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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy



OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [Redacted]

Office: New York

Date: FEB 25 2003

IN RE: Obligor: [Redacted]

Bonded Alien: [Redacted]

IMMIGRATION BOND: Bond Conditioned for the Delivery of an Alien under Section 103 of the Immigration and Nationality Act, 8 U.S.C. § 1103

IN BEHALF OF OBLIGOR:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The delivery bond in this matter was declared breached by the District Director, New York, New York, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record indicates that on October 21 1997, the obligor posted a \$5,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated July 17, 2001, was sent to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender into the custody of an officer of the Immigration and Naturalization Service (the Service) at 9:00 a.m. on August 27, 2001, at 26 Federal Plaza, Room 9-110, 9th Floor, New York, NY 10278. The obligor failed to present the alien, and the alien failed to appear as required. On February 1, 2002, the district director informed the obligor that the delivery bond had been breached.

On appeal, counsel asserts that the Form I-352 is unenforceable because the Service failed to obtain the required OMB approval prior to using this form.

The Immigration Bond (Form I-352) is a collection of information as defined by the Paperwork Reduction Act (PRA), 5 C.F.R. § 1320.3(3)(c). The Service is an agency for the purposes of the PRA and the Form I-352 falls under the PRA. In stating that the Form I-352 is unenforceable because the Service did not seek approval for the Form I-352 after its prior approval lapsed, counsel ignores the provision of the whole law and its plain meaning.

The PRA was intended to rein agency activity by not burdening the public, small businesses, corporations and other government agencies to submit information collection requests on forms that do not display control numbers approved by the Office of Management and Budget (OMB). The plain meaning of the PRA makes it clear that a person who fails to comply with a collection of information will not be subject to any penalty. See *U.S. v. Burdett*, 768 F. Supp. 409 (E.D.N.Y. 1991).

The PRA only protects the public from failing to provide information to a government agency. Here, the obligor did file the information requested on Form I-352, therefore, the obligor cannot avail himself of the affirmative defense provision codified in 44 U.S.C. § 3512. Only those persons who refuse to comply with a collection of information can raise the public protection provision as in *Saco River Cellular, Inc. v. FCC*, 133 F.3d. 25, 28 (D.C. Cir. 1998). The U.S. Court of Appeals has stated that the public protection provision is limited in scope and only protects individuals who fail to file information. *U.S. v. Spitzauer*, 176 F.3d 486 (9th Cir. 1999) (Unpublished, text in Westlaw); cert. denied 528 U.S. 921, 120 S.Ct. 283 (Oct. 4, 1999).

On appeal, counsel states that the Service did not provide the obligor with a photograph of the alien.

The present record contains evidence that a properly completed questionnaire with the alien's photograph attached was forwarded to the obligor with the notice to surrender pursuant to the Amwest/Reno Settlement Agreement, entered into on June 22, 1995 by the Service and Far West Surety Insurance Company. It is noted that the Amwest/Reno Settlement Agreement does not require that the Service provide a photograph of the alien to the obligor, only a properly completed questionnaire.

On appeal, counsel states that the obligor has not yet received a response to its FOIA request.

The alleged failure of the New York District Office to respond to the obligor's FOIA request has no bearing in this matter as bond proceedings are separate and apart from any other proceedings. Furthermore, the mere filing of a FOIA request does not excuse the obligor from delivering the alien as demanded.

On appeal, counsel contends that the obligor is not bound by the obligations it freely undertook in submitting the bond in this case, and that the Service cannot enforce the terms of the Form I-352 because "its terms constitute regulations, and the INS did not submit it to Congress for review as required by the Congressional Review Act" (CRA), 5 U.S.C. § 801, et seq. This argument is meritless.

For purposes of the CRA, the term "rule" has, with three exceptions, the same meaning that the term has for purposes of the Administrative Procedure Act (APA). 8 U.S.C. § 804(3). The relevant provision of the APA defines a "rule" as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. 5 U.S.C. § 551(4).

There are at least two reasons why Form I-352 is not a "rule" for purposes of the CRA. First, the Form I-352 is not a rule at all. It is a bonding agreement, in effect, a surety contract under which the appellant undertakes to guarantee an alien's appearance in the immigration court, and, if it comes to that, for removal. Section 236(a)(2) of the Act, 8 U.S.C. § 1226(a)(2), permits the Attorney General to release on bond an alien subject to removal proceedings. This section also permits the Attorney General to describe the conditions on such bonds, and to approve the security on them. Section 103(a)(3) of the Act, 8 U.S.C. § 1103(a)(3), permits the Attorney General to prescribe bond forms. While Form I-352 may well be a form used to comply with rules relating to release of aliens on bond, the Form itself is not a rule. It is not an "agency statement," 5 U.S.C. § 551(4), but a surety agreement between the obligor and the Government.

Second, even if it can be said that Form I-352 is a "rule," the CRA does not apply. The CRA itself provides that its requirements do not apply to a "rule of particular applicability." 5 U.S.C. §

804(3)(A). If Form I-352 is a "rule," it is "of particular applicability" since it applies only to each particular case in which a person freely agrees to sign and file the Form I-352.

On appeal, counsel states that the bonded alien is a national of El Salvador. Counsel opines that the bonded alien is eligible for Temporary Protected Status (TPS). Counsel further states that the alien's eligibility raises questions whether his bond has "ceased to exist as a matter of law" since a grant of TPS terminates INS detention and removal authority. Counsel cites no law that provides for a delivery bond to "cease to exist."

Jurisdiction over whether an alien is eligible for TPS lies with the Service or the immigration judge, not the obligor for the alien's delivery bond. Counsel has not submitted evidence that the bonded alien has been granted Temporary Protected Status by either the Service or an immigration judge.

Temporary Protected Status is by definition a temporary status for certain qualifying aliens from designated countries. At the expiration of a validly granted TPS period, absent some further change of the alien's status, the alien will be required to depart the United States. Under the terms of the bond contract, the Service has the responsibility to maintain the bond to insure the alien's ultimate departure from the United States. Pursuant to part (G) of the bond contract, a delivery bond remains in effect until removal proceedings are finally terminated or the alien is actually accepted for removal.

On appeal, counsel claims that "INS has an affirmative duty to inform [the alien] of his eligibility" for TPS.

Section 244(a)(3) of the Act provides for notice to aliens of their eligibility for Temporary Protected Status in a form and language that the alien can understand. The Service has widely publicized the eligibility criteria for each TPS program, both in English and in the native language of the designated country, e.g. Spanish for Nicaragua, Honduras and El Salvador. This satisfies the notice requirement of the Act.

On appeal, counsel asserts that the alien was granted voluntary departure on December 30, 1998, without requiring the posting of a voluntary departure bond. Thus, the delivery bond ceased to exist as a matter of law on that date and could not be breached on August 27, 2001.

The record reflects that a removal hearing was held on December 30, 1998, and the alien was granted voluntary departure from the United States on or before April 30, 1999, with an alternate order of removal to take effect in the event that the alien failed to depart as required. The court did not order the alien to post a voluntary departure bond. The alien was ordered to provide the Service, within 60 days, travel documentation sufficient to assure lawful

entry into the country to which the alien was departing. The right of appeal was waived.

Voluntary departure may be granted by the Service or by the immigration court under prescribed conditions set forth in the statute at section 240B of the Act, 8 U.S.C. § 1229c, and by regulation at 8 C.F.R. § 240.25 and 8 C.F.R. § 240.26. Under the provisions of section 240B of the Act, 8 U.S.C. § 1229c and 8 C.F.R. § 240.26(d), when an immigration court grants a request for voluntary departure, the immigration judge also enters an alternate order of removal to take effect in the event the alien fails to depart as required. The Service, not the immigration court, is statutorily responsible for removing the alien whose order of voluntary departure becomes a final removal order. Section 241 of the Act, 8 U.S.C. § 1231. Removal proceedings are not over until the Service has discharged this statutory responsibility. The statute does not extinguish the delivery bond on an alien who remains free to choose whether to voluntarily depart the United States, or to remain in the United States in violation of the order.

The delivery bond will not be canceled until it is replaced by another type of bond to ensure the alien's departure, such as a voluntary departure bond, or under the terms of the bond, until proceedings have terminated or the alien is accepted for removal. As the bonded alien is still in the United States, removal proceedings are not over, and the delivery bond remains in effect.

Delivery bonds are violated if the obligor fails to cause the bonded alien to be produced or to produce himself/herself to an immigration officer or immigration judge upon each and every written request until removal proceedings are finally terminated, or until the alien is actually accepted by the immigration officer for detention or removal. *Matter of Smith*, 16 I&N Dec. 146 (Reg. Comm. 1977).

The regulations provide that an obligor shall be released from liability where there has been "substantial performance" of all conditions imposed by the terms of the bond. 8 C.F.R. § 103.6(c)(3). A bond is breached when there has been a substantial violation of the stipulated conditions of the bond. 8 C.F.R. § 103.6(e).

8 C.F.R. § 103.5a(a)(2) provides that personal service may be effected by any of the following:

- (i) Delivery of a copy personally;
- (ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;

(iii) Delivery of a copy at the office of an attorney or other person including a corporation, by leaving it with a person in charge;

(iv) Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.

The bond (Form I-352) provides in pertinent part that the obligor "agrees that any notice to him/her in connection with this bond may be accomplished by mail directed to him/her at the above address." In this case, the Form I-352 listed 407 Fannin St., Houston, TX 77002 as the obligor's address.

The evidence of record indicates that the Notice to Deliver Alien was sent to the obligor at 407 Fannin St., Houston, TX 77002 on July 17, 2001 via certified mail. This notice demanded that the obligor produce the bonded alien on August 27, 2001. The domestic return receipt indicates the obligor received notice to produce the bonded alien on July 23, 2001. Consequently, the record clearly establishes that the notice was properly served on the obligor in compliance with 8 C.F.R. § 103.5a(a)(2)(iv).

Furthermore, it is clear from the language used in the bond agreement that the obligor shall cause the alien to be produced or the alien shall produce himself to a Service officer upon each and every request of such officer until removal proceedings are either finally terminated or the alien is accepted by the Service for detention or removal.

It must be noted that delivery bonds are exacted to insure that aliens will be produced when and where required by the Service for hearings or removal. Such bonds are necessary in order for the Service to function in an orderly manner. The courts have long considered the confusion which would result if aliens could be surrendered at any time or place it suited their or the surety's convenience. *Matter of L-*, 3 I&N Dec. 862 (C.O. 1950).

After a careful review of the record, it is concluded that the conditions of the bond have been substantially violated, and the collateral has been forfeited. The decision of the district director will not be disturbed.

ORDER: The appeal is dismissed.