reopen has remained the same since that time: to provide an alien with the opportunity to offer new evidence to immigration authorities that is particularly relevant to a previous decision made by the same authority.³⁰ Originally found in the form of regulations, motions to reopen had no statutory guidelines regarding time limits and the number of motions permitted.³¹ In 1996, however, after a debate on whether aliens were abusing motions to reopen, the Department of Justice (DOJ) published a final rule requiring that any motion to reopen “must be filed not later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.”³² That same year, Congress codified motions to reopen when it passed the IIRIRA, thereby changing the procedure from “a regulatory to a statutory form of relief.”³³ The new motion to reopen provision codified the DOJ’s ninety-day time limit and restricted an alien to a single motion.³⁴ The new provisions of the IIRIRA greatly limited an alien’s ability to appeal removal rulings when relevant new

New Hazards for Alien and Practitioner Alike, 37 U. MEM. L. REV. 429, 433 (2007) (“Similar to voluntary departure, the motion to reopen is also a creature of historical development, with origins in the case law from the early twentieth century.”).

29. See, e.g., *Silva*, *supra* note 28, at 433 n.17 (citing *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916)).

30. *Azarte*, 394 F.3d at 1283. A motion to reopen will be unsuccessful, unless the alien can show that the

new evidence is material and could not have been discovered and presented at the former hearing. This restriction is equally binding on [the Department of Homeland Security (DHS)] and the noncitizen. There is also an implicit requirement that the facts alleged would be sufficient, if proved, to change the result. Motions to reopen for the purpose of applying for discretionary relief will not be granted if the respondent had a full opportunity to apply for such relief at the former hearing unless the relief is sought on the basis of subsequent circumstances.

1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 15, § 3.05[7][a] (footnotes omitted). Motions to reopen have been compared to motions for a new trial based on newly discovered evidence pursuant to Federal Rule of Criminal Procedure 33. *White v. INS*, 6 F.3d 1312, 1315 (8th Cir. 1993).

31. *Silva*, *supra* note 28, at 433-34 (“In 1941, the Attorney General, through the Immigration and Naturalization Service (‘INS’), included the motion to reopen in the federal regulations, one year after the statutory voluntary departure provisions were codified in the Alien Registration Act of 1940.”); see also *Azarte*, 394 F.3d at 1283.

32. 8 C.F.R. § 3.2(c)(2) (1997) (current version at 8 C.F.R. § 1003.2(c) (2007)); see also *Silva*, *supra* note 28, at 434.

33. *Azarte*, 394 F.3d at 1283.

34. 8 U.S.C.A. § 1229a(c)(7) (West 2005 & Supp. 2007); *Silva*, *supra* note 28, at 434.

information has arisen regarding his status; it also restricted the discretion of the BIA to hear such appeals.³⁵

*B. The Development of Voluntary Departure in
American Immigration Law*

In addition to the motion to reopen provision the IIRIRA also altered the voluntary departure provision.³⁶ Voluntary departure, like the motion to reopen, was a concept originally addressed early in the twentieth century.³⁷ The goal of the voluntary departure scheme is to reduce “the costs associated with deporting individuals from the United States and [to] provid[e] a mechanism for illegal aliens to leave the country without being subject to the stigma or bars to future relief that are part of the sanction of deportation.”³⁸ The first statutory basis for voluntary departure was the Alien Registration Act,³⁹ which was later included in the INA.⁴⁰ Under the INA, this provision had no time limit; however in practice, the INS granted voluntary departure periods of up to a year or more.⁴¹

As with the motion to reopen, the IIRIRA changed the INA’s voluntary departure provision by restricting its application. The voluntary departure period, as set out in the IIRIRA, cannot exceed 120 days if granted before the end of a proceeding, or sixty days if granted at the conclusion of a proceeding.⁴² In general, these time limits have been strictly adhered to, and in fact, there is a separate provision which specifically prevents these voluntary departure dates from being

35. See § 1003.2(c); see also Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 940-45 (2006) (describing the effect of the IIRIRA specifically on the BIA and IJs); Jill M. Pfenning, *Inadequate and Ineffective: Congress Suspends the Writ of Habeas Corpus for Noncitizens Challenging Removal Orders by Failing to Provide a Way to Introduce New Evidence*, 31 VT. L. REV. 735, 743-44 (2007) (describing generally the changes the IIRIRA has had on the review of immigration cases).

36. 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007); see also *Azarte*, 394 F.3d at 1284-85 (characterizing the IIRIRA as having effected “drastic[]” change).

37. *Azarte*, 394 F.3d at 1284. The first recorded referral to this concept was in 1923. *United States ex rel. Patton v. Tod*, 292 F. 243, 244 (S.D.N.Y. 1923) (noting that due to the conditions of World War I, an alien was granted “temporary admission under a bond for a period of one year, [with] voluntary departure to be effected sooner if so directed”).

38. *Azarte*, 394 F.3d at 1284.

39. Alien Registration Act, 1940, ch. 439, § 20, 54 Stat. 670, 672; see also *Silva*, *supra* note 28, at 432 & n.11.

40. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, § 244, 66 Stat. 163, 214-17 (1952); see also *Silva*, *supra* note 28, at 432.

41. See *Rubenstein*, *supra* note 28, at 11.

42. 8 U.S.C. §§ 1229c(a)(2)(A), (b)(2) (2000).

extended.⁴³ The IIRIRA also lists specific requirements that an alien must meet before he can be granted voluntary departure, so that only a certain number of good standing aliens are eligible for such relief.⁴⁴

If an alien does not voluntarily depart during the time period allotted, he is subject to serious consequences.⁴⁵ However, voluntary departure is a great benefit to the alien who satisfies the requirements listed in the INA because it allows a noncitizen to leave the United States with almost no consequences even though the alien violated the law by remaining in the country illegally.⁴⁶

C. The Interrelationship of the Motion to Reopen and Voluntary Departure Provisions

The motion to reopen and voluntary departure provisions are both relevant in a procedural discussion of the removal of aliens from the U.S. Neither provision mentions the other; therefore, it is not clear how Congress intended the two to interact.⁴⁷ There have been, and will continue to be, many instances where these two provisions overlap. The obvious example arises when an alien is granted a voluntary departure period of sixty days, files a motion to reopen within those sixty days, and then that motion remains pending when the sixty-day period expires.⁴⁸

43. See 8 C.F.R. § 1240.26(f) (2007) (“In no event can the total period of a time, including any extension, exceed 120 days or 60 days . . .”).

44. 8 U.S.C. § 1229c(b)(1) (2000). Requirements for voluntary departure include physical presence in the U.S. for at least the preceding year; good moral character for at least the preceding five years; the absence of triggering deportability conditions, such as the commission of an aggravated felony or other security grounds; and the means and intent to depart the U.S., as shown by clear and convincing evidence. See *id.* § 1229c(b)(1)(A)-(D).

45. The three primary consequences for an alien who does not leave within the voluntary departure time allotted are: first, the forfeiture of a bond that the alien must post when voluntary departure is granted, which is meant to encourage aliens to leave the country within the time given, *id.* § 1229c(a)(3); second, a fine of no less than \$1000 but no more than \$5000, 8 U.S.C.A. § 1229c(d)(1)(A) (West Supp. 2007); and third, the alien will be ineligible for a period of ten years to apply for any regularization of their illegal status in the United States, *id.* § 1229c(d)(1)(B). The third consequence is arguably the harshest, because the alien cannot return to the country with a *legal* status, even temporarily, during the ten-year period.

46. See Rubenstein, *supra* note 28, at 2. The main consequence avoided through voluntary departure is bypassing removal proceedings and the punishments that accompany such proceedings, including “an order of removal and the attendant bars to readmission into the United States that would otherwise attach if the alien were removed by the Government.” *Id.*

47. See Silva, *supra* note 28, at 431-32.

48. Ugokwe v. U.S. Attorney Gen., 453 F.3d 1325, 1327 (11th Cir. 2006) (noting that the alien’s motion to reopen failed because the alien did not depart voluntarily from the country as directed); Banda-Ortiz v. Gonzales, 445 F.3d 387, 388 (5th Cir. 2006) (same),

The INA, as amended by the IIRIRA, does not cover this situation because it treats the two provisions separately.⁴⁹

In 1997, the DOJ offered some preliminary advice in an interim rule discussing this interplay between voluntary departure and motions to reopen, but notably has refused to issue a final rule.⁵⁰ The DOJ considered “three possible options: no tolling of any period of voluntary departure; tolling the voluntary departure period for any 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.”⁵¹ No final DOJ or Department of Homeland Security (DHS) regulations regarding a stay of the voluntary departure period were ever promulgated.⁵² However, in November 2007, the DOJ published a proposed rule in the Federal Register that directly responds to the current circuit split.⁵³ This proposed rule provides that if an alien has been granted voluntary departure and before that period expires the alien files a motion to reopen or a motion to reconsider, that filing will have the effect of terminating the grant of voluntary departure.⁵⁴ This rule, if promulgated, would solve this statutory conflict and put an end to the circuit split. This is only a proposed rule, however, and currently the DOJ and its IJs continue to follow the rule that if an alien stays in the

cert. denied, 127 S. Ct. 1874 (2007); *Azarte v. Ashcroft*, 394 F.3d 1278, 1281 (9th Cir. 2005) (same).

49. Compare 8 U.S.C. § 1229c(a), with *id.* § 1229c(c); see also Katherine A. Tapley, *Recent Development, Automatic Tolling of the Voluntary Departure Period—A Circuit Split*, 39 ST. MARY’S L.J. 185, 194-95 (2007) (discussing this statutory conflict).

50. *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10,312, 10,325-26 (proposed Mar. 6, 1997); see also Reply Brief in Support of Petition for Writ of Certiorari at 3, *Dada v. Gonzales*, No. 06-1181 (U.S. Aug. 17, 2007) (stating that although the DOJ asserted that it would issue regulations on tolling, “no such regulations were ever issued”).

51. *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. at 10,326.

52. *Barroso v. Gonzales*, 429 F.3d 1195, 1205-06 (9th Cir. 2005).

53. *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67,674 (proposed Nov. 30, 2007).

54. *Id.* at 67,674. The proposed regulation helps to solve the circuit split by automatically terminating the grant of voluntary departure if a motion to reopen is filed before the period for voluntary departure has expired.

This proposed rule would amend the Department of Justice . . . 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 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.

Id.

U.S. past his period for voluntary departure he forfeits his pending motion to reopen and loses the benefits he would have received by departing voluntarily.⁵⁵

Procedurally, it is the immigration judges of the DOJ's internal division of the Executive Office of Immigration Review (EOIR), including those IJs who sit on the BIA, who are in charge of deciding the proper interplay between voluntary departure and motions to reopen.⁵⁶ The IJs make the initial ruling and set the period for voluntary departure.⁵⁷ Then, if that decision is appealed, the BIA makes its ruling and may extend the voluntary departure period by another thirty days.⁵⁸ If a motion to reopen is filed, it is the BIA that normally grants or denies the motion after hearing the new evidence.⁵⁹ Based on these duties, it is sensible to look to the BIA's interpretation to determine how these two provisions should interrelate.

The BIA has interpreted 8 C.F.R. § 1003.2 to mean that if an alien does depart voluntarily, he forfeits any motions to reconsider or reopen, and there has been no significant debate about this interpretation.⁶⁰ Therefore, any pending motions are immediately discarded.⁶¹ However, the question remains as to whether the voluntary departure period should be automatically tolled while a motion to reopen is pending if the alien chooses to stay in the country.⁶²

55. See *Dada v. Gonzales*, 207 F. App'x 425, 425 (5th Cir. 2006) (discussing how "[t]he BIA denied Dada's motion to reopen on the ground that, because he failed to leave the United States by the imposed deadline for voluntary departure, he was statutorily ineligible for adjustment of status, pursuant to 8 U.S.C. § 1229c(d)"); see also *supra* notes 22-23, 49 and accompanying text.

56. 8 C.F.R. § 1240.26 (2007) (describing BIA and IJ judicial discretion); 1 GORDON, MAILMAN, & YALE-LOEHR, *supra* note 15, § 3.04 (describing the EOIR); Rubenstein, *supra* note 28, at 5 (describing the EOIR as a "quasi-judicial agency" within the DOJ, which "operate[s] independently of the INS").

57. See, e.g., 8 U.S.C. § 1229c (2000).

58. See, e.g., *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 388 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007); *Azarte v. Ashcroft*, 394 F.3d 1278, 1280 (9th Cir. 2005).

59. 1 GORDON, MAILMAN & YALE-LOEHR, *supra* note 15, § 3.05[6][a].

60. See *supra* note 19 and accompanying text.

61. See 8 C.F.R. § 1003.2(d).

62. See *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1329 (11th Cir. 2006) (discussing the issue and noting the existence of the circuit split). On September 25, 2007, the Supreme Court granted certiorari in *Dada v. Mukasey*, a case appealed from the Fifth Circuit that deals with the proper interrelationship of the voluntary departure and motion to reopen provisions. *Dada v. Gonzales*, 207 F. App'x 425, (5th Cir. 2006), *cert. granted sub nom. Dada v. Keisler*, 128 S. Ct. 36 (Sept. 25, 2007) (No. 06-1181), *argued sub nom. Dada v. Mukasey*, No. 06-1181 (Jan. 8, 2008). The facts of *Dada v. Mukasey* are a bit different than *Banda-Ortiz v. Gonzales* because in *Dada* the alien specifically requested a withdrawal of his voluntary departure before it had expired. Petition for Writ of Certiorari at 11, *Dada v. Gonzales*, No. 06-1181 (U.S. Feb. 26, 2007). The BIA refused

The BIA's stance on the proper interplay of voluntary departure and motions to reopen has remained constant for over a decade.⁶³ In fact, its stance was the same when the motions to reopen were only in regulatory form and the voluntary departure provision was codified in the INA.⁶⁴ *Shaar* is the most often-cited BIA case addressing this issue.⁶⁵ Although the ruling relies on the earlier INA provision for voluntary departure, which has since been updated in the IIRIRA, as well as an uncodified motion to reopen regulation, the current language of the two provisions in the IIRIRA has changed minimally.⁶⁶ The BIA's decision in *Shaar* set the precedent that an alien who fails to depart within the granted voluntary departure period is "statutorily ineligible for suspension of deportation."⁶⁷ On appeal, the Ninth Circuit agreed with the BIA's reasoning.⁶⁸ Therefore, until recently, the courts and the BIA agreed that if an alien remained in the United States after the date set for voluntary

that request (which the Fifth Circuit upheld) and then subsequently deemed that the relief requested in Dada's motion to reopen was unavailable since he had stayed past his voluntary departure period. *Id.* at 10-12. The Court has a chance with its decision on this case to resolve the circuit split that is centered on the proper interplay of the voluntary departure and motion to reopen provisions.

63. *Compare Shaar*, 21 I. & N. Dec. 541, 548-49 (1996) (interim decision) ("[A] deportable alien must leave the United States within the time of voluntary departure . . . absent very limited exceptional circumstances."), *aff'd sub nom. Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998), *with Banda-Ortiz*, 445 F.3d at 391 ("The BIA has reasonably interpreted the governing statutes . . . to permit the filing and resolution of a motion to reopen, so long as it does not interfere with the . . . voluntary departure date . . ."), *and Azarte*, 394 F.3d at 1281 ("Under the BIA's current interpretation, . . . if an alien departs within his voluntary departure period, he forfeits any motion to reopen . . . because he is no longer within the United States.").

64. *See Shaar*, 21 I. & N. Dec. at 548-49; *Silva*, *supra* note 28, at 435 & n.32, 436 & n.35 (collecting prior, consistent BIA holdings).

65. *See, e.g., Dekoladenu v. Gonzales*, 459 F.3d 500, 505 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285); *Ugokwe*, 453 F.3d at 1327; *Azarte*, 394 F.3d at 1286-87.

66. *Compare* 8 U.S.C. § 1252b(e)(2) (1994) (repealed 1996) ("[A]ny alien allowed to depart voluntarily . . . who remains in the United States after the scheduled date of departure . . . shall not be eligible for relief . . . for a period of 5 years after the scheduled date of departure . . ."), *with* 8 U.S.C.A. § 1229c(a) (2000) (providing a period of 120 days for voluntary departure prior to the completion of deportation proceedings), *and id.* § 1229c(b) (providing a period of 60 days for voluntary departure after the conclusion of deportation proceedings). The biggest difference among these statutes is the time limits added to the latter two provisions.

67. *See Shaar*, 21 I. & N. Dec. at 549.

68. *See Shaar*, 141 F.3d at 956 ("We find no fault with [the BIA's] reading of the statute, for that is what the statute plainly says."). It is important to note that the Ninth Circuit's holding here was based on the INA before the enactment of the IIRIRA, which made specific changes to these provisions, most notably by adding strict time limits. *See supra* note 66 and accompanying text.

departure, the alien could not obtain relief unless exceptional circumstances existed.⁶⁹

The language of the IIRIRA has modified the voluntary departure and motion to reopen provisions slightly, mostly by adding strict time limits.⁷⁰ Even with these changes introduced by the IIRIRA, the BIA has consistently interpreted how these two provisions should interact in immigration law.⁷¹ The BIA continues to hold that if an alien voluntarily departs within the time period allotted, he forfeits all pending motions because he is no longer in the United States.⁷² Additionally, the BIA strictly holds that if an alien remains in the country beyond the period granted for voluntary departure, the alien is no longer eligible for the relief requested with a motion to reopen, and is precluded for ten years from seeking such relief.⁷³ It is this latter interpretation that has caused the most controversy among the circuit courts.

D. The Circuit Courts' Insight on the Proper Relationship of Voluntary Departure and Motions to Reopen

The Ninth Circuit, the same court that affirmed the BIA's ruling in *Shaar*, has taken the lead role in challenging the BIA's interpretation regarding the interplay between the voluntary departure and motion to reopen provisions.⁷⁴ In *Azarte v. Ashcroft*, the Ninth Circuit was the first to rule on the issue of what happens under the new IIRIRA standards to a pending motion to reopen after a voluntary departure period expires.⁷⁵

69. Rubenstein, *supra* note 28, at 12 (“[A]n alien who was granted voluntary departure but failed to secure a sufficient departure period from the BIA . . . was faced with having to choose between (1) voluntarily departing or (2) appealing a removal order at the risk of losing the benefits of voluntary departure.”). Exceptional circumstances did not include motions to reopen, and therefore relief was not available to an alien if he remained in the country after the voluntary departure period expired. *Shaar*, 21 I. & N. Dec. at 544; *see also id.* at 544-45 (holding that the IJ's inability to hear motions before the voluntary period has expired cannot be seen as an exceptional or unusual circumstance given the “heavy caseload” of IJs). *But see* Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) (criticizing the “[r]epeated egregious failures of the Immigration Court”).

70. *See supra* notes 34, 42 and accompanying text.

71. *See supra* note 63.

72. *E.g.*, Chedad v. Gonzales, 497 F.3d 57, 62 (1st Cir. 2007); *Dekoladenu*, 459 F.3d at 504; *Ugokwe*, 453 F.3d at 1330; *Banda-Ortiz*, 445 F.3d at 391; *Barroso v. Gonzales*, 429 F.3d 1195, 1201 (9th Cir. 2005); *Kanivets v. Gonzales*, 424 F.3d 330, 334 (3d Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (*per curiam*); *Azarte*, 394 F.3d at 1281; *see also* 8 C.F.R. § 1003.2(d) (2007) (providing that if the alien is no longer in the United States, then he is no longer eligible for the relief that a motion to reopen provides).

73. *See Chedad*, 497 F.3d at 61; *Azarte*, 394 F.3d at 1282 & n.2.

74. *See Dekoladenu*, 459 F.3d at 504 (discussing *Azarte*'s influence on sister circuits); *Ugokwe*, 453 F.3d at 1329-30 (same).

75. *Azarte*, 394 F.3d at 1287 (“[W]e must interpret the new IIRIRA provisions in the first instance.”).

Azarte was a typical deportation case.⁷⁶ The Azartes, natives of Mexico, lost their removal hearing and their subsequent appeal to the BIA, and were ordered to leave the country.⁷⁷ Despite the outcome of the hearing, their request for voluntary departure was granted.⁷⁸ Seven days before their time to voluntarily depart expired, the Azartes timely filed a motion to reopen with the BIA.⁷⁹ The motion offered new information about their family's status in an attempt to show an exceptional need to stay in the country.⁸⁰ The BIA, after a six-month delay, held that because the Azartes had stayed past their voluntary departure period, they were ineligible for cancellation of removal.⁸¹ The Azartes then timely filed an appeal with the U.S. Court of Appeals for the Ninth Circuit.⁸²

The Ninth Circuit repudiated the BIA's interpretation of the interrelationship of these two provisions, holding that the BIA's

76. 394 F.3d 1278. Salvadore Azarte and Celia Castellon, of Mexico, illegally entered the United States in 1987. They stayed in California, where they got married and had two children. *Id.* at 1280. In April 1997, the INS began removal hearings against the couple, charging that they were in the United States illegally. *Id.* The Azartes conceded their removability, but requested that their removal be cancelled, or in the alternative, that they be granted voluntary departure. In April 1999, the IJ denied their cancellation of removal request because the Azartes had not shown that exceptional or extreme hardship would result if they were forced to leave the United States. *Id.* The Azartes appealed the decision. On April 23, 2002, the BIA affirmed, and allowed the Azartes an additional thirty days to voluntarily depart. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* at 1280-81. Along with the motion to reopen, the Azartes also requested a stay of deportation. This is notable because the court did not completely answer the question of whether the voluntary departure period is *automatically* tolled while a motion to reopen is pending. *See id.* at 1288 n.20. Instead, the Ninth Circuit stated that it would not address the issue because the Azartes had requested a stay of removal; the court then inferred that this request also implied a request for a stay of their voluntary departure period. *Id.* However, in 2005, the Ninth Circuit, in *Barroso v. Gonzales*, held that the voluntary departure period should be *automatically* tolled whether or not a request to stay deportation (or voluntary departure) is made. *See Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005).

80. *Azarte*, 394 F.3d at 1281. The new information concerned the mental and physical health of the Azartes' son. He had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), had "inadequate control over his bodily functions," and suffered from anxiety and depression. *Id.* When the Azartes filed their motion to reopen, they offered this new evidence to the BIA, "hop[ing] that this information would persuade the BIA that their departure from the United States would constitute an exceptional and extremely unusual hardship for their American-citizen son." *Id.* The Azartes stated that they depended on medical insurance from Mr. Azarte's job to pay for their son's treatment, and that they could not afford to continue the treatment if they were deported. *Id.*

81. *Id.*

82. *Id.*

interpretation had drastic negative consequences that were unintended by Congress.⁸³ The BIA rarely hears a motion to reopen within sixty days of its being filed.⁸⁴ Therefore, no realistic opportunity exists for an alien who has been granted voluntary departure to use his statutory right to a motion to reopen the deportation hearing.⁸⁵ The Azartes faced a no-win situation because of the BIA's reading of these two provisions.⁸⁶ Regardless of the new information that may have changed their position as illegal aliens, if the Azartes left within their voluntary departure period, they would forfeit any right to a reopening of their case.⁸⁷ On the other hand, if they stayed beyond the time allotted in the grant of voluntary departure, the Azartes would forfeit any pending motion to reopen.⁸⁸ From this, the Ninth Circuit reasoned that Congress could not have intended such a result when it codified these two provisions in the IIRIRA in 1996.⁸⁹

Holding that the BIA's interpretation was erroneous, the court attempted to offer its own statutory interpretation of the two provisions.⁹⁰ The court began by stating that deference to the view of an administrative agency is not necessary when "normal principles of statutory construction suffice" to determine the statute's meaning.⁹¹ The Ninth Circuit pointed out that this concept is especially true when the

83. *Id.* at 1281-82; *see also Barroso*, 429 F.3d at 1207-08 (affirming *Azarte*).

84. *Azarte*, 394 F.3d at 1282 ("[T]he BIA rarely if ever rules on a motion to reopen before an alien's voluntary departure period has expired . . ."); *see also* Press Release, Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002) (describing the "massive backlog of pending cases" and referring to the BIA as "a bottleneck in the system"), available at http://www.usdoj.gov/opa/pr/2002/August/02_eoir_489.htm.

85. *Azarte*, 394 F.3d at 1282 ("[T]he interpretation serves to deprive aliens who are afforded voluntary departure of their statutory right to a determination on the merits of motions to reopen."); *see also Kanivets v. Gonzales*, 424 F.3d 330, 334 (3d Cir. 2005).

86. *See Kanivets*, 424 F.3d at 334 (calling the situation a "Catch-22").

87. *Azarte*, 394 F.3d at 1281 ("[I]f an alien departs within his voluntary departure period, he forfeits any motion to reopen he may have filed because he is no longer within the United States." (citing 8 C.F.R. § 1003.2(d) (2004))); *see also Kanivets*, 424 F.3d at 334 ("[I]f the alien leaves the country within the period allowed for voluntary departure, he forfeits his motion to reopen." (citing § 1003.2(d))).

88. *Azarte*, 394 F.3d at 1281-82; *see also Kanivets*, 424 F.3d at 334-35 ("Under the BIA ruling, the result is that an alien who does not leave the United States within the time specified in the grant of voluntary departure is not entitled to adjustment of status. . . . Before enactment of the statute, the practice had been to extend voluntary departure freely so that the BIA would have time to rule on reopening before the alien would have been required to depart.").

89. *Azarte*, 394 F.3d at 1286-89.

90. *Id.*

91. *Id.* at 1285 (quoting *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 786 (9th Cir. 2004)).

agency's interpretation leads to an "absurd result."⁹² Therefore, the court discarded the principle (enunciated in *Chevron v. Natural Resources Defense Council, Inc.*) that deference is owed to agency interpretations.⁹³ Rather, the Ninth Circuit looked to other canons of statutory construction, primarily using the language of the statute itself to determine Congress' intent.⁹⁴ The court determined that "[w]ith respect to motions to reopen and voluntary departure, Congress' language in IIRIRA is clear and unambiguous."⁹⁵ Further, the court held that Congress intended to give aliens both the opportunity to file motions to reopen and to request voluntary departure.⁹⁶ Thus, the court refused to believe that Congress would enact the motion to reopen statute without any mention of a voluntary departure exception and yet not intend that it apply to the "significant" number of aliens who are granted voluntary departure.⁹⁷

Although the Ninth Circuit had ruled in *Shaar* that an alien's voluntary departure period is not tolled when a motion to reopen is pending, the *Azarte* court held that because the IIRIRA had "drastically altered . . . immigration law," these provisions required a new interpretation.⁹⁸ The

92. *Id.* at 1288-89.

93. *Id.* at 1285 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); see also *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-90 (5th Cir. 2006) (noting that the *Azarte* court declined to defer to the agency interpretation of the statute), *cert. denied*, 127 S. Ct. 1874 (2007). Where an agency is charged with interpreting its statutory mandate, courts will show that interpretation considerable deference so long as the interpretation is reasonable or permissible. See *Chevron*, 467 U.S. at 843-44; see also WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 145-49 (3d ed. 2006). Further, the Supreme Court has held that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)); see also Richard H. Fallon Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1097 (1998) ("Under the regime of *Chevron* . . . courts must frequently accord deference to statutory interpretations rendered by administrative agencies . . . even if the interpretation is not the best one.").

94. *Azarte*, 394 F.3d at 1285.

95. *Id.*

96. *Id.* at 1286 ("There is no doubt that Congress intended to give the Attorney General's designates the ability to grant voluntary departure for up to 60 days and allow aliens to file a motion to reopen within 90 days." (footnote omitted)).

97. *Id.* at 1289. In 2006, however, only ten percent of deportees were granted voluntary departure. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK, at Q1 (2007), available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

98. *Azarte*, 394 F.3d at 1286-87 (citing *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1170 (9th Cir. 2003)). The court argued that *Shaar* was decided at a time when motions to reopen had no statutory basis, and therefore the interrelationship of the voluntary

court found that the IIRIRA, with its statutory implementation of time limits, required a departure from once-settled case law espoused in *Shaar*.⁹⁹

In freshly interpreting the IIRIRA, the circuit court held that it was “obligated” to look at the statute in its entirety.¹⁰⁰ When applying this form of statutory construction to the IIRIRA, both voluntary departure and motions to reopen must have force, and neither should control the other.¹⁰¹ The current BIA reading, in the court’s view, eliminated some of the meaning of the motion to reopen by depriving all aliens granted voluntary departure of the motion to reopen as a form of relief.¹⁰² The Ninth Circuit believed that under a better interpretation, the voluntary departure period would be tolled if a motion to reopen is filed before the departure period expires.¹⁰³ According to the court, this would allow both provisions to have force without one negating or controlling the other.¹⁰⁴ The court also contended that this interpretation would satisfy the canon of statutory construction prohibiting any interpretation leading to absurd results.¹⁰⁵ Further, it would be “absurd to conclude that Congress ‘intended to allow motions to reopen to be filed but not heard.’”¹⁰⁶ Finally, the court observed that the tolling of voluntary departure periods would also satisfy the oft-applied canon that

departure and motion to reopen provisions could not be analyzed and applied in the same manner today. *Id.* at 1286. Additionally, when *Shaar* was decided, through frequent extensions, aliens were normally given as long as one year for voluntary departure, making it much more realistic that a motion to reopen would be considered and ruled on before they had to leave. *Id.* at 1286-87.

99. *Id.*

100. *Id.* at 1287-88. Another similar rule of statutory construction states that various provisions within a statute should be interpreted in a complementary fashion. See *Citizens’ Util. Ratepayer Bd. v. State Corp. Comm’n*, 956 P.2d 685, 703 (Kan. 1998) (holding that a fundamental rule of statutory construction is that “[c]ourts must ‘construe all provisions of statutes *in pari materia* with a view of reconciling and bringing them into workable harmony, if reasonably possible to do so’” (quoting *Kan.-Neb. Natural Gas Co. v. State Corp. Comm’n*, 271 P.2d 1091, 1092 (1954))). The Ninth Circuit does not discuss this rule of statutory interpretation, but it serves to strengthen the argument that the voluntary departure period should be automatically tolled when a motion to reopen is pending.

101. See *Azarte*, 394 F.3d at 1287-88.

102. *Id.*

103. *Id.* at 1288.

104. *Id.* (discussing that this approach would be “more consistent” with the statute’s thrust, thereby “effectuat[ing] both statutory provisions”).

105. *Id.* at 1288.

106. *Id.* at 1289 (quoting *Shaar v. INS*, 141 F.3d 953, 960 (9th Cir. 1998) (Browning, J., dissenting)). This supposedly absurd result would be reality if the BIA’s ruling is accepted and put into practice by the circuit courts.

“deportation statutes should be construed in favor of the alien.”¹⁰⁷ Not tolling the voluntary departure period would preclude many aliens from obtaining redress when their circumstances change; therefore, the Ninth Circuit argued that the BIA interpretation could not be correct.¹⁰⁸ Consequently, the Ninth Circuit remanded the *Azartes*’ motion to reopen with instructions for the BIA to consider the motion on its merits.¹⁰⁹

Although the Ninth Circuit overruled the BIA’s interpretation in *Azarte*, in subsequent decisions the BIA continued to rule as it had previously, refusing to toll the voluntary departure period when a motion to reopen is pending.¹¹⁰ As a result, other circuits began to follow in the Ninth Circuit’s footsteps in overturning the BIA’s interpretation.¹¹¹ The Third, Eighth, and Eleventh Circuits have now held that the BIA’s interpretation is erroneous and that voluntary departure periods should be automatically tolled when a motion to reopen is pending.¹¹²

107. *Id.* (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 962 (9th Cir. 2004)).

108. *Id.*

109. *Id.*

110. *See, e.g.*, *Chedad v. Gonzales*, 497 F.3d 57, 58 (1st Cir. 2007).

111. *See Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1331 (11th Cir. 2006) (“We adopt the rule established in *Azarte* that the timely filing of a motion to reopen tolls the period of voluntary departure pending the resolution of the motion to reopen.”); *Kanivets v. Gonzales*, 424 F.3d 330, 336 (3d Cir. 2005) (“[W]e hold that because *Kanivets* timely filed his petition for reopening, the BIA should decide his motion for reopening on the merits.”); *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam) (“We agree with the view in *Azarte* that *Sidikhouya* must be afforded an opportunity to receive a ruling on the merits of his timely filed motion to reopen . . .”).

112. *See Ugokwe*, 453 F.3d at 1329-31; *Kanivets*, 424 F.3d at 334-36; *Sidikhouya*, 407 F.3d at 952. Though these three courts explicitly state that they are basing their decisions on the reasoning set forth in *Azarte*, *see supra* note 110, a slightly different question was posed in *Azarte*. There, the plaintiffs requested a stay of their voluntary departure. *Azarte*, 394 F.3d at 1281. The court noted that it would not reach the question of whether the voluntary departure period should be automatically tolled, *id.* at 1288 n.20, but rather held only that it should be tolled while a motion to reopen is pending and a stay is requested, *id.* at 1289. In dictum, however, the court suggested that automatically tolling the voluntary departure period while a motion to reopen is pending “would be consistent with the legislative scheme.” *Id.* at 1288 n.20. Less than a year later, the Ninth Circuit finally ruled that voluntary departure periods should be automatically tolled while a motion to reopen is pending, regardless of whether a stay is requested. *Barroso v. Gonzales*, 429 F.3d 1195, 1207-08 (9th Cir. 2005). Despite the more recent *Barroso* decision, however, circuit courts continue to cite *Azarte* for support of automatically tolling the voluntary departure period. *See supra* note 110. Therefore, this Comment will also refer to the reasoning as “*Azarte* logic” when discussing whether voluntary departure should be automatically tolled.

The Eighth Circuit was the first to apply *Azarte's* reasoning in its April 2005 opinion in *Sidikhouya v. Gonzales*.¹¹³ The Third Circuit followed soon after, overturning the BIA's ruling in *Kanivets v. Gonzales*.¹¹⁴ Finally, in June 2006 the Eleventh Circuit overturned the BIA's decision in *Ugokwe v. United States Attorney General*.¹¹⁵ These decisions not only provide that the BIA's interpretation creates an absurd result, but have relied heavily on *Azarte* in doing so.¹¹⁶

E. *The Creation of a Circuit Split – The Fifth Circuit Decides Banda-Ortiz v. Gonzales*

By the end of 2005, it appeared that circuit by circuit, the BIA's interpretation was slowly being discredited.¹¹⁷ However, the Fifth Circuit halted this trend when, in 2006, it rejected the holding in *Azarte* and attacked the Ninth Circuit's reasoning and method of statutory

113. *Sidikhouya*, 407 F.3d at 952. The plaintiff, Youssef Sidikhouya, a citizen of Morocco, came to the United States on a visitor's visa and never left. *Id.* at 951. He was ordered to appear before an IJ in December 2001. He conceded removability and requested voluntary departure, which was granted; his request for a continuance pending his labor certification application, however, was denied. *Id.* Sidikhouya appealed to the BIA in October 2002. He then proceeded to marry a U.S. citizen, who filed a Petition for Alien Relative, which allows U.S. citizens to establish a relationship to an alien wishing to immigrate to the country. *Id.*; see U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., OMB FORM NO. 1615-0012, I-130, PETITION FOR ALIEN RELATIVE ¶ 1 (2005), available at <http://www.uscis.gov/files/form/i-130.pdf>. The BIA affirmed the IJ's ruling in January 2004 and Sidikhouya sought a motion to reopen in February, before his voluntary departure period had expired. *Sidikhouya*, 407 F.3d at 951. In his motion, he offered new evidence consisting of documents establishing his marriage to a U.S. citizen. The next month, however, the BIA denied Sidikhouya's motion to reopen because he had failed to leave within his voluntary departure period. *Id.*

114. *Kanivets*, 424 F.3d at 335-36. Oleg Kanivets, a citizen of Kyrgyzstan, filed for asylum on August 2, 1999, more than six months after he was to leave the U.S. *Id.* at 331. He alleged that he was a victim of religious persecution, which resulted in physical assaults, hospital stays, and unemployment. *Id.* at 331-32. The IJ refused him asylum but granted him sixty days of voluntary departure. The BIA affirmed in October 2002 and granted an additional thirty days for voluntary departure. *Id.* at 332. In November 2002, Kanivets timely filed a motion to reopen based on his alien worker certification and his employer's pending immigration petition. In July 2003, the BIA denied this motion on the ground that Kanivets had stayed past his voluntary departure period and therefore was ineligible for readjustment of his status. *Id.* at 332-33.

115. *Ugokwe*, 453 F.3d at 1330-31. In April 2004, an IJ found that Nigerian citizen Mildred Ugokwe was illegally residing in the U.S. because she had overstayed her visa. *Id.* at 1326-27. She was given until August 2004 to depart voluntarily. On July 28, 2004 she filed a timely motion to reopen based on her marriage to a U.S. citizen. *Id.* at 1327. The IJ did not issue a ruling until after the voluntary departure period expired and then denied her motion, reasoning that Ugokwe had stayed past her voluntary departure period. *Id.*

116. See *supra* notes 110-11 and accompanying text.

117. See *Barroso*, 429 F.3d 1195 (decided November 18, 2005); *Kanivets*, 424 F.3d 330 (decided September 7, 2005); *Sidikhouya*, 407 F.3d 950 (decided May 17, 2005).

interpretation.¹¹⁸ In *Banda-Ortiz v. Gonzales*, the Fifth Circuit concluded that voluntary departure was a benefit only conferred on aliens who meet certain criteria, such as having good moral character; and even then granted only to those aliens that specifically request such relief.¹¹⁹ Therefore, the court did not view the BIA's interpretation as absurd; instead, it regarded voluntary departure as a privilege that must be requested.¹²⁰ The privilege comes with a price: the alien must forego any benefit from a motion to reopen, if such a motion is not ruled on by the time the voluntary departure period expires.¹²¹

Much like the *Azarte* court, the Fifth Circuit began by looking directly to the language of the INA as amended by the IIRIRA.¹²² The court reasoned that automatically tolling the voluntary departure period would almost always cause that period to exceed 120 days, in direct conflict with the limitation of the statute.¹²³ The Fifth Circuit also found that the

118. *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006) (contradicting the Ninth Circuit's finding that the BIA's interpretation to not toll the voluntary departure period was "nonsensical" (quoting *Azarte v. Ashcroft*, 394 F.3d 1278, 1288-89 (9th Cir. 2005))), *cert. denied*, 127 S. Ct. 1874 (2007).

119. *See id.* at 389 (quoting 8 C.F.R. § 240.25(c)); *see also supra* note 44 and accompanying text. Mexican citizen Sergio Banda-Ortiz was charged with removability, being in the country "without being admitted or paroled," in March 2000. *Banda-Ortiz*, 445 F.3d at 388. He conceded removability but requested a cancellation of his removal, "claiming that his departure would impose 'exceptional and extremely unusual hardship' on his older son and adoptive parents." *Id.* Alternately, he requested voluntary departure. The IJ denied his request for cancellation but granted voluntary departure. *Id.* Banda-Ortiz appealed to the BIA, which affirmed the IJ's decision and granted Banda-Ortiz a thirty-day voluntary departure period. Rather than depart, he then filed a timely motion to reopen in order to introduce "new evidence of hardship to his family that would result from his departure." *Id.* Eventually, after some procedural complications, his motion was denied because he failed to depart before the expiration of his voluntary departure period. *Id.*

120. *Banda-Ortiz*, 445 F.3d at 389-90 ("Voluntary departure is the result of an agreed upon exchange of benefits between an alien and the Government."). The court went on to explain the benefits an alien receives by opting to pursue voluntary departure:

- 1) the ability to choose his own destination point; 2) the opportunity to put his affairs in order without fear of being taken into custody; 3) freedom from extended detention while the government prepares for his removal; 4) avoidance of the stigma of forced removal; and 5) continued eligibility for an adjustment of status.

Id. (citing *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004)).

121. *Id.* at 390 (citing 8 U.S.C. § 1229c(d)).

122. *See id.* at 389-90; *see also supra* note 93 and accompanying text. This approach is the standard first step in statutory interpretation. *See, e.g.,* *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004).

123. *See Banda-Ortiz*, 445 F.3d at 390. The court reasoned that because 8 U.S.C. § 1229c(b)(2) provides that voluntary departure must be limited to a period of sixty days, "[a]utomatic tolling would effectively extend the validity of [the alien's] voluntary departure period well beyond the sixty days that Congress has authorized." *Id.*; *see also* 8

statute plainly states that an alien who fails to depart during his voluntary departure period loses his eligibility for the regularization of his immigration status.¹²⁴ The Fifth Circuit held that the BIA properly interpreted the INA to prohibit automatic tolling of the voluntary departure period when an alien files a motion to reopen.¹²⁵ However, a debate existed even within the Fifth Circuit, exemplified by Judge Jerry Smith's strong dissent in *Banda-Ortiz*, which reaffirmed the *Azarte* logic.¹²⁶

F. The Fourth Circuit joins the Fifth Circuit – Dekoladenu v. Gonzales

The Fourth Circuit joined the Fifth Circuit in June 2006 in *Dekoladenu v. Gonzales*.¹²⁷ Agreeing with the *Banda-Ortiz* court, the Fourth Circuit reasoned that voluntary departure is a benefit rather than a right.¹²⁸ The court also applied the Fifth Circuit's logic with respect to automatic tolling, holding that such tolling violates the express language of the IIRIRA's strict time limits for voluntary departure.¹²⁹ Additionally, the Fourth Circuit based its decision on *Chevron* deference.¹³⁰ Because the

C.F.R. § 1240.26(f) (2007) (“In no event can the total period of time, including any extension, exceed . . . 60 days as set forth in section 240B of the Act [8 U.S.C. § 1229c(b)(2)].”).

124. 8 U.S.C.A. § 1229c(d)(1) (West Supp. 2007); *see Banda-Ortiz*, 445 F.3d at 390.

125. *Banda-Ortiz*, 445 F.3d at 391.

126. *Id.* at 393 (Smith, J., dissenting) (“It makes little sense why Congress would codify a right to file a motion to reopen ‘within 90 days of the date of entry of a final administrative order of removal,’ § 1229a(c)(7)(C)(i), if, in a substantial number of cases, the order of removal itself would result in forfeiture of the motion.”).

127. 459 F.3d 500 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285). Christopher Dekoladenu, a citizen of Ghana, applied for asylum and withholding of removal in June 2000, nearly two years after his six-month visa expired in 1998. *Id.* at 502. He was ordered to appear at a removal hearing, and in March 2003 he asked that the IJ “adjourn and continue or terminate the removal proceedings” because of various employment applications that were pending. *Id.* The IJ denied the request but granted Dekoladenu a voluntary departure date of July 7, 2003. *Id.* Dekoladenu filed a timely motion to reopen on that day but the IJ denied the motion and the BIA affirmed. The Board stated that Dekoladenu no longer had a right to a motion to reopen because he had failed to depart within his voluntary departure period. *Id.* at 502-03.

128. *Id.* at 506 (“Voluntary departure is not a right, but a *benefit*. . . . Because voluntary departure is a privilege that is only available to a subset of removable aliens, it is neither ‘absurd’ nor ‘nonsensical’ to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen.”); *see also Banda-Ortiz*, 445 F.3d at 389-90.

129. *Dekoladenu*, 459 F.3d at 506-07; *see also Banda-Ortiz*, 445 F.3d at 390.

130. *Dekoladenu*, 459 F.3d at 507 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)); *see also supra* note 92 and accompanying text.

court concluded the BIA's decision was more than reasonable, it showed the decision deference.¹³¹

The Fourth Circuit also responded to the argument presented in *Azarte* that ambiguous deportation statutes should be construed in favor of aliens.¹³² Because in its view the statute was unambiguous, the court declined to apply this canon.¹³³ The Fourth Circuit concluded that the INA, as amended by the IIRIRA, clearly laid out the function of these two provisions, including the strict time limits.¹³⁴ Based on this belief, the Fourth Circuit determined that the reasoning of the *Azarte* line of cases expressly violated the language of the INA.¹³⁵

G. *The First Circuit Makes the Circuit Split Four to Three – Chedad v. Gonzales*

The First Circuit joined with the Fourth and Fifth Circuits in July 2007 when it decided *Chedad v. Gonzales*.¹³⁶ The First Circuit closely followed

131. *Dekoladenu*, 459 F.3d at 506-07. The Fourth Circuit also based its decision on another canon of statutory interpretation, that a specific provision controls a general provision. *Id.* at 505. The court held that voluntary departure is more specific and thus should control the motion to reopen provision. *Id.* at 505-06. This is true because “[t]he voluntary departure provision applies to *certain* removable aliens . . . while the motion to reopen provision applies to *all* aliens subject to removal.” *Id.* In applying the specific-controlling-the-general method of statutory construction, the court found that both the voluntary departure and the motion to reopen provisions continue to have effect, by making available motions to reopen to aliens granted voluntary departure without making a specific request for such relief. *Id.* at 506. Using this method, “the apparent conflict the *Azarte* court found between the two statutes disappears.” *Id.*

132. *Id.* at 507 n.7 (“[T]he *Azarte* court’s reliance on ‘the well-established canon of construction that deportation statutes should be construed in favor of the alien’ is misplaced.” (quoting *Azarte v. Ashcroft*, 394 F.3d 1278, 1289 (9th Cir. 2005))).

133. *Id.* at 507; cf. *Kwai Fun Wong v. United States*, 373 F.3d 952, 962 (9th Cir. 2004) (“[T]he twin background principles . . . [are] a strong presumption favoring judicial review of administrative decisions and that ambiguities in deportation statutes should be construed in favor of the alien . . .”).

134. *Dekoladenu*, 459 F.3d at 504; see also *id.* at 507 (“[W]e believe that the statutory provisions governing motions to reopen and voluntary departure clearly indicate that filing a motion to reopen does not toll the voluntary departure period.”).

135. See *id.* at 506-07.

136. 497 F.3d 57 (1st Cir. 2007). Adil Chedad, of Morocco, appeared before an IJ in May 1998 for removal proceedings for overstaying his six-month nonimmigrant visa, which had been issued in 1994. *Id.* at 58-59. He admitted having overstayed, but asked for a continuance because his wife, a lawful permanent resident, had filed an application for citizenship on his behalf. *Id.* at 59. The continuance was granted; however, when Chedad appeared before an IJ in March 1999, his application for citizenship was still pending. The IJ denied his request for another continuance and instead granted Chedad voluntary departure. *Id.* Chedad appealed this final decision. While his appeal was pending, Chedad’s wife became a U.S. citizen, and Chedad asked the BIA to remand, “citing his newly minted status as the spouse of a United States citizen, as well as prior approval of

the reasoning of both *Dekoladenu* and *Banda-Ortiz*.¹³⁷ It ruled that the voluntary departure period should not be tolled when a motion to reopen is granted because the applicable statutes and regulations clearly set time limits on the length of the voluntary departure period.¹³⁸ The First Circuit, however, conceded that “[t]his may or may not be wise policy, but it is, we believe, the most plausible construction of the statute.”¹³⁹

II. AN ANALYSIS OF THE CIRCUIT SPLIT: WHICH THEORY OF STATUTORY CONSTRUCTION SHOULD PREVAIL?

The split between the First, Fourth, and Fifth Circuits and the Third, Eighth, Ninth, and Eleventh Circuits is one characterized by disagreements over statutory interpretation.¹⁴⁰ Though both sides have interpreted the same statutes, the results are very different.¹⁴¹ The First, Fourth, and Fifth Circuits have affirmed the BIA’s interpretation of the proper interplay between the voluntary departure and motion to reopen provisions, whereas the other four circuits have opposed the BIA’s

his I-130 petition.” *Id.* The BIA affirmed the decision on October 25, 2002, and granted him thirty days to voluntarily depart. *Id.* at 59-60.

On November 22, 2002, before his voluntary departure period expired, Chedad filed a timely motion to reopen based on the new circumstances surrounding his eligibility for citizenship. *Id.* at 60. Eventually, the motion was heard by an IJ who determined that because Chedad had failed to leave the country within his voluntary departure period, he was ineligible for adjustment of status. The BIA affirmed this decision and Chedad subsequently appealed to the First Circuit. *Id.*

137. *See id.* at 63-64.

138. *Id.*

139. *Id.* at 64.

140. *Compare id.* at 63 (holding that because the IIRIRA “evin[ces] a congressional intent to make the benefits of voluntary departure available only to aliens who agree to . . . leave the country willingly,” filing a motion to reopen does not toll the departure deadline), and *Dekoladenu*, 459 F.3d at 507 (“[W]e believe that the statutory provisions governing motions to reopen and voluntary departure clearly indicate that filing a motion to reopen does not toll the voluntary departure period.”), and *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 390 (5th Cir. 2006) (“Automatic tolling would effectively extend the validity of [the] voluntary departure period well beyond the sixty days that Congress has authorized.”), *cert. denied*, 127 S. Ct. 1874 (2007), with *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1330-31 (11th Cir. 2006) (finding that the BIA’s interpretation of § 1229a(c)(7) improperly “creates an exception” to the statute’s plain language), and *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005) (holding that construing 8 C.F.R. § 1003.2(f) “as applying to a grant of voluntary departure” would produce an impermissibly “absurd result[.]” (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004))), and *Kanivets v. Gonzales*, 424 F.3d 330, 334-35 (3d Cir. 2005) (holding that timely filing a motion to reopen tolls § 1229a(c)(7)’s limitations period until the BIA rules on the motion), and *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam) (holding that the BIA’s denial of plaintiff’s motion to reopen “solely on the ground that he had overstayed his voluntary departure period” was an abuse of discretion).

141. *See* 8 U.S.C.A. § 1229a(c)(7) (West 2005 & Supp. 2007) (motion to reopen); 8 U.S.C. § 1229c (2000) (voluntary departure).

stance, relying heavily on the assertion that because the BIA's statutory construction leads to absurd results, it cannot be upheld.¹⁴² A review of the statutory interpretation methods used by the circuit courts will illuminate the disagreement among them.

A. The First Canon of Statutory Interpretation: Look to the Text

The first step of statutory interpretation is to look to the language of the statute to examine its plain meaning.¹⁴³ Congress codified each of the two provisions with strict guidelines for their application to aliens subject to removal proceedings.¹⁴⁴ However, in an apparent oversight, neither provision discusses its role in relation to the other, despite the fact that they overlap.¹⁴⁵ The question thus becomes: are the voluntary departure and motion to reopen provisions ambiguous with regard to their proper interrelationship, or is there plain language that leads to a clear result?¹⁴⁶

142. See *supra* note 139.

143. See *Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th Cir. 2005); see also *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004) (“[O]ur analysis begins with the language of the statute When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.” (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993))).

144. See 8 U.S.C.A. § 1229a(c)(7); 8 U.S.C. § 1229c. Each alien is limited to one motion to reopen, 8 U.S.C.A. § 1229a(c)(7)(A), which must be “filed within 90 days of the date of entry of a final administrative order of removal,” *id.* § 1229a(c)(7)(C)(i). The voluntary departure provision has an extensive list of guidelines, including strict eligibility criteria, time limits providing that the voluntary departure period cannot exceed 120 days, and a list of consequences an alien faces if he fails to depart within the granted departure period. 8 U.S.C. § 1229c(a)-(d).

145. See *supra* note 47 and accompanying text. The regulations implementing these provisions create further confusion as “[a]ny departure from the United States . . . occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.” 8 C.F.R. § 1003.2(d) (2007); see also *Kanivets*, 424 F.3d at 334 (“An alien may timely file a petition for reopening, but if the BIA does not decide the petition within the period for voluntary departure, the alien loses the right to have a ruling.”).

146. Compare *Azarte*, 394 F.3d at 1288-89, with *Dekoladenu*, 459 F.3d at 506-07. One of the basic disagreements of the circuit split is whether the language of these two provisions is ambiguous. The answer to this question greatly affects the interpretation of the IIRIRA. The Ninth Circuit, in *Azarte*, found that the voluntary departure provision and the motion to reopen provision are not ambiguous separately, but that their interrelationship is ambiguous. *Azarte*, 394 F.3d at 1285-86. The Ninth Circuit cleverly used this “in some ways ambiguous, in some ways unambiguous” argument to its advantage. First, the court characterized the provisions as unambiguous when it discussed whether deference to the BIA was appropriate under *Chevron*. See *id.* at 1285 (“The first step under *Chevron* is to determine whether the statutory meaning is unambiguous. No deference to the view of the administrative agency is necessary when ‘normal principles of statutory construction suffice’ to determine the statute’s meaning.”) (citations omitted); see also *supra* note 92. Second, the court emphasized that the *interplay* of the voluntary departure and motion to reopen provisions was ambiguous, and therefore the canon of statutory construction that immigration statutes should be construed in favor of aliens

When looking to the language of the statute for its plain meaning, the Ninth Circuit in *Azarte* insisted that it is also necessary to apply the canon of statutory construction which holds that “courts are generally obligated to analyze the statute as a whole.”¹⁴⁷ The Ninth Circuit reasoned that when analyzing the INA as a whole, Congress could not have intended to have the voluntary departure provision control the motion to reopen provision.¹⁴⁸ Therefore, to ensure that both statutes have force, it is necessary to automatically toll the voluntary departure period while a motion to reopen is pending.¹⁴⁹ It concluded that the BIA’s interpretation “deprives the motion to reopen provision of meaning,”¹⁵⁰ and therefore could not be correct. This argument may be theoretically sound; however, the court avoided interpreting what is *in* the text, and instead justified its interpretation by what is *not* in the plain language.¹⁵¹

The First, Fourth, and Fifth Circuits have countered the Ninth Circuit’s reasoning by referencing the plain language of the statute.¹⁵² These courts cite the language of section 1229c(a), which directly states that the voluntary departure period shall not exceed 120 days.¹⁵³ These circuits argue that the Ninth Circuit’s reasoning in *Azarte* violates the explicit time limit imposed in the statute, and therefore the plain language of the text unambiguously precludes the voluntary departure periods from being automatically tolled.¹⁵⁴

applied. *See Azarte*, 394 F.3d at 1289. The Fourth Circuit responded to the Ninth Circuit’s subtle application of the statutory ambiguity in *Dekoladenu*. *See Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006) (holding the “statutory provisions governing motions to reopen and voluntary departure” unambiguous and therefore granting deference to the decision of the BIA), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285).

147. *Azarte*, 394 F.3d at 1287. The court described the purpose of the “Whole Act Rule” is to give a statute “such a construction as will carry into execution the will of the Legislature.” *Id.* at 1288 (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). Further, the court held that statutes must be interpreted “such that [each] provision[] ha[s] force.” *Id.*

148. *Id.*

149. *See id.*

150. *Id.*

151. *See id.* at 1288-89 (“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.”).

152. *See Chedad v. Gonzales*, 497 F.3d 57, 63-64 (1st Cir. 2007); *Dekoladenu v. Gonzales*, 459 F.3d 500, 506 (4th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389-91 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007).

153. *See, e.g., Dekoladenu*, 459 F.3d at 507 (citing 8 U.S.C. § 1229c(a)(2)(A) (2000)).

154. *See id.* at 505; *Banda-Ortiz*, 445 F.3d at 389-91. The Fourth Circuit also looked to the plain language of the text to interpret the interrelationship of these two provisions

B. Does the BIA's Interpretation Lead to an Absurd Result?

Another important question at the heart of this circuit split is whether the BIA's interpretation of the voluntary departure and motion to reopen provisions leads to an absurd result.¹⁵⁵ The Ninth Circuit and those circuits that follow the logic cited in *Azarte* have found that to not automatically toll the voluntary departure period when a motion to reopen is pending leads to an absurd result.¹⁵⁶ Therefore, these circuits reasoned that the BIA's interpretation cannot be followed even if it is

while applying the "canon of statutory construction that a specific statutory provision controls a more general one." *Dekoladenu*, 459 F.3d at 505 (quoting *Warren v. N.C. Dep't of Human Res.*, 65 F.3d 385, 390 (4th Cir. 1995)). In *Dekoladenu*, the Fourth Circuit argued that when this canon is applied, the two provisions retain their meaning, but the voluntary departure provision controls the motion to reopen because it is applied to a more specific class of individuals. *Id.* at 505-06. Although the Fourth Circuit's argument is convincing, the "specific provision controlling the general" canon appears to have less applicability than the "statute as a whole" canon, as applied by the Ninth Circuit. Compare *Azarte*, 394 F.3d at 1288 ("Such an interpretation would effectuate both statutory provisions. IJs and the BIA . . . would retain the authority Congress intended: to determine one non-frivolous motion to reopen."), with *Dekoladenu*, 459 F.3d at 506 ("[Our] interpretation gives effect to both provisions. A motion to reopen remains available to all aliens, but an alien who requests voluntary departure will forfeit his right to a decision on his motion to reopen if the IJ grants his request."). Therefore, this argument ultimately is not persuasive. However, the Fourth Circuit's use of this canon supports its view that the plain language of the statute indicates that these provisions are not ambiguous in their relationship with each other, and that refusing to toll the voluntary departure period while a motion to reopen is pending does not lead to "an absurd result." *Dekoladenu*, 459 F.3d at 506. The Fourth Circuit argued that the language of these provisions demands a clear result, especially when this canon of statutory construction is applied. *Id.* at 507.

155. See *supra* notes 104-05 and accompanying text. The "absurd results" argument, first utilized by the Ninth Circuit in *Azarte*, has been applied by the other circuits upholding the *Azarte* logic to counter the argument made by the Fourth and Fifth Circuits that the plain language of the text clearly supports the result advocated by the BIA: that the voluntary departure period should not be tolled while a motion to reopen is pending. Compare *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1329-31 (11th Cir. 2006), and *Kanivets v. Gonzales*, 424 F.3d 330, 334-35 (3d Cir. 2005), and *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam), and *Azarte*, 394 F.3d at 1288-89, with *Dekoladenu*, 459 F.3d at 506, and *Banda-Ortiz*, 445 F.3d at 389-90.

156. *Azarte*, 394 F.3d at 1288-89 ("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."). The "absurd results" principle of statutory construction provides that a statute need not be interpreted according to its plain meaning if that meaning leads to unintelligent results. See *id.*; see also *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("[A]uthoritative administrative constructions should be given the deference to which they are entitled, absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.") (emphasis added).

based on the plain language of the statute.¹⁵⁷ Their argument is sound: if an interpretation truly does lead to an absurd result, it is likely that Congress did not intend such a construction.¹⁵⁸

The First, Fourth, and Fifth Circuits have responded to this “absurd interpretation” argument by again emphasizing that Congress intended the granting of voluntary departure to be a benefit.¹⁵⁹ Therefore, to these circuits “it is neither ‘absurd’ nor ‘nonsensical’ to require aliens who wish to reap the benefits of voluntary departure to give up their right to a resolution of a motion to reopen.”¹⁶⁰ In addition, an alien must specifically request voluntary departure.¹⁶¹ Thus, when an alien makes such a request he acknowledges that he intends to leave the country within the granted time period and take advantage of the benefits that go along with voluntary departure.¹⁶² This, it is argued, is not an absurd result.¹⁶³ The First, Fourth, and Fifth Circuits’ argument, although arguably less fair, is based on firmer statutory analysis.¹⁶⁴

C. The Circuits’ Disagreement Over the Amount of Deference Given to the BIA’s Interpretation

Chevron deference mandates that a court give an agency’s interpretation deference when Congress has selected that agency to control a specific area of the law.¹⁶⁵ *Chevron* deference has frequently been applied to BIA rulings.¹⁶⁶ BIA decisions that have elements of statutory interpretation are given deference “when it appears that

157. *Azarte*, 394 F.3d at 1288-89. The circuits siding with *Azarte* agree that the best way to avoid this “absurdity” is to automatically toll the voluntary departure period when a motion to reopen is pending. See *Ugokwe*, 453 F.3d at 1329-31; *Kanivets*, 424 F.3d at 334-35; *Sidikhouya*, 407 F.3d at 952.

158. *Cf. Turkette*, 452 U.S. at 580.

159. See *Chedad v. Gonzales*, 497 F.3d 57, 63 (2007); *Dekoladenu*, 459 F.3d at 505-07; *Banda-Ortiz*, 445 F.3d at 390-91; see also *supra* notes 119-20 and accompanying text.

160. *Dekoladenu*, 459 F.3d at 506.

161. See 8 C.F.R. § 240.25(c) (2007); *id.* § 1240.26(b)(1)(i)(A); see also *Banda-Ortiz*, 445 F.3d at 389.

162. See *Chedad*, 497 F.3d at 63; *Dekoladenu*, 459 F.3d at 506; *Banda-Ortiz*, 445 F.3d at 389-90.

163. See sources cited *supra* note 161.

164. See Rubenstein, *supra* note 28, at 27-29.

165. See *supra* note 92 (discussing *Chevron* deference).

166. See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Nwolise v. U.S. INS*, 4 F.3d 306, 309 (4th Cir. 1993) (“[I]t is well established that the legal determinations of the Board in interpreting the Act are entitled to deference by this court. Indeed, we have stated that where ‘the BIA’s interpretation of the statutory section is neither inconsistent or unjustified, we [will] uphold the Board’s construction which, in its estimation, will better serve the legislative intent and purpose.’” (quoting *Chiravacharadhikul v. INS*, 645 F.2d 248, 251 (4th Cir. 1981)) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984))).

Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁶⁷ *Chevron* deference only applies when the plain language of the statute does not clearly indicate congressional intent.¹⁶⁸ Therefore, in cases of ambiguity, a court must accept the agency’s interpretation as long as it is reasonable and “is based on a permissible construction of the statute,”¹⁶⁹ even if such interpretation is not the best possible one.¹⁷⁰

The Fourth and Fifth Circuits reasoned that if, as *Azarte* holds, the statute is ambiguous with regard to the interrelationship of the two provisions,¹⁷¹ then *Chevron* deference should apply.¹⁷² These courts contended that if the statute is “silent or ambiguous with respect to the effect of a motion to reopen on the voluntary departure period, we would have to defer to the BIA’s interpretation of the statutes it administers.”¹⁷³ The BIA’s interpretation should be followed because it is reasonable¹⁷⁴ and based on a permissible construction of the statute.¹⁷⁵ The BIA’s interpretation is even more reasonable when voluntary departure is viewed as a benefit conferred on an alien.¹⁷⁶ This logical argument adheres to the principle of *Chevron* deference.¹⁷⁷

The Third, Eighth, Ninth, and Eleventh Circuits maintain that the *Chevron* deference principle can not control the BIA’s decision because doing so leads to both unreasonable and absurd results.¹⁷⁸ In particular, the Ninth Circuit cited past cases which support “rejecting and affording

167. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

168. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

169. *Dekoladenu v. Gonzales*, 459 F.3d 500, 507 (4th Cir. 2006) (quoting *Aguirre-Aguirre*, 526 U.S. at 424), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285).

170. Fallon, *supra* note 3, at 1097.

171. *See supra* notes 146-50 and accompanying text.

172. *See Dekoladenu*, 459 F.3d at 507; *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 1874 (2007).

173. *Dekoladenu*, 459 F.3d at 507.

174. *See Banda-Ortiz*, 445 F.3d at 391.

175. *Dekoladenu*, 459 F.3d at 507.

176. *See Dekoladenu*, 459 F.3d at 507; *Banda-Ortiz*, 445 F.3d at 391.

177. *See supra* note 92. Congress has given the Attorney General the power to decide whether voluntary departure should be granted. 8 U.S.C. § 1229c(a)(1), (b)(1) (2000). The Attorney General makes this decision after the IJ has entered an order granting the voluntary departure. *Id.* § 1229c(b)(1). Thus, Congress has given the power to apply, and therefore interpret, this statute to the DOJ, which implements the statute through the EOIR. *See supra* note 56 and accompanying text.

178. *See Azarte v. Ashcroft*, 394 F.3d 1278, 1288-89 (9th Cir. 2005); *see also Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1330-31 (11th Cir. 2006); *Barroso v. Gonzales*, 429 F.3d 1195, 1207 (9th Cir. 2005); *Kanivets v. Gonzales*, 424 F.3d 330, 334-35 (3d Cir. 2005); *Sidikhoyou v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (per curiam).

no deference to a legal interpretation by the BIA that ‘contravenes the statute and leads to absurd and wholly unacceptable results.’”¹⁷⁹ In these circuits’ view, the BIA’s interpretation contradicts Congress’ intention and therefore should be supplanted with a reading of the statute that gives effect to both provisions.¹⁸⁰ This is a reasonable position, allowing courts to overturn the BIA’s ruling on the narrow basis that Congress would not intend to produce a nonsensical result, as applied to these factual situations.¹⁸¹ It is questionable, however, whether the circuits’ application of the statutory text proves that the BIA’s interpretation truly is unreasonable and impermissible under the statute,¹⁸² or rather, that it is simply not the best result.¹⁸³

D. The Ninth Circuit Relies on the Canon of Construction that Immigration Statutes Should be Construed in Favor of Aliens

The final statutory canon referred to in the circuit court decisions is the principle that when a deportation statute is ambiguous, it should be construed in favor of aliens.¹⁸⁴ In *Azarte*, the Ninth Circuit viewed this canon as mandating that the voluntary departure period be automatically tolled when a motion to reopen is pending.¹⁸⁵ The Third, Eighth, Ninth, and Eleventh Circuits, therefore, would resolve the ambiguities of the

179. *Azarte*, 394 F.3d at 1288 (quoting *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004)); see also *United States v. Turkette*, 452 U.S. 576, 580 (1980) (reaffirming the rule that courts must avoid statutory interpretations that lead to absurd results).

180. See *Azarte*, 394 F.3d at 1288-89 (holding that in order to avoid an untenable result, both statutes must be given effect by tolling the voluntary departure period); see also *Ugokwe*, 453 F.3d at 1330-31 (joining the *Azarte* line of cases in order to not “ignore” an entire statutory provision); *Kanivets*, 424 F.3d at 334-35; *Barroso*, 429 F.3d at 1207; *Sidikhouya*, 407 F.3d at 952.

181. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (“[O]ne of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce ‘absurd’ results . . .”).

182. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that if a statute is silent or ambiguous, the court need only determine if a permissible construction exists).

183. See Fallon, *supra* note 3, at 1097.

184. Compare *Azarte*, 394 F.3d at 1289 (recognizing the statutory canon of construction that construes ambiguous deportation statutes in favor of aliens, and finding such ambiguities in the deportation statute in question), with *Dekoladenu v. Gonzales*, 459 F.3d 500, 507 n.7 (4th Cir. 2006) (holding that because there are no ambiguities in the statute, it need not be construed in favor of the alien), *petition for cert. filed*, 75 U.S.L.W. 3530 (U.S. Mar. 22, 2007) (No. 06-1285). The Supreme Court has recognized that the severe impact of deportation warrants construing deportation statutes in favor of aliens. See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948) (holding that “because deportation is a drastic measure and at times the equivalent of banishment or exile,” the narrowest reading possible will be used in an attempt to preserve the alien’s freedom).

185. *Azarte*, 394 F.3d at 1289.

INA by giving aliens an actual opportunity for relief.¹⁸⁶ The Fourth Circuit, however, has responded by referring back to its previous assertion that this statute is not in fact ambiguous; therefore, this particular canon of statutory construction does not apply.¹⁸⁷

III. HOW SHOULD THIS CIRCUIT SPLIT BE RESOLVED?: AN AMENDMENT, A SUPREME COURT DECISION, OR AN ADMINISTRATIVE RULE?

A. *An Amendment to Clarify the Proper Interrelationship of the Two Provisions*

The existence of this circuit split indicates that something needs to be done in order to ensure uniformity across the American judicial system. There are a few different ways that the conflict between the motion to reopen and the voluntary departure provisions can be resolved. First, to clarify its intent, Congress could pass an amendment to the INA explaining the proper interrelationship of the two provisions.¹⁸⁸ A well written amendment would be effective because it would provide both the courts and affected aliens (or their lawyers) with clear, unambiguous language dictating the proper result.¹⁸⁹ The problems, however, with relying on an amendment are that the process for passing such an

186. *Ugokwe v. U.S. Attorney Gen.*, 453 F.3d 1325, 1330 (11th Cir. 2006).

187. *Dekoladenu*, 459 F.3d at 506-07 & n.7. *Compare Azarte*, 394 F.3d at 1289 (determining that the two statutory provisions are incompatible with one another, unless the court's construction is accepted), *with Dekoladenu*, 459 F.3d at 506-07 (holding that "the more specific voluntary departure provision governs in those limited situations in which it applies," thus avoiding any conflict between the two provisions).

188. *See* Tapley, *supra* note 49, at 227-28 (proposing an amendment to the IIRIRA).

189. Several immigration bills have been introduced in Congress that contain language under which the interplay between voluntary departure and the motion to reopen provision would be directly affected by an amendment to 8 U.S.C. § 1229c, the voluntary departure provision. *See* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 211; Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 208. The substantive provision of one proposal states:

Except as expressly agreed to by the Secretary in writing in the exercise of the Secretary's discretion before the expiration of the period allowed for voluntary departure, *no motion*, appeal, application, petition, or petition for review shall affect, reinstate, enjoin, delay, stay, or toll the alien's obligation to depart from the United States during the period agreed to by the alien and the Secretary.

S. 2611, § 211(c)(5) (emphasis added); *see also* H.R. 4437, § 208(b)(4) (providing language nearly identical to that of the Senate bill). Neither bill has passed, but each would codify the First, Fourth, and Fifth Circuits' opinions by stating that the voluntary departure period should never be delayed, stayed or tolled on account of a motion. This result seems unfair to aliens who have been granted their request for voluntary departure and subsequently experience new circumstances which legitimately should affect their status in the United States.

amendment is extensive and varying interpretations are always possible when it comes to statutory language. On a substantive level, although tolling the voluntary departure period would be more fair for those aliens that have valid reasons for requesting a motion to reopen, it also provides an incentive for aliens who are granted voluntary departure to file a meritless motion in order to extend their stay in the United States and still retain the benefits of departing voluntarily.¹⁹⁰ For these reasons, an amendment that would toll the voluntary departure period while a motion to reopen is pending is not the best course of action at this time, especially in light of the need for an immediate solution.

B. Supreme Court Decision to Resolve This Circuit Split

In September 2007, the Supreme Court granted certiorari for *Dada v. Mukasey*, a case that was appealed from the Fifth Circuit.¹⁹¹ Procedurally, the facts of this case are almost identical to the others discussed in this article with one notable exception: the petitioner in *Dada* specifically requested a withdrawal of his voluntary departure before filing the motion to reopen.¹⁹² The Supreme Court now has the opportunity to resolve the circuit split with its decision in the *Dada* case. Based on oral arguments it seems likely the Court will rule against the Third, Eighth, Ninth and Eleventh Circuits' interpretation that the voluntary departure period should be automatically tolled when a motion to reopen is requested.¹⁹³ As the Supreme Court's questioning indicates, this result is too clearly contrary to the plain language of the statute.¹⁹⁴ Therefore it is unlikely that a Supreme Court decision will be able to both resolve this circuit split and provide the fairest result for aliens.

190. Brief for the Respondent at 33-34, *Dada v. Mukasey*, No. 06-1181 (U.S. Dec. 3, 2007).

191. *Dada v. Keisler*, 128 S. Ct. 36 (2007). *Dada*, like most of the cases discussed in this article, dealt with an alien who was granted voluntary departure and then filed a motion to reopen. Petition for Writ of Certiorari, *supra* note 62, at 10-11. *Dada* stayed past his voluntary departure period in order to await his hearing on the motion to reopen, but like other aliens before him, the BIA ruled that since he had stayed past the voluntary departure period, he was no longer entitled to the relief requested in his motion. *Id.* at 11. *Dada* appealed the BIA's decision to the Fifth Circuit, which followed the reasoning laid out in *Banda-Ortiz*, upheld the BIA's decision, and denied *Dada's* appeal in a one page unpublished opinion. *Dada v. Gonzales*, 207 F. App'x 425 (5th Cir. 2006).

192. Petition for Writ of Certiorari, *supra* note 62, at 11.

193. Transcript of Oral Argument at 19-20, *Dada*, No. 06-1181 (providing questions and responses by Justices Breyer, Scalia, and Stevens, which indicate that they are not comfortable contradicting the plain language of the IIRIRA); *see also id.* at 55-57 (revealing that the focus of the argument is shifting from the "automatic tolling" solution to adopting the regulation proposed by the DOJ).

194. Transcript of Oral Argument, *supra* note 193, at 19-20.

However, Dada may have a chance at succeeding on another related ground. After oral arguments, the Court directed the parties to provide supplemental briefs on the issue of whether or not an alien should be allowed to withdraw his grant of voluntary departure.¹⁹⁵ If the Court decides that such a voluntary withdrawal is permissible, then in effect this will provide aliens with a way to retain their right to a motion to reopen even after being granted voluntary departure. However, a Court decision based on that ground alone will not resolve the issue that existed in so many of the cases discussed in this article: specifically where an alien does not request to withdraw of his grant of voluntary departure.

*C. A Regulation from the Department of Justice that
Resolves the Circuit Split*

The third possibility for resolving this circuit split is an administrative regulation that clarifies the proper interplay of the voluntary departure and motion to reopen provisions. On November 30, 2007, the DOJ proposed such a regulation.¹⁹⁶ In the proposed regulation the grant of voluntary departure would automatically terminate if a motion to reopen is filed.¹⁹⁷ Such a rule would resolve the circuit split as well as provide a fair result for immigrants who are lawfully entitled to this motion to reopen. This proposed regulation does not contradict the plain language of the statute because there is no mention of terminating the grant of voluntary departure in the IIRIRA.¹⁹⁸ Also, an agency's interpretation of a statute is given such high deference¹⁹⁹ that a regulation is a useful tool to clear up this type of disagreement over statutory language. For these reasons, this proposed regulation is the best solution to resolving this circuit split while providing the most equitable outcome.

IV. CONCLUSION

The fact that a circuit split exists indicates that the INA, as amended by the IIRIRA, does not clearly indicate the proper interrelationship between the voluntary departure and the motion to reopen provisions. The language of the two provisions, specifically the strict voluntary

195. *Dada v. Mukasey*, No. 06-1181, 2008 WL 370895, at *1 (U.S. Jan. 14, 2008) (directing the parties to file supplemental briefs addressing “[w]hether an alien who has been granted voluntary departure and has filed a timely motion to reopen should be permitted to withdraw the request for voluntary departure prior to the expiration of the departure period”).

196. Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review, 72 Fed. Reg. 67674 (proposed Nov. 30, 2007).

197. *Id.* at 67674; see also *supra* note 54.

198. See 8 U.S.C.A. § 1229c (West 2005 & Supp. 2007).

199. See *supra* note 92 (discussing *Chevron* deference).

departure time limit, leads to one result supported by three circuits. However, fairness considerations, analyzing the statute as a whole, and giving each provision equal effect leads to a different result, which is supported by four circuits. Therefore the DOJ's proposed regulation, automatically terminating the grant of voluntary departure when a motion to reopen is filed, provides a result that is both in line with current statutory language and ensures that aliens have access to all of their statutorily given rights.

