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Nkacoang u. INS: A Complementary Theory for Denying Reinstatement of Voluntary Departure

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Nkacoang v. INS: A Complementary Theory for Denying Reinstatement of Voluntary Departure

I. INTRODUCTION

A deportable alien[1] may be allowed to leave the United States pursuant to an immigration remedy known as "voluntary departure."[2] If an immigration judge[3] finds an alien deportable, she has the authority to grant the alien voluntary departure,[4] which allows an eligible alien to leave the United States at his own expense within a specified time period.[5] If the alien does not depart before that time, he may be deported. The Board of Immigration Appeals,[6] which hears appeals from immigration judges' decisions, may also grant voluntary departure.[7] Although the alien may still appeal the Board's decision to a federal court of appeals,[8] only a district director[9] may extend or reinstate voluntary departure after the immigration judge or the Board has granted voluntary departure.[10] This regulatory scheme presents a problem: if the alien appeals to a federal court of appeals, and the court affirms the finding of deportability, can the court then reinstate a previously granted period of voluntary departure? The courts of appeals are split on the issue.[11] A recent Eleventh

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1. For the definition of "alien," see *infra* text accompanying note 13. For a discussion of which aliens are deportable, see *infra* text accompanying note 14.

2. Voluntary departure provides advantages to the alien not granted when he is deported and is discussed at length in Part II of this Note.

3. *See infra* text accompanying note 28.

4. *See* 8 C.F.R. § 242.8(a) (1996) ("In any proceeding conducted under this part the immigration judge shall have the authority . . . to determine applications under section[] . . . 244 . . . of the Act . . . ."). Section 244, describing voluntary departure, is codified at 8 U.S.C. § 1254(e).

5. *See* 8 U.S.C. § 1254(e) (1994); 8 C.F.R. § 244.1.

6. *See infra* note 32 and accompanying text.

7. *See infra* notes 33-34 and accompanying text.

8. *See infra* text accompanying notes 35-37.

9. District directors are Immigration and Naturalization Service employees whose duties are described at 8 C.F.R. § 103.1(g)(2)(ii).

10. *See* 8 C.F.R. § 244.2 ("Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director . . . .").

11. Before *Nkacoang v. INS*, 83 F.3d 353 (11th Cir. 1996), five courts of appeals

Circuit case, *Nkacoang v. INS*,[12] addressed the issue, concluding that a court of appeals does not have authority to reinstate voluntary departure.

This Note examines the *Nkacoang* decision. Part II provides background to immigration proceedings and voluntary departure. A description of the facts in *Nkacoang* and a presentation of the Eleventh Circuit's jurisdictional analysis is found in Part III. Part IV examines the court's reasoning. This Note not only concludes that the *Nkacoang* court correctly refused to reinstate voluntary departure, but also bolsters the court's jurisdictional analysis with a complementary theory of exhaustion of administrative remedies.

II. BACKGROUND

Several different courts may be involved in proceedings to determine deportability of an alien. An immigration judge ("IJ") initially determines deportability. The Board of Immigration Appeals ("BIA") hears appeals from immigration judges' decisions. A federal court of appeals may hear an appeal from the BIA's decisions. This Part provides additional information on deportation proceedings, the different courts involved, and when these courts may grant voluntary departure.

An "alien" is "any person not a citizen or national of the United States."[13] When an alien violates his permission to reside in the United States, the government may deport him.[14] After deportation, an alien cannot return to the United States unless he has remained out of the United States for five consecutive years.[15]

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declined to reinstate voluntary departure. *See* Faddoul v. INS, 37 F.3d 185 (5th Cir. 1995); Castaneda v. INS, 23 F.3d 1576 (10th Cir. 1994); Alsheweikh v. INS, 990 F.2d 1025 (8th Cir. 1993); Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991); Ballenilla-Gonzalez v. INS, 546 F.2d 515 (2d Cir. 1976). Three courts of appeals have held that they do have jurisdiction to reinstate voluntary departure. *See* Ramsay v. INS, 14 F.3d 206 (4th Cir. 1994); Umanzor-Alvarado v. INS, 896 F.2d 14 (1st Cir. 1990); Contreras-Aragon v. INS, 852 F.2d 1083 (9th Cir. 1988) (en banc).

12. 83 F.3d at 356-57.

13. 8 U.S.C. § 1101(a)(3) (1994).

14. *See id.* § 1251(a) (describing the classes of deportable aliens).

15. *See* 8 C.F.R. § 212.2(a). An alien convicted of an aggravated felony must remain outside the United States for 20 years. *See id.* However, an alien can receive special permission to reenter the United States even if he has not remained outside for the requisite number of years. *See id.* ("[A]ny alien who is seeking to enter the United States prior to the completion of the requisite five- or twenty-year absence, must apply for permission to reapply for admission to the United States as provided under this part.").

Deportable aliens may remain in the United States at the discretion of the Immigration and Naturalization Service ("INS"). Voluntary departure is one form of discretionary relief.[16] Voluntary departure originally was not a statutory form of discretionary relief from deportation. Initially, administrative officers merely allowed some aliens to depart without the stigma of deportation.[17] The Alien Registration Act of 1940[18] codified the practice of voluntary departure, and provision for it exists today at 8 U.S.C. § 1254(e).[19]

Voluntary departure is advantageous to the alien because it allows him to depart to a country of his choice without the blemish of deportation and with the possibility of returning to the United States.[20] However, it does require leaving the United States, a result most aliens hope to avoid.[21] It also means the alien must pay his own transportation out of the United States.[22]

Aliens who are thought to be deportable are brought before an IJ in a deportation hearing.[23] Aliens may request voluntary

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16. Other common forms of discretionary relief include: suspension of deportation, *see* 8 U.S.C. § 1254(a); adjustment of status, *see id.* § 1255(a), *see also* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 51.01[1][a] (revised ed. 1996); asylum, *see* 8 U.S.C. § 1158; withholding of deportation, *see id.* § 1253(h); and stay of deportation, *see* 8 C.F.R. § 243.4, *see also* 3 GORDON ET AL., *supra*, § 72.08[1][c].

17. *See* 3 GORDON ET AL., *supra* note 16, § 74.02[1].

18. Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670, 672 (codified as amended in scattered sections of 8 U.S.C.).

19. This subsection states:

> (1) Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3) or (4) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.
>
> (2) The authority contained in paragraph (1) shall not apply to any alien who is deportable because of a conviction for an aggravated felony.

8 U.S.C. § 1254(e).

20. *See* Kaczmarczyk v. INS, 933 F.2d 588, 597 (7th Cir. 1991); Contreras-Aragon v. INS, 852 F.2d 1088, 1090 (9th Cir. 1988) (en banc); Nocon v. INS, 789 F.2d 1028, 1033-34 (3d Cir. 1986); 3 GORDON ET AL., *supra* note 16, § 74.02[1].

21. *See* 3 GORDON ET AL., *supra* note 16, § 74.02[1]; RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 14.36 (2d ed. 1996).

22. *See* 8 U.S.C. § 1254(e)(1). If the alien cannot pay, the United States may pay for the alien's departure. *See id.* § 1252(g).

23. Deportation proceedings are described at 8 U.S.C. § 1252(b). *See also* 8 C.F.R. pt. 242 (1996) (outlining INS procedures for deportation proceedings).

departure either before, during, or after the hearing.[24] An alien requesting voluntary departure before deportation proceedings applies informally to an INS agent,[25] and such requests are liberally granted.[26]

If a deportation proceeding has begun, the alien may request voluntary departure from the IJ,[27] who presides at the hearing and has authority to determine deportability and grant discretionary relief.[28] To obtain voluntary departure, the alien must establish: (1) that he is ready, willing, and able to leave at his own expense,[29] (2) that he has shown good moral character for five years, and (3) that his case merits the judge's discretion in allowing him to remain in the United States.[30] If an IJ grants voluntary departure, her order will normally state a specific date before which the alien must depart, as well as a final order of deportation which becomes effective if the alien does not depart before the deadline.[31]

Aliens may appeal an IJ's deportation decision to the Board of Immigration Appeals within ten days of her decision.[32] During an appeal, the BIA can grant voluntary departure to eligible aliens if the IJ did not do so.[33] It can also reinstate an IJ's grant of voluntary departure. Usually, the amount of time the BIA will reinstate depends on the original IJ time grant.[34]

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24. *See* 3 GORDON ET AL., *supra* note 16, § 74.02[2].

25. *See* 8 C.F.R. § 242.5(a)(1) (listing INS agents who may grant voluntary departure prior to the commencement of a deportation hearing).

26. *See* 3 GORDON ET AL., *supra* note 16, § 74.02[4][b].

27. *See id.* § 74.02[4][c].

28. *See* 8 C.F.R. § 242.8(a).

29. *See id.* § 244.1.

30. *See* 8 U.S.C. § 1254(e)(1) (1994).

31. *See* 3 GORDON ET AL., *supra* note 16, § 74.02[2][b].

32. *See* 8 C.F.R. § 242.21(a). The BIA consists of a chairperson and eleven members. *See id.* § 3.1(a)(1). Attorneys for both the alien and the INS may file appellate briefs in support of their positions. *See id.* § 3.3(c). The BIA may summarily dismiss the appeal, *see id.* § 3.1(d)(1-a), or it may hear oral arguments, *see id.* § 3.1(e).

33. Since the BIA holds the discretionary authority of the Attorney General, *see* 8 C.F.R. § 3.1(d)(1), and since granting voluntary departure is an exercise of discretion, *see* 8 U.S.C. § 1254(e)(1) (stating voluntary departure is granted "in . . . discretion"), the BIA has the authority to grant voluntary departure.

34. Chouliaris, 16 I. & N. Dec. 168, 170 (1977) (interim decision) ("If an immigration judge provided for a voluntary departure period of 30 days or less, we shall reinstate the original grant. In those cases in which a period exceeding 30 days has been granted, the respondent will be given 30 days from the date of our decision in which to depart voluntarily. Where the original grant has not yet expired and the remaining period exceeds 30 days, the respondent shall be permitted to depart voluntarily on or before the date specified by the immigration judge.").

The BIA will not grant voluntary departure if the alien appealed frivolously or

A federal court of appeals may review orders of the BIA which result in an alien's deportation.[35] After filing an appeal, the alien receives an automatic stay of deportation pending determination of the court's decision, unless the court directs otherwise.[36] However, as with most appeals from administrative board decisions, the alien must first exhaust administrative remedies before appealing to a circuit court.[37]

At any time after a deportation hearing has concluded, a district director can grant voluntary departure[38] or can reinstate or extend a period of voluntary departure originally granted by either an IJ or the BIA.[39] Indeed, ultimate discretionary authority to extend or reinstate an order of voluntary departure has been granted to the district director.[40] The issue discussed in *Nkacoang* is whether the courts of appeals may also reinstate or extend the voluntary departure period after affirming on review the BIA's deportation order.

III. *NKACOANG V. INS*[41]

A. Facts

As a high school-student during the 1970s in South Africa, Lebogang Nkacoang was expelled from two high schools for participating in antiapartheid activities.[42] The first expulsion followed a strike during which the entire student body refused to attend classes. Later, he was expelled from another school for leading a strike which resulted in burning the school and the

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solely for delay. *See* R-P-, 20 I. & N. Dec. 230, 231 (1990); Patel, 19 I. & N. Dec. 394, 395-96 (1986).

The alien cannot appeal a refusal to extend or reinstate voluntary departure, but he can appeal for review in a federal district court pursuant to 8 U.S.C. § 1329, which gives district courts jurisdiction over "all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. §§ 1151-1362]." 8 U.S.C. § 1329.

35. *See* 8 U.S.C. § 1105a (authorizing judicial review generally by incorporating 28 U.S.C. §§ 2341-2351).

36. *See id.* § 1105a(a)(3).

37. *See id.* § 1105a(c).

38. *See* 8 C.F.R. § 243.5; 3 GORDON ET AL., *supra* note 16, § 74.02[4][e].

39. *See* 8 C.F.R. § 244.2.

40. *See id.*; *see also infra* notes 100-02 and accompanying text.

41. 83 F.3d 353 (11th Cir. 1996).

42. Many black South African students were involved in civil disturbances during the mid-1970s. These were set off by the Soweto Riots, beginning June 16, 1976, which protested a policy requiring black students to study Afrikaans, a language spoken by many white South Africans. For a description of the Soweto Riots and other subsequent student uprisings, see generally T.R.H. DAVENPORT, SOUTH AFRICA: A MODERN HISTORY 389-94 (4th ed. 1991).

principal's car.[43] Police held Nkacoang for one week after his arrest for arson. After his release, he moved to Lesotho to continue high school.[44] Both the Pan African Congress ("PAC") and the African National Congress ("ANC")[45] recruited Nkacoang there. He joined PAC, thinking "it would be better at putting pressure on the minority white government."[46] At PAC's expense, Nkacoang moved to Tanzania to finish high school and begin university study.[47]

In 1983, Nkacoang moved to Europe to continue his studies, and later returned to Tanzania to administer student fellowships in PAC's education office.[48] Because of personal conflicts with his supervisor and personal uneasiness with PAC, however, Nkacoang disassociated himself with the organization. He left Tanzania for the United States in 1984 to study at Tuskegee University with a United Nations Scholarship.[49]

In the United States, Nkacoang applied for political asylum and withholding of deportation, alleging that if required to return to South Africa, he would be persecuted because of his political beliefs.[50] An IJ denied Nkacoang's asylum application and his request for withholding of deportation, but granted voluntary departure within thirty days. The BIA affirmed the IJ's decision and allowed voluntary departure within thirty days of its decision.[51] On appeal, the Eleventh Circuit also denied asylum. More importantly, the court held it lacked jurisdiction to reinstate voluntary departure and that such authority was vested in the INS district director. The court stated: "[A]bsent a Congressional empowerment to act, this court lacks jurisdictional authority to grant an extension. . . . [P]etitioner's request for reinstatement of his period of voluntary departure is DENIED without preju-

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43. *See Nkacoang*, 83 F.3d at 355.

44. *See id.* Lesotho is a small country entirely surrounded by South Africa.

45. The PAC and the ANC are both groups which fought for an end to white minority rule in South Africa. The ANC was formed in 1912 as the South African Races Congress, and the PAC in 1959. *See* DAVENPORT, *supra* note 42, at 236, 357.

46. *Nkacoang*, 83 F.3d at 355.

47. *See id.*

48. *See id.*

49. *See id.*

50. While South Africa had gained its independence from white minority rule by the time Nkacoang's appeal to the Eleventh Circuit was decided, South Africa was still under apartheid when he applied for asylum in 1989.

51. *See Nkacoang*, 83 F.3d at 355.

dice to consideration of his request for an extension pending before the district director."[52]

B. The Court's Analysis

Nkacoang's appeal raised two issues: (1) was the BIA correct in denying asylum and withholding deportation, and (2) can a federal court of appeals, after affirming a final order of deportation issued by the BIA, reinstate the BIA's grant of voluntary departure.[53] The court affirmed the BIA's denial of asylum and withholding of deportation because Nkacoang did not satisfy the prerequisites for such relief.[54] The court then addressed its authority to reinstate the Board's grant of voluntary departure. The court reviewed the voluntary departure statute and regulation[55] and examined the other courts of appeals' decisions related to voluntary departure reinstatements.[56] The issue had been addressed previously in eight courts of appeals.[57] Most of these courts refused to reinstate voluntary departure,[58] some maintaining that they lacked jurisdiction because the authority to reinstate or extend the time of voluntary departure originally granted by the IJ or the BIA lay in the district director's "sole jurisdiction."[59] However, some courts of appeals reinstated voluntary departure after affirming the BIA's finding of deportability[60] for reasons of access to judicial appeal[61] and judicial/administrative efficiency.[62]

After reviewing these cases, the Eleventh Circuit adopted the Tenth Circuit's reasoning in *Castaneda v. INS*:[63] "[A]bsent a Congressional empowerment to act, this court lacks jurisdictional

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52. *Id.* at 357 (footnote omitted).
53. *See id.* at 354-55.
54. *See id.* at 355-56.
55. *See* 8 U.S.C. § 1254(e) (1994); 8 C.F.R. § 244 (1996).
56. *See Nkacoang*, 83 F.3d at 356-57.
57. *See supra* note 11 and accompanying text.
58. *See* Faddoul v. INS, 37 F.3d 185, 193 (5th Cir. 1994); Castaneda v. INS, 23 F.3d 1576, 1583 (10th Cir. 1994); Alsheweikh v. INS, 990 F.2d 1025, 1028 (8th Cir. 1993); Kaczmarczyk v. INS, 933 F.2d 588, 598 (7th Cir. 1991); Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521-22 (2d Cir. 1976); 8 C.F.R. § 244.2 (1996).
59. *See Castaneda*, 23 F.3d at 1583; *Kaczmarczyk*, 933 F.2d at 598; *see also* Contreras-Aragon v. INS, 852 F.2d 1088, 1097 (9th Cir. 1988) (en banc) (Poole, J., dissenting); *id.* at 1098-99 (Kozinski, J., dissenting).
60. *See* Ramsay v. INS, 14 F.3d 206, 211-13 (4th Cir. 1994); Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990); *Contreras-Aragon*, 852 F.2d at 1094-97.
61. *See Contreras-Aragon*, 852 F.2d at 1093-94.
62. *See Umanzor-Alvarado*, 896 F.2d at 16.
63. 23 F.3d 1576 (10th Cir. 1994).

authority to grant an extension [of voluntary departure]."[64] The facts in *Castaneda* were similar to *Nkacoang*: the alien in question also sought asylum, withholding of deportation, or voluntary departure.[65] The IJ "denied all requested relief except voluntary departure."[66] On appeal, the BIA affirmed and extended voluntary departure thirty days from the date of its order.

In determining that it lacked jurisdiction to extend voluntary departure, the Tenth Circuit focused on its lack of jurisdiction to grant the requested relief. It reviewed cases in which other courts of appeals and the Supreme Court stated that a federal court can act only when empowered by Congress.[67] Additionally, the Tenth Circuit addressed the two concerns of courts of appeals that had reinstated voluntary departure: access to appellate review and judicial/administrative economy.[68] In short, the court declined to reinstate voluntary departure because Congress had not granted it jurisdiction to do so.[69] Relying on the *Castaneda* court's reasoning, the *Nkacoang* court reached the same result.[70]

IV. ANALYSIS

The Eleventh Circuit correctly held that a court of appeals is without jurisdiction to reinstate an alien's voluntary departure. The jurisdictional argument has been used by some of the other courts of appeals that have denied requests for reinstatement of voluntary departure.[71] These courts reason that courts of appeals can only act where they have an explicit congressional grant of jurisdiction. Congress has not empowered the courts of appeals to reinstate voluntary departure; therefore, the courts of appeals do not have jurisdiction to reinstate voluntary departure.

Although not addressed by the circuits, an exhaustion of administrative remedies analysis reinforces the lack of jurisdiction

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64. Nkacoang v. INS, 83 F.3d 353, 357 (11th Cir. 1996).

65. *See Castaneda*, 23 F.3d at 1577-78.

66. *Id.* at 1578.

67. *See id.* at 1580 (citing Finley v. United States, 490 U.S. 545, 548 (1989) and Wyeth Lab. v. United States Dist. Court, 851 F.2d 321, 324 (10th Cir. 1988)).

68. *See id.* at 1581-83. For a discussion of how the *Castaneda* court addressed the two concerns, see *infra* Part IV.A.2.

69. *See id.* at 1583.

70. *See* Nkacoang v. INS, 83 F.3d 353, 357 (11th Cir. 1996).

71. *See id.*; *Castaneda*, 23 F.3d at 1583; Kaczmarczyk v. INS, 933 F.2d 588, 598 (7th Cir. 1991); *see also* Contreras-Aragon v. INS, 852 F.2d 1088, 1097 (9th Cir. 1988) (en banc) (Poole, J., dissenting); *id.* at 1098-99 (Kozinski, J., dissenting).

argument. The exhaustion rule mandates that if an administrative remedy is available, a litigant is not entitled to collateral judicial relief. An administrative remedy for receiving a reinstatement of voluntary departure is available from the INS district director.[72] Therefore, an alien is not entitled to a reinstatement of voluntary departure from a court of appeals during its review of an order of deportation.

This Part first explores the jurisdictional analysis and then the exhaustion of administrative remedies analysis. It then concludes that the exhaustion argument confirms the correctness of the jurisdictional analysis and more effectively addresses the judicial and administrative efficiency concerns of some courts reaching different results than *Nkacoang*.

A. The Jurisdictional Argument

1. Statutory and case law basis of the jurisdictional argument

Examining the argument over the jurisdiction of the courts of appeals shows that the *Nkacoang* court was correct in holding that it had no authority to reinstate voluntary departure. This is true because Congress has not expressly authorized the courts of appeals to reinstate voluntary departure.

Nkacoang, like other cases ruling that courts of appeals cannot reinstate voluntary departure,[73] focused on the court's lack of jurisdiction to grant the reinstatement. The premise of this jurisdictional argument was stated in the 1850 Supreme Court case of *Sheldon v. Sill*:[74] "Courts created by statute can have no jurisdiction but such as the statute confers. . . . Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary."[75] The courts of appeals are inferior Article III courts[76] created by

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72. *See* 8 C.F.R. § 244.2 (1996); *supra* note 40; *infra* Part IV.B.

73. *See Castaneda*, 23 F.3d at 1580 ("[N]one of the pertinent statutes discussed above provide any basis whatsoever for this court to assume authority for affording the discretionary, administrative relief sought . . . ."); *Kaczmarczyk*, 933 F.2d at 598 ("[W]e lack authority to review the INS's discretionary grant of voluntary departure."); *see also Contreras-Aragon*, 852 F.2d at 1097 (Poole, J., dissenting) ("We do not have the authority; we should not venture to create such power."); *id.* (Kozinski, J., dissenting) ("[N]either statute nor regulation nor Supreme Court opinion authorizes such an action . . . .").

74. 49 U.S. (8 How.) 441 (1850).

75. *Id.* at 449.

76. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States shall

Congress,[77] and possess only such jurisdiction as Congress has conferred upon them by statute.[78] A petitioner requesting review in a court of appeals must establish that Congress, by statute, has authorized the court to review its case.[79] Without express jurisdiction, a court of appeals cannot dispose of a case or grant the relief requested.[80]

In 8 U.S.C. § 1105a, Congress explicitly grants the courts of appeals exclusive jurisdiction to review final orders of deportation resulting from deportation proceedings.[81] Two Supreme Court cases have examined the scope of jurisdiction of the courts of appeals under 8 U.S.C. § 1105a: *Foti v. INS*,[82] and *Fan Kwok v. INS*.[83]

In *Foti*, an illegal alien had conceded his deportability at a deportation hearing. Both the IJ and the BIA denied Foti's request for discretionary suspension of deportation, which would have allowed him to stay in the country as a permanent resident.[84] Foti appealed the denial to a court of appeals, which dismissed for lack of jurisdiction.[85] The appeals court determined that, pursuant to 8 U.S.C. § 1105a, it could only review final orders of deportation, not denials of discretionary relief.[86] The Supreme Court reversed, establishing that the meaning of "final order of deportation" includes denials of discretionary relief:

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be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish.").

77. *See* Evarts Act of 1891, ch. 517, 26 Stat. 826 (codified as amended in scattered sections of 28 U.S.C.) (creating the courts of appeals).

78. *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3901, at 3 & n.2 (2d ed. 1992) (listing cases holding that courts of appeals' jurisdiction is limited by statute); *id.* § 3905, at 232.

79. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.4.1 (1993).

80. *See* BERNARD SCHWARTZ & EDWIN D. WEBB, ADMINISTRATIVE LAW § 8.4 (3d ed. 1991) ("[T]he federal courts are powerless to deal with unlawful agency action unless judicial review is provided expressly by statute.").

81. 8 U.S.C. § 1105a(a) (1994) ("The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title . . . ."). Chapter 158 of Title 28, found at 28 U.S.C. §§ 2341-2351, grants the courts of appeals "exclusive jurisdiction" to review final orders, and in some circumstances rules and regulations, of various administrative agencies. *See* 28 U.S.C. § 2342 (1994).

82. 375 U.S. 217 (1963).

83. 392 U.S. 206 (1967).

84. *See* 8 U.S.C. § 1254(a).

85. *See* Foti v. INS, 308 F.2d 779 (2d Cir. 1962), *rev'd*, 375 U.S. 217 (1963).

86. *See id.* at 782.

> [I]t seems rather clear that all determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals, such as orders denying voluntary departure . . . and orders denying the withholding of deportation . . . , are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals . . . .[87]

Thus, denials of discretionary relief are within the §1105a jurisdiction of the courts of appeals.

While *Foti* appears to broaden § 1105a jurisdiction, a slightly more recent case shows the Court's hesitancy to expand that section's scope. In *Fan Kwok v. INS,*[88] the alien conceded deportability at a deportation hearing and was granted voluntary departure.[89] Fan Kwok did not leave the United States within the time allowed and was ordered to surrender for deportation.[90] He asked the district director for a stay of deportation so he could apply for an adjustment of status, which would have allowed him to become a permanent resident of the United States.[91] The district director found Fan Kwok ineligible for an adjustment and denied that relief.[92] He appealed the district director's decision to the court of appeals, which dismissed the appeal for lack of jurisdiction.[93] The Third Circuit held it could not review the denial of a request for adjustment of status since the denial did not occur in a deportation hearing pursuant to 8 U.S.C. § 1252(b).[94] The Supreme Court affirmed: "[T]he judicial review provisions of § [1105a] embrace only those determinations made during a proceeding conducted under § [1252(b)] . . . ."[95] The Court made clear its hesitancy to expand a court of appeal's jurisdiction beyond that granted by Congress:

> Section [1105a] is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a juris-

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87. *Foti*, 375 U.S. at 229.
88. 392 U.S. 206 (1967).
89. *See id.* at 207.
90. *See id.*
91. *See id.* For information concerning stays of deportation, see 8 C.F.R. § 243.4 (1996) and 3 GORDON ET AL., *supra* note 16, § 72.08[1][c]. For information concerning adjustment of status, see 8 U.S.C. § 1255(a) (1994) and 2 GORDON ET AL., *supra* note 16, § 51.01[1][a].
92. *See Fan Kwok*, 392 U.S. at 207-08.
93. *See* Fan Kwok v. INS, 381 F.2d 544 (3d Cir. 1967).
94. *See id.* at 543.
95. *Fan Kwok*, 392 U.S. at 216.

> dictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes. Further, as a statute addressed entirely to "specialists," it must, as Mr. Justice Frankfurter observed, "be read by judges with the minds of . . . specialists."
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> . . . A denial by a district director of a stay of deportation is not literally a "final order of deportation," nor is it, as was the order in *Foti*, entered in the course of administrative proceedings conducted under § [1252](b). . . . If, as the Immigration Service urges, § [1105a] (a) embraces all determinations "directly affecting the execution of" a final deportation order, Congress has selected language remarkably inapposite for its purpose. As Judge Friendly observed in a similar case, if "Congress had wanted to go that far, presumably it would have known how to say so."[96]

Thus, the court of appeals did not have jurisdiction to address Fan Kwok's case because Congress had not empowered the court to review decisions made outside a section 1252(b) hearing.

Applying this statutory and case authority to the reinstatement of voluntary departure situation, it is clear that Congress has not expressly granted jurisdiction to the courts of appeals authorizing them to reinstate voluntary departure. According to 8 U.S.C. § 1105a, courts of appeals may only review final orders of deportation resulting from a section 1252(b) hearing. "Final orders of deportation" was interpreted in *Foti* to include denials of discretionary relief which effectively result in an alien's deportation.[97] Requesting the court to reinstate voluntary departure, however, is not asking for a review of a final order of deportation, nor is it a request to review a denial of voluntary departure, which *Foti* implies is within a court of appeals' jurisdiction.[98] It is a request that the court affirmatively reinstate an expired period of voluntary departure.[99] *Fan Kwok* shows the Supreme Court's tendency to construe jurisdictional statutes narrowly—it construed § 1105a narrowly to deny the court of appeals jurisdiction over Fan Kwok's appeal. Based on 8 U.S.C. § 1105a, Congress did not grant courts of appeals jurisdiction to reinstate voluntary

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96. *Id.* at 212-14 (citations omitted) (footnotes omitted).

97. *See* Foti v. INS, 375 U.S. 217, 232 (1963).

98. *See id.*

99. *See* Contreras-Aragon v. INS, 852 F.2d 1088, 1097 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting) ("There is no mystery about what the majority is doing in this case: It is reinstating a grant of voluntary departure that long ago expired. That's what petitioner ask[ed] us to do . . . .").

departure, as that section only gives a court authority to review final orders of deportation and, as *Foti* makes clear, denials of discretionary relief such as voluntary departure. In fact, sole jurisdiction to grant reinstatements of voluntary departure has been expressly delegated to INS district directors. Congress has granted the Attorney General discretionary authority to permit eligible aliens to depart voluntarily.[100] She may delegate any aspect of this authority to others,[101] and has delegated the authority to reinstate or extend a period of voluntary departure to the INS district directors:

> Authority to reinstate or extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is within the sole jurisdiction of the district director, except that an immigration judge or the Board may reinstate voluntary departure in a deportation proceeding that has been reopened for a purpose other than solely making an application for voluntary departure.[102]

As a result, requests for reinstatement of voluntary departure must be brought before the district director in accordance with 8 C.F.R. § 244.2, not before a court of appeals.

2. *Addressing the concerns of access to judicial review and efficiency*

The majority of courts that have denied requests for reinstatement of voluntary departure have specifically held they

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100. *See* 8 U.S.C. § 1254(e)(1) (1994).

101. *See id.* § 1103(a) ("[The Attorney General] may require or authorize any employee of the [Immigration and Naturalization] Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the [Immigration and Naturalization] Service."). The Attorney General has delegated authority to grant voluntary departure to various persons. INS personnel may grant voluntary departure before a deportation proceeding has commenced. *See* 8 C.F.R. § 242.5(a)(1) (1996). Immigration judges may grant voluntary departure during deportation hearings. *See id.* § 244.1. The BIA may grant voluntary departure during an appeal of a deportation hearing because it exercises the discretionary authority of the Attorney General. *See id.* § 3.1(d)(1) ("[I]n considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case."). Granting voluntary departure is such an exercise of discretionary authority. *See* 8 U.S.C. § 1254(e)(1) (stating that granting voluntary departure is within the Attorney General's discretion).

102. 8 C.F.R. § 244.2.

were without jurisdiction to do so.[103] On the other hand, courts reinstating voluntary departure have supported their holdings by stating that their decisions uphold the alien's right to judicial review[104] and support notions of judicial and administrative efficiency.[105] In their view, access to judicial review and judicial/administrative efficiency outweigh the jurisdictional concerns of the courts of appeals declining to reinstate voluntary departure. While the judicial review concern can be shown to be misplaced, the efficiency argument remains pitted against the jurisdiction argument.

a. The judicial review concern. The judicial review concern arises because courts fear that an alien found deportable by the BIA and given voluntary departure is faced with the choice of either appealing or voluntarily departing—but not both.[106] The BIA usually grants an alien only thirty days in which to voluntarily depart. It would be impossible to petition for, brief, and argue a case before a court of appeals within that amount of time. If the alien chooses to appeal, the period of voluntary departure is sure to expire before a decision from the court of appeals is issued.[107] Some courts of appeals fear that this reality "raises the serious question of whether voluntary departure can be used as an enticement to induce the alien to forego judicial review"[108] and have assumed authority to reinstate voluntary departure in order to assure the alien that his appeal would not jeopardize voluntary departure.[109]

However, the judicial review concern is misplaced. An alien's right, as well as his opportunity, for judicial review is still available even though the courts of appeals do not have the jurisdiction to reinstate voluntary departure. The Tenth Circuit has explained two reasons why an alien's right to judicial review is not compromised in this situation. First, an alien who has been granted voluntary departure by the BIA still "retains precisely the same right to judicial review he would otherwise have had; it is only that his alternative to continued litigation has been made

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103. *See* Nkacoang v. INS, 83 F.3d 353, 357 (11th Cir. 1996); Castaneda v. INS, 23 F.3d 1576, 1583 (10th Cir. 1994); Kaczmarczyk v. INS, 933 F.2d 588, 598 (7th Cir. 1991); *see also Contreras-Aragon*, 852 F.2d at 1097 (Poole, J., dissenting).

104. *See Contreras-Aragon*, 852 F.2d at 1093-95.

105. *See* Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990).

106. *See Contreras-Aragon*, 852 F.2d at 1093.

107. *See id.* at 1093-94.

108. *Id.* at 1093.

109. *See id.* at 1096.

more attractive."[110] The Tenth Circuit analogized this situation to a criminal plea-bargain in which a defendant pleads guilty in order to avoid litigation and, perhaps, a more serious sentence.[111] The fact that the BIA has granted the alien voluntary departure does not affect his ability to appeal but simply forces him to more heavily weigh the costs of his appeal as against the benefits of complying with the voluntary departure. Second, an alien whose voluntary departure period expires during his appeal to the court of appeals may still obtain an extension or reinstatement of voluntary departure from the district director in accordance with 8 C.F.R. § 244.2. The district director's decision is reviewable by a United States district court.[112] For these two reasons, the Tenth Circuit concluded the "courts of appeal need not overstep or attempt to extend their jurisdiction" by reinstating voluntary departure.[113] Judicial review of an alien's application for voluntary departure is not improperly impinged.

b. The efficiency concern. The second concern of the courts of appeals which reinstate voluntary departure relates to judicial/administrative economy. One court mentioned: "We see nothing in the law that requires us to waste time and resources or that deprives us of the legal power to order the legally appropriate remedy—a remedy already granted by the Board."[114]

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110. Castaneda v. INS, 23 F.3d 1576, 1581 (10th Cir. 1994).

111. *See id.*

112. If the alien is dissatisfied with the district director's decision, he cannot appeal the decision to a court of appeals. *See* Fan Kwok v. INS, 392 U.S. 206, 216 (1970) (holding that judicial review provisions of 8 U.S.C. § 1105a are limited to proceedings conducted pursuant to 8 U.S.C. § 1252(b), not decisions of district directors). However, he can appeal for review in a United States district court pursuant to 8 U.S.C. § 1329, which gives district courts jurisdiction over "all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. §§ 1151-1362]." 8 U.S.C. § 1329 (1994). Several cases have suggested that § 1329 jurisdiction would allow a district court to review a district director's denial of reinstatement or extension of voluntary departure. *See, e.g., Castaneda*, 23 F.3d at 1579 ("[M]any courts have recognized that the district director's refusal to extend voluntary departure is reviewable in the district court pursuant to . . . the general jurisdictional grant set out in 8 U.S.C. § 1329 . . . ."); Lad v. INS, 539 F.2d 808, 809 n.4 (1st Cir. 1976) ("It would appear that petitioners may seek review of the District Director's decision in the district court."); *cf. Fan Kwok*, 392 U.S. at 210 ("In situations to which the provisions of [§ 1105a] are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court."). The district court reviews the district director's decision on an abuse of discretion standard. *See* Bolanos v. Kiley, 509 F.2d 1023, 1026 (2d Cir. 1975) ("The refusal of the District Director to extend the date for . . . voluntary departure is thus to be viewed under the usual test of abuse of discretion.").

113. *Castaneda*, 23 F.3d at 1582.

114. Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990).

Courts of appeals which reinstate voluntary departure avoid additional administrative and judicial procedures. On the other hand, if a court of appeals finds that it lacks jurisdiction to reinstate voluntary departure, an alien must spend additional time seeking a reinstatement from the district director, as well as possibly appealing a district director's denial of reinstatement before a federal district court. The jurisdictional argument does not, by itself, address the efficiency concern, and some courts of appeals have assumed jurisdiction to reinstate voluntary departure in order to, as they claim, avoid this inefficiency.[115]

A finding of lack of jurisdiction results in a determination that the district director, not the court of appeals, has the authority to reinstate voluntary departure. Accordingly, if the court of appeals has affirmed the alien's order of deportation but the alien wishes to depart voluntarily, he must seek the district director's approval. If the director denies approval, the alien may appeal the denial to a district court, which reviews for abuse of discretion.[116] The district court decision may again be appealed to a court of appeals under its jurisdiction to review final orders of district courts.[117] Ironically, the issue of reinstatement of voluntary departure would then return to where it had been in the first place—before a court of appeals. At that point, however, the court would ask whether the district director abused her discretion by disallowing voluntary departure, not whether a court of appeals should reinstate voluntary departure.[118] Even so, the voluntary departure issue would emerge in the same court twice.

Some courts, in an effort to promote judicial and administrative efficiency, merely avoid the additional steps and reinstate voluntary departure in situations in which a reinstatement from the district director seems certain.[119] The courts appear to pit the Article III jurisdictional concern against judi-

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115. *See id.*

116. *See supra* note 112 and accompanying text.

117. *See* 28 U.S.C. § 1291 (1994) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

118. *See, e.g.*, Bolanos v. Kiley, 509 F.2d 1023, 1026 (2d Cir. 1975) ("The refusal of the District Director to extend the date for . . . voluntary departure is thus to be viewed under the usual test of abuse of discretion.").

119. *See Umanzor-Alvarado*, 896 F.2d at 16 ("We see nothing in the law that requires us to waste time and resources or that deprives us of the legal power to order the legally appropriate remedy . . . ."); *see also* Ramsay v. INS, 14 F.3d 206, 213 (4th Cir. 1994) (reinstating voluntary departure and partially adopting *Umanzor-Alvarado*).

cial/administrative efficiency concerns and find the efficiency concerns more important. In essence, they seem to have accepted Justice White's pronouncement in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[120] that "Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."[121] Because these courts favor efficiency, they reinstate voluntary departure despite the lack of an express grant of jurisdiction.

The Tenth Circuit addressed the efficiency concern in *Castaneda v. INS*.[122] The court found the efficiency argument unpersuasive because the result reflected (1) a "misplacement of the burden of persuasion" required to obtain voluntary departure and (2) a "fundamental misapprehension of the nature of [the district director's] discretionary authority."[123] These arguments, however, do not adequately refute efficiency claims because they do not address the fact that requiring an alien to request reinstatement from the district director will potentially take a great amount of time.

A better response to efficiency concerns would have been to focus on established exhaustion of administrative remedies principles, an approach ignored by the courts of appeals in *Umanzor-Alvarado v. INS* and *Ramsay v. INS*. These courts assumed jurisdiction because they valued judicial/administrative efficiency over jurisdictional limitations. However, an exhaustion of administrative remedies argument answers the criticism of lack of effi-

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120. 458 U.S. 50, 92-118 (1982) (White, J., dissenting).

121. *Id.* at 113. Subsequent Supreme Court cases such as *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589-93 (1985), and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986), adopted White's balancing test for determining questions of the jurisdictional scope of Article III.

However, the balancing by the courts of appeals in *Umanzor-Alvarado v. INS* and *Ramsay v. INS*, which reinstated voluntary departure for efficiency reasons, was not explicit.

122. 23 F.3d 1576 (10th Cir. 1994).

123. *Id.* at 1582. Regarding the first reason, the Tenth Circuit reminded other courts that have reinstated voluntary departure that an alien should always maintain the burden of proving eligibility to receive voluntary departure. *See id.* *Umanzor-Alvarado* and *Ramsay* both required the INS to disprove an alien's eligibility instead of requiring the alien to affirmatively establish eligibility. *See Ramsay*, 14 F.3d at 213; *Umanzor-Alvarado*, 896 F.2d at 16.

The Tenth Circuit's second argument against efficiency considered the district director's discretion. The court was correct in stating that discretion by its very nature allows the decision-maker some leeway to decide either way. *See Castaneda*, 23 F.3d at 1582-83. Discretion, however, is an aspect of the exhaustion of administrative remedies argument, which does counter the efficiency argument. *See infra* Part IV.B.

ciency while affirming the correctness of the finding of lack of jurisdiction. When courts of appeals require aliens to exhaust their administrative remedies by requiring requests for reinstatement to be brought before the district director, judicial and administrative resources are more efficiently used overall.

B. The Exhaustion of Administrative Remedies Argument

Courts of appeals that have denied reinstatement of voluntary departure have stated such relief is available from the INS district director.[124] The availability of a district director-granted reinstatement suggests another method of analyzing the *Nkacoang* question: exhaustion of administrative remedies. While related to the lack of jurisdiction analysis, it has not been as thoroughly discussed by the courts of appeals.[125] It complements the jurisdiction analysis by leading to the same result while at the same time effectively addressing the judicial and administrative economy concerns which have troubled some courts of appeals.

1. The basis of the exhaustion argument

In *Myers v. Bethlehem Shipbuilding Corp.*,[126] the court stated the general rule requiring exhaustion of administrative remedies: "[It is a] long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been ex-

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124. *See* Nkacoang v. INS, 83 F.3d 353, 357 (11th Cir. 1996) ("[P]etitioner's request for reinstatement of his period of voluntary departure is DENIED without prejudice to consideration of his request for an extension pending before the district director."); *Castaneda*, 23 F.3d at 1583 (same); Alsheweikh v. INS, 990 F.2d 1025, 1028 (8th Cir. 1993) ("Alsheweikh may request [a reinstatement of voluntary departure] from the INS."); Kaczmarczyk v. INS, 933 F.2d 588, 598 (7th Cir. 1991) ("[Petitioners may] file[] a motion with the INS district director to *reinstate* voluntary departure."); Farzad v. INS, 808 F.2d 1071, 1072 (5th Cir. 1987) (per curiam) ("There is no legal or equitable persuasion for this court to augment the administrative remedy already available to Farzad of applying to the district director to grant an extension of voluntary departure."); *see also* Contreras-Aragon v. INS, 852 F.2d 1088, 1101 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting) (stating that reinstatement of voluntary departure by courts of appeals "undermines the heretofore unquestioned principle that a court will not act where the petitioner has failed to exhaust administrative remedies").

125. The most extensive discussion of the exhaustion issue can be found in Judge Kozinski's dissent in *Contreras-Aragon*, 852 F.2d at 1100-02 (Kozinski, J., dissenting). The Fifth Circuit used exhaustion in *Farzad v. INS*, 808 F.2d 1071 (5th Cir. 1987), to avoid reinstating voluntary departure.

126. 303 U.S. 41 (1938).

hausted."[127] Phrased otherwise, "[C]ourts should not interfere with the job given to an agency until it has completed its work."[128]

Two Supreme Court decisions further explain the Court's exhaustion policy: *McKart v. United States*[129] and *McCarthy v. Madigan*.[130] In *McKart*,[131] the Supreme Court identified six reasons underlying exhaustion:

1. it allows the agency to apply its expertise and discretion in situations in which statutes have provided for exclusive agency action;
2. it permits the administrative procedure to continue uninterrupted (having an effect similar to the judicial limitations on interlocutory appeals);
3. it strengthens administrative autonomy (Congress has specified particular functions for agencies, and they should be given tbe chance to fulfill those functions);
4. it permits the agency to develop an adequate factual record so that when the courts do review agency action the agency has completed its fact-finding and used its discretion;
5. it promotes judicial efficiency because the agency has the opportunity to correct its own mistakes or take appropriate action, mooting the need for any judicial intervention; and
6. it discourages others from bypassing the administrative process, which might weaken administrative effectiveness.[132]

In *McCarthy v. Madigan*,[133] the Court summarized the policies derived from previous exhaustion cases (most notably *McKart*) into two reasons exhaustion should be required: "protecting administrative agency authority and promoting judicial

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127. *Id.* at 50-51 (citation omitted).

128. SCHWARTZ & WEBB, *supra* note 80, § 8.33.

129. 395 U.S. 185 (1969). Some scholars consider *McKart* the Supreme Court's most thorough treatment of exhaustion. *See* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (3d ed. 1994); *see also* 4 KENNETH CULP DAVIS & JOHN P. WILSON, ADMINISTRATIVE LAW TREATISE § 26:1 (2d ed. 1983).

130. 503 U.S. 140 (1992).

131. *McKart*, 395 U.S. at 197 ("We cannot agree that application of the exhaustion doctrine would be proper in tha circumstances of the present case.").

132. *See* 2 DAVIS & PIERCE, *supra* note 129, § 15.2 (citing *McKart*, 395 U.S. at 193-95).

133. 503 U.S. 140 (1992).

efficiency."[134] The Court also described three exceptions in which it had declined to apply exhaustion: (1) when exhaustion results in prejudice to a subsequent judicial action, (2) when the administrative remedy is inadequate because the agency is without power to grant the requested relief, and (3) when the agency is biased or has predetermined the issue before it.[135] Additionally, the Court distinguished between statutory and discretionary exhaustion: when Congress explicitly mandates exhaustion, it should be required, but when Congress has not clearly mandated exhaustion, courts are free to exercise discretion in requiring it.[136]

Academic treatises generally support the Supreme Court's exhaustion policies but have criticized the Courts' application of exhaustion.[137] One common criticism is that "[n]o judge at any level has undertaken to work out a rational overall system" by which other judges could analyze exhaustion problems.[138] Similarly, it is argued that "the Court's opinions on exhaustion do not form a consistent and coherent pattern," such as would make it possible to "describe the law of exhaustion in a manner that is both helpful to lawyers and judges and consistent with *all* of the Supreme Court's many exhaustion decisions."[139] In other words, the Court has described its exhaustion policy, but has not suggested a rational test other courts could apply to analyze exhaustion questions. To fill this void, two administrative law authors, Kenneth Davis and Richard Pierce, recently have proposed a four-part exhaustion test.[140] They suggest courts examine:

> (1) [T]he extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency factfinding or application of expertise, and (4) the extent to which the agency has already completed its factfinding or applied its expertise.[141]

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134. *Id.* at 145.

135. *See id.* at 146-48.

136. *See id.* at 144.

137. *See* 4 DAVIS & WILSON, *supra* note 129, § 26:1; 2 DAVIS & PIERCE, *supra* note 129, § 15.2.

138. 4 DAVIS & WILSON, *supra* note 129, § 26:1.

139. 2 DAVIS & PIERCE, *supra* note 129, § 15.2.

140. The test was originally proposed in Davis' 1958 treatise and included three parts. The 1994 edition added the fourth element. *See id.*

141. *Id.*

The aggregate of these factors, weighed equally, aids a judge in exercising her discretion on whether to require exhaustion.[142] In summary, both case law and scholars support exhaustion and its objectives: promoting judicial efficiency and maintaining the autonomy of administrative agencies.

2. *The exhaustion argument and reinstating voluntary departure*

Applying either the factors listed in *McCarthy* or the four-element test of Professors Davis and Pierce, the courts of appeals should require an alien to exhaust an available administrative remedy by requesting a reinstatement of voluntary departure from the district director before seeking it judicially.

a. The McCarthy *policies and reinstating voluntary departure.* Under the *McCarthy* exhaustion guidelines, courts should require exhaustion before reinstating voluntary departure. *McCarthy* states two reasons for requiring exhaustion: "protecting administrative agency authority and promoting judicial efficiency."[143]

To preserve agency authority, courts should allow agencies to exercise primary responsibility for their administrative programs.[144] Additionally, exhaustion should particularly apply to situations in which agency discretionary power or particular agency expertise is exercised.[145] Reinstatements of voluntary

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142. *See id.*

Several courts of appeals have adopted a previous, three-prong version of the Davis and Pierce test proposed in 1958. In 1964, the Ninth Circuit adopted the test in *Lone Star Cement Corp. v. FTC*, 339 F.2d 505, 510 (9th Cir. 1964). Subsequently, the Sixth and Eleventh Circuits used essentially the same test in *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981), and *Rogers v. Bennett*, 873 F.2d 1387, 1393 (11th Cir. 1989). Each of these cases involved a party's suit in federal district court for an injunction to stop an administrative proceeding before a federal agency. *See id.* at 1389, 1391 (Department of Education); *Shawnee Coal*, 661 F.2d at 1085, 1089 (Department of Interior); *Lone Star*, 339 F.2d at 506, 508 (FTC). In each case, the court of appeals determined that the party could not seek an injunction in federal court without exhausting its administrative remedies. *See Rogers*, 873 F.2d at 1392-96; *Shawnee Coal*, 661 F.2d at 1092-95; *Lone Star*, 339 F.2d at 509-10. The Ninth Circuit's discussion of the Davis test is illustrative of these courts' adoptions of the test: "[T]he [exhaustion] standard suggested by Professor Davis in his Administrative Law Treatise . . . is as complete and workable as can be stated." *Id.* at 510. The Ninth Circuit has subsequently applied the Davis test in other cases. *See, e.g.*, Casey v. FTC, 578 F.2d 793, 796 (9th Cir. 1978); Marshall v. Able Contractors, Inc., 573 F.2d 1055, 1057 (9th Cir. 1978); California *ex rel.* Christensen v. FTC, 549 F.2d 1321, 1323 (9th Cir. 1977).

143. *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

144. *See id.*

145. *See id.*

departure are the primary responsibility of an agency (the INS) and require the exercise of discretionary power. Congress has specifically authorized the Attorney General to grant voluntary departure;[146] in turn, the Attorney General has delegated the authority to reinstate voluntary departure to the INS district director.[147] Voluntary departure is a form of discretionary relief from deportation,[148] and the district director is not required to grant the relief even if the applicant is eligible.[149] A court of appeals should not usurp the primary responsibility of the Attorney General and her delegate, the district director, to authorize voluntary departure, especially in light of the remedy's discretionary nature. To do so violates the first reason for requiring exhaustion articulated in *McCarthy*.

The second reason to require exhaustion relates to promoting judicial efficiency. *McCarthy* suggests that requiring exhaustion allows an agency to moot a judicial controversy and produces a factual record for subsequent judicial review.[150] Allowing the district director to hear all requests for reinstatement of voluntary departure would moot the need for a court of appeals to consider reinstatement during review of a BIA deportation order. It would save judicial resources because the court of appeals would not have to examine the facts related to the alien's eligibility under 8 U.S.C. § 1254(e).[151] While these facts may not be complex or technical, they are facts which Congress and the Attorney General have intended that the district director develop when an alien requests a reinstatement of voluntary departure. As one court stated, regardless of the actual skill or expertise required to determine the facts, "it is only good sense that the agency be the first to evaluate them."[152] Requiring exhaustion in this situa-

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146. *See* 8 U.S.C. § 1254(e) (1994).

147. *See* 8 C.F.R. § 244.2 (1996).

148. *See* 8 U.S.C. § 1254(e); 3 GORDON ET AL., *supra* note 16, § 74.02[3] ("Congress has not decreed that voluntary departure must be permitted for all who have satisfied the statutory prerequisites, but has authorized the Attorney General to exercise his discretion."); STEEL, *supra* note 21, § 14.36 ("[T]he alien must demonstrate that he warrants a favorable exercise of discretion.").

149. *See* Castaneda v. INS, 23 F.2d 1576, 1582-83 (10th Cir. 1994).

150. *See McCarthy*, 503 U.S. at 145-46.

151. It would also save the INS attorney the time required te prove to a court of appeals that the INS will not "present the district director with . . . [a] reason for refusing the reinstatement," as is required by some courts of appeals. Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990); *see also* Ramsay v. INS, 14 F.3d 206, 213 (4th Cir. 1994).

152. Lone Star Cement Corp. v. FTC, 339 F.2d 505, 512 (9th Cir. 1964).

tion actually saves judicial resources which, ironically, is one concern of the courts of appeals which have reinstated voluntary departure.[153] *McCarthy* also required a court to balance the interests of the individual to prompt access to federal courts and institutional interests favoring exhaustion.[154] The Court described three situations in which exhaustion should not be required: when exhaustion unduly prejudices a subsequent judicial action,[155] when there is doubt about the agency's authority to grant the requested relief,[156] and when the administrative remedy is inadequate because the agency is biased or has predetermined the issue.[157] While the *McCarthy* Court did not require exhaustion because the balance of these interests swayed against it,[158] reinstating voluntary departure involves none of these situations.

First, the alien will not be prejudiced in subsequent judicial action. Even if an alien is required to request voluntary departure from the district director, subsequent judicial review of the district director's decision is available.[159] If the alien desires future judicial proceedings, they are obtainable. Second, the district director clearly has authority pursuant to 8 C.F.R. § 244.2 to grant a reinstatement of voluntary departure. In fact, that regulation states she has the "sole jurisdiction"[160] to grant such relief. The final issue, relating to agency bias or predisposition, is a factual issue and would depend upon the individual circumstances of the alien requesting voluntary departure. However, courts have suggested that it would be wrong for a district director to deny voluntary departure solely because an alien had in good faith appealed the BIA decision to the court of appeals.[161] Reinstatements of voluntary departure involve none of the con-

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153. *See supra* Part IV.A.2.
154. *See McCarthy*, 503 U.S. at 146.
155. *See id.* at 146-47.
156. *See id.* at 147-48.
157. *See id.* at 148.
158. *See id.* at 152-56.
159. *See supra* note 112 and accompanying text.
160. 8 C.F.R. § 244.2 (1996).
161. *See, e.g.*, Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990) ("We also note that the circuit courts that have considered the matter have either held or strongly suggested that the law would forbid the government to deny a reinstatement *solely* because an alien brought such a good faith, potentially successful appeal."). *But see* Castaneda v. INS, 23 F.3d 1576, 1582-83 (10th Cir. 1994) (rejecting the idea that situations exist in which the law would require reinstatement because voluntary departure is discretionary).

cerns which might lead a court away from requiring exhaustion. Under the *McCarthy* analysis, federal courts of appeals should require exhaustion before reinstating voluntary departure.

b. The Davis and Pierce test and reinstating voluntary departure. Davis and Pierce suggest examining: (1) the petitioner's injury from requiring exhaustion, (2) the difficulty of the merits the court must resolve, (3) the extent to which agency fact-finding or application of expertise aids the resolution of the merits, and (4) the extent of previous agency fact-finding or application of expertise.[162] The combined weight of these factors suggests exhaustion should be required before circuit courts reinstate voluntary departure.

First, an alien is not injured if he must pursue a reinstatement from a district director. The application does not cost him money or much time. No written briefs or memoranda are required. "The request for reinstatement or extension of voluntary departure is submitted informally to the district director at the alien's place of residence."[163] There are no time deadlines imposed which would deny an application as a result of late submission; the alien can apply at any time, even after the court of appeals case has been resolved.[164] Judicial review of the district director's decision is available,[165] so even if she denies the application the alien will have the opportunity for another appeal. Leaving reinstatement of voluntary departure to the district director will not prejudice the alien. Little if any harm will result from requiring exhaustion.

Second and third, although the degree of difficulty of the merits of reinstating voluntary departure is low, agency fact-finding and expertise will aid in the determination of the merits. Aliens must meet certain statutory requirements to be eligible for voluntary departure.[166] The IJ and the BIA must therefore review an alien's eligibility before they grant voluntary depar-

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162. *See supra* Part IV.B.1.

163. 3 GORDON ET AL., *supra* note 16, § 74.02[4][f].

164. Judge Kozinski, in his dissent in *Contreras-Aragon*, quoted an excerpt of the Ninth Circuit's oral arguments in which the petitioner's counsel freely admitted he could go to the district director at any time and request a reinstatement of voluntary departure, but that he was unwilling to do so. Judge Kozinski reasoned that the perpetual availability of a reinstatement from the district director suggests exhaustion and counters any arguments that an alien would have to forego a court of appeals case to take advantage of voluntary departure. Contreras-Aragon v. INS, 852 F.2d 1088, 1101-02 (9th Cir. 1988) (en banc) (Kozinski, J. dissenting).

165. *See supra* note 112 and accompanying text.

166. *See* 8 U.S.C. § 1254(e) (1994).

ture. However, between the time voluntary departure is initially granted and the time a court of appeals examines the alien's case, he may have become ineligible.[167] The district director, not the court of appeals, is in the best position to pursue the necessary fact-finding to determine the alien's eligibility. She "adjudicates most . . . matters relating to extensions and reinstatements of voluntary departure,"[168] and is in a better position to know the alien's personal situation than the court of appeals. Even one court which reinstated voluntary departure recognized that "the District Director . . . is better suited [than the court of appeals] to consider the factual prerequisites which determine an alien's eligibility for voluntary departure."[169] The Attorney General has properly delegated[170] her authority to grant voluntary departure[171] to the district director in situations in which an extension or reinstatement is requested.[172] The district director should be allowed to exercise that delegated authority in the manner the Attorney General has established in the regulations, regardless of the simplicity of the fact-finding or the merits of the reinstatement.

Fourth, the agency has not completed its fact-finding or had a chance to apply its expertise in evaluating the current eligibility for voluntary departure of an alien appealing to a federal court of appeals. While the IJ and the BIA previously found the alien eligible for voluntary departure, that previous agency involvement is irrelevant to whether the alien is currently eligible. The district director should be allowed to complete the fact-finding necessary to determine whether the alien is currently eligible, as well as to use the discretionary authority conferred upon her by the Attorney General[173] to determine whether the alien's situation merits a grant of voluntary departure.

The four factors Davis and Pierce have proposed show the alien will not be injured by requiring exhaustion, that agency

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167. *See* Ramsay v. INS, 14 F.3d 206, 213 (4th Cir. 1994) ("[I]n the interim period between the BIA's and court of appeals' decisions, the alien may have committed acts which would preclude him from eligibility for voluntary departure . . . .").

168. 52 Fed. Reg. 24,982 (1987).

169. *Ramsay*, 14 F.3d at 213.

170. *See* 8 U.S.C. § 1103(a) (authorizing the Attorney General to delegate her authority with respect to immigration law).

171. *See id.* § 1254(e)(1) (authorizing the Attorney General to grant voluntary departure to aliens in certain circumstances).

172. *See* 8 C.F.R. § 244.2 (1996) (granting a district director the "sole jurisdiction" to reinstate or extend a previous grant of voluntary departure).

173. *See id.*

fact-finding has not been completed, and that such fact-finding will benefit a determination on the merits of an alien's request for voluntary departure. These factors weighed together suggest that a court of appeals should require exhaustion of administrative remedies by allowing the district director to adjudicate all reinstatements of voluntary departure.

Using either the Davis and Pierce four-part test or the *McCarthy* factors, courts of appeals should require exhaustion of administrative remedies in a situation in which an alien requests a reinstatement of voluntary departure.

3. *The benefits of the exhaustion argument*

Analyzing reinstatement of voluntary departure through an exhaustion of administrative remedies perspective shows how judicial resources are actually saved when the court of appeals does not take it upon itself to reinstate voluntary departure. This counters one of the arguments of some courts of appeals which have reinstated voluntary departure.[174]

Since aliens must meet certain statutory requirements to be eligible for voluntary departure,[175] the court of appeals must make a factual determination of the alien's eligibility before granting voluntary departure. As has been stated, the court is not best suited to make such determinations.[176] Some courts have placed the responsibility upon the INS attorneys arguing the appeal to show they would offer the district director any objections to a reinstatement.[177] However, if the district director is allowed to exercise the discretion and fact-finding responsibilities the Attorney General has given her to reinstate voluntary departure,[178] the court of appeals would not have to spend time and resources determining the issue of voluntary departure at all. The court would save time both in fact-finding and in actually determining whether a reinstatement is appropriate. The court would not be troubled with the issue at all, because the district director—the person upon whom the regulations delegate responsibility to reinstate voluntary departure[179]—would

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174. *See supra* Part IV.A.2.b.
175. *See* 8 U.S.C. § 1254(e).
176. *See supra* note 169 and accompanying text.
177. *See* Ramsay v. INS, 14 F.3d 206, 213 (4th Cir. 1994); Umanzor-Alvarado v. INS, 896 F.2d 14, 16 (1st Cir. 1990).
178. *See* 8 C.F.R. § 244.2.
179. *See id.*

handle the reinstatement. When the regulatory scheme established by the Attorney General to deal with reinstatements of voluntary departure is followed, the judiciary saves its time for issues more properly before it.

It is true that a longer judicial process may be required if the district director denies a request for reinstatement of voluntary departure and the alien wishes to appeal.[180] However, what might be considered a lack of judicial efficiency resulting from an appeal of the district director's decision is more a problem with the nature of judicial appeals in general rather than requiring exhaustion in this specific situation. A well-recognized principle of exhaustion is that it saves judicial resources[181]—allowing the agency to make a correct decision first while mooting judicial consideration of the issue[182]—and permits the agency to perform its fact-finding and discretionary duties without interruption.[183] Exhaustion in the *Nkacoang* situation actually saves judicial resources in the aggregate.

V. CONCLUSION

In *Nkacoang*, the Eleventh Circuit properly denied a request for reinstatement of an alien's voluntary departure. The court correctly reasoned it was without jurisdiction from Congress to grant the reinstatement. This reasoning had previously been applied by other courts of appeals deciding the identical issue. But the jurisdictional analysis, on its own, fails to adequately answer the concern of courts which have balanced jurisdiction against judicial/administrative efficiency and found efficiency more important. Applying an exhaustion of administrative remedies analysis bolsters the result of the jurisdictional approach employed by the court in *Nkacoang*. Exhaustion answers the judicial efficiency concern of some courts granting a reinstatement. As complementary arguments, lack of jurisdiction and exhaustion of administrative remedies establish that courts of appeals should not reinstate voluntary departure.

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180. *See supra* Part II.A.

181. *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992); McKart v. United States, 395 U.S. 185, 195 (1969); SCHWARTZ & WEBB, *supra* note 80, § 8.33.

182. *See McCarthy*, 503 U.S. at 145.

183. *See McKart*, 395 U.S. at 194.