

Such a conditional grant shall be converted to a grant when a grant is available.

(4) *Motion to reopen.* The Service may file a motion to reopen within 90 days after the alien is issued a grant of suspension of deportation or cancellation of removal pursuant to paragraphs (b)(1), (b)(2), or (b)(3) of this section, if after the issuance of a conditional grant by the Immigration Court or the Board the applicant committed an act that would have rendered him or her ineligible for suspension of deportation or cancellation or removal at the time of the conversion.

(5) *Travel for aliens conditionally granted suspension of deportation or cancellation of removal.* If the Immigration Court or the Board granted suspension of deportation or cancellation of removal on a conditional basis or, if the conditional grant by the Immigration Court was appealed to the Board and the Board issued such a conditional grant, the alien shall retain the conditional grant of suspension of deportation or cancellation of removal upon return to the United States following a temporary absence abroad and be permitted to resume completion of his or her case, provided that:

(i) The alien departed on or before September 30, 1998 with or without a grant of advance parole from the District Director; or

(ii) The alien, prior to his or her departure from the United States after September 30, 1998, obtained a grant of advance parole from the District Director in accordance with section 212(d)(5) of the Act and §212.5 of this chapter and complied with the terms and conditions of the advance parole.

(c) *Grants of suspension of deportation or cancellation of removal in fiscal years subsequent to fiscal year 1998.* On and after October 1, 1998, the Immigration Court and the Board may grant applications for suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect prior to April 1, 1997) or cancellation of removal and adjustment of status under section 240A(b) of the Act that meet the statutory requirements for such relief and warrant a favorable exercise of discretion until the annual numerical limitation has been reached in that fiscal

year. The awarding of such relief shall be determined according to the date the order granting such relief becomes final as defined in §§ 3.1(d)(3) and 3.39 of this chapter.

(1) *Applicability of the annual cap.* When grants are no longer available in a fiscal year, further decisions to grant or deny such relief shall be reserved until such time as a grant becomes available under the annual limitation in a subsequent fiscal year. Immigration judges and the Board may deny without reserving decision or may pre-empt those suspension of deportation or cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. The basis of such denial or preemption may not be based on an unfavorable exercise of discretion, a finding of no good moral character on a ground not specifically noted in section 101(f) of the Act, a failure to establish exceptional or extremely unusual hardship to a qualifying relative in cancellation cases, or a failure to establish extreme hardship to the applicant and/or qualifying relative in suspension cases.

(2) *Aliens applying for additional forms of relief.* Whether or not the cap has been reached, the Immigration Court or the Board shall adjudicate concurrently all other forms of relief for which the alien has applied. Applications for suspension of deportation or cancellation of removal shall be denied in the exercise of discretion if the alien is granted asylum or adjustment of status, including pursuant to section 202 of NACARA, while the suspension of deportation or cancellation of removal application is pending. Where an appeal of a decision granting asylum or adjustment is sustained by the Board, a decision to deny as a matter of discretion an application for suspension of deportation or cancellation of removal on this basis shall be reconsidered.

[63 FR 52138, Sept. 30, 1998, as amended at 66 FR 6446, Jan. 22, 2001]

### Subpart C—Voluntary Departure

#### § 240.25 Voluntary departure—authority of the Service.

(a) *Authorized officers.* The authority contained in section 240B(a) of the Act

§ 240.25

8 CFR Ch. I (1–1–12 Edition)

to permit aliens to depart voluntarily from the United States may be exercised in lieu of being subject to proceedings under section 240 of the Act by district directors, assistant district directors for investigations, assistant district directors for examinations, officers in charge, chief patrol agents, the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Office of Juvenile Affairs, service center directors, and assistant service center directors for examinations.

(b) *Conditions.* The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien’s timely departure from the United States, including the posting of a bond, continued detention pending departure, and removal under safeguards. The alien shall be required to present to the Service, for inspection and photocopying, his or her passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. The Service may hold the passport or documentation for sufficient time to investigate its authenticity. A voluntary departure order permitting an alien to depart voluntarily shall inform the alien of the penalties under section 240B(d) of the Act.

(c) *Decision.* The authorized officer, in his or her discretion, shall specify the period of time permitted for voluntary departure, and may grant extensions thereof, except that the total period allowed, including any extensions, shall not exceed 120 days. Every decision regarding voluntary departure shall be communicated in writing on Form I-210, Notice of Action—Voluntary Departure. Voluntary departure may not be granted unless the alien requests such voluntary departure and agrees to its terms and conditions.

(d) *Application.* Any alien who believes himself or herself to be eligible for voluntary departure under this section may apply therefor at any office of the Service. After the commencement of removal proceedings, the application may be communicated through the Service counsel. If the Service agrees to voluntary departure after pro-

ceedings have commenced, it may either:

(1) Join in a motion to terminate the proceedings, and if the proceedings are terminated, grant voluntary departure; or

(2) Join in a motion asking the immigration judge to permit voluntary departure in accordance with §240.26.

(e) *Appeals.* An appeal shall not lie from a denial of an application for voluntary departure under this section, but the denial shall be without prejudice to the alien’s right to apply to the immigration judge for voluntary departure in accordance with §240.26 or for relief from removal under any provision of law.

(f) *Revocation.* If, subsequent to the granting of an application for voluntary departure under this section, it is ascertained that the application should not have been granted, that grant may be revoked without advance notice by any officer authorized to grant voluntary departure under §240.25(a). Such revocation shall be communicated in writing, citing the statutory basis for revocation. No appeal shall lie from revocation.

[62 FR 10367, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002]

**Subpart D—Exclusion of Aliens (for Proceedings Commenced Prior to April 1, 1997) [Reserved]**

**Subpart E—Proceedings to Determine Deportability of Aliens in the United States: Hearing and Appeal (for Proceedings Commenced Prior to April 1, 1997) [Reserved]**

**Subpart F—Suspension of Deportation and Voluntary Departure (for Proceedings Commenced Prior to April 1, 1997) [Reserved]**

**Subpart G—Civil Penalties for Failure to Depart [Reserved]**