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U.S. Citizenship
and Immigration
Services

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FEB 24 2004

FILE:  Office: NEW YORK Date:

IN RE: Obligor: 
Bonded Alien

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

ON BEHALF OF OBLIGOR:



INSTRUCTIONS:

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

Mari Johnson

so 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. A subsequent appeal was rejected by the Administrative Appeals Office (AAO). The matter will be reopened by the AAO on a CIS motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The appeal will be dismissed.

The record indicates that on December 21, 1999, the obligor posted a \$2,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated April 29, 2002, 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 (legacy INS), now Immigration and Customs Enforcement (ICE), at 9:00 a.m. on June 12, 2002, at [REDACTED]

[REDACTED] The obligor failed to present the alien, and the alien failed to appear as required. On October 22, 2002, the district director informed the obligor that the delivery bond had been breached.

On October 9, 2003, the AAO rejected the appeal as evidence in the record indicated that the obligor had failed to file a timely appeal.

On motion, the AAO has determined that the Notice of Appeal, Form I-290B was received at the New York District Office within the required timeframe as demonstrated by the domestic return receipt, Form 3811 now contained in the record. The order rejecting the appeal will be withdrawn and the appeal will be adjudicated on its merits.

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 ICE cannot enforce the terms of the Form I-352 because "its terms constitute regulations, and the INS [now ICE] 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, now the Secretary, Department of Homeland Security (Secretary), to release on bond an alien subject to removal proceedings. This section also permits the Secretary 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 Secretary 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). Assuming, arguendo, that Form I-352 can be called a rule, it applies only to each particular case in which a person freely agrees to sign and file the Form I-352. Thus, even if the obligor were correct in saying Form I-352 is a rule, it would be a rule of particular applicability, exempt from the reporting requirement.

On appeal, counsel argues that the Form I-352 is unenforceable because ICE 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). ICE is an agency for the purpose of the PRA and the Form I-352 falls under the PRA. In stating that the Form I-352 is unenforceable because ICE 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. *See U.S. v. Spitzauer*, 176 F.3d 486 (table), 1999 WL 197240 (9th Cir.1999), cert. denied 528 U.S. 921, 120 S.Ct. 283 (Oct. 4, 1999).

On appeal, counsel asserts that the immigration judge issued an order of removal on April 27, 2001. Counsel further asserts that because ICE made no attempt to execute this order within 90 days, it has lost detention authority, and the delivery bond should be canceled as a matter of law:

The record reflects that a removal hearing was held on April 27, 2001 and the alien was ordered removed from the United States in absentia.

In *Bartholomeu v. INS*, 487 F. Supp. 315 (D. Md. 1980), the judge stated regarding former section 242(c) of the Immigration and Nationality Act (the Act) that, although the statute limited the authority of the Attorney General, now the Secretary, Department of Homeland Security (Secretary), to detain an alien after a six-month period (at that time) following the entry of an order of removal, the period had been extended where the delay in effecting removal arose not from any dalliance on the part of the Attorney General but from the alien's own resort to delay or avoid removal. The Attorney General never had his unhampered and unimpeded six-month period in which to effect the alien's timely removal because the alien failed to appear for removal and remained a fugitive.

Present section 241(a)(2) of the Act, 8 U.S.C. § 1231(a)(2), gives the Secretary authority to physically detain an alien for a period of 90 days from the date of final order of removal for the purpose of effecting removal, and was intended to give the Secretary a specific unhampered period of time within which to effect removal. Section 241(a)(1)(C) of the Act, 8 U.S.C. § 1231(a)(1)(C), specifically provides for an extension of the removal period beyond the 90-day period when the alien conspires or acts to prevent his own removal. As the alien in this case failed to appear for the removal hearing, the Secretary's detention authority is suspended, and, following *Bartholomeu*, will be deemed to start running when the alien is apprehended and otherwise available for actual removal.

As noted above, the Secretary maintains detention authority in this case, as the alien failed to appear for his removal hearing and to surrender to ICE for removal. We will nevertheless fully address counsel's arguments below.

The AAO has continually held that the Secretary's authority to maintain a delivery bond is not contingent upon his authority to detain the alien. Counsel argues this ruling is contrary to *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954).

Following his arrest for violating immigration laws, Rowoldt, the alien in *Shrode*, was released on a bond conditioned upon his appearance for deportation proceedings. Although the order of deportation became final in April 1952, he was not deported. In October 1952, more than six months after the deportation order became final, Rowoldt was placed on supervisory parole. Immigration officials, however, refused to release him from bond..

In upholding the lower court's decision releasing Rowoldt from bond, the appellate court noted that the statute granted the Attorney General supervisory and limited detention authority but did not authorize the posting of bond. The court stated that the requirement to post bail is tantamount to making the sureties jailers, and that the power to require bail connotes the power to imprison in the absence of such bail. Since the only authority the Attorney General could exercise in Rowoldt's case was supervisory, a bond could not be required.

Since *Shrode*, section 305 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) added section 241(a)(1) of the Act, 8 U.S.C. § 1231(a)(1). It provides generally that the Secretary shall remove an alien from the United States within 90 days following the order of removal, with the 90-day period suspended for cause. During the 90-day removal period, the Secretary shall exercise detention authority by taking the alien into custody and canceling any previously posted bond unless the bond has been breached or is subject to being breached. Section 241(a)(2) of the Act; 8 C.F.R. § 241.3(a).

Section 241(a)(3) of the Act provides that if an alien does not leave or is not removed during the 90-day period, the alien shall be subject to supervision under regulations prescribed by the Secretary. Posting of a bond may be authorized as a condition of release after the 90-day detention period. 8 C.F.R. § 241.5(b). Thus, unlike in *Shrode*, the Secretary has the continuing authority to require aliens to post bond following the 90-day post-order detention period.

Counsel suggests that once ICE no longer has detention authority over the alien, the delivery bond must terminate by operation of law. However, this is contrary to the holdings of *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Doan v. INS*, 311 F.3d 1160 (9th Cir. 2002). In *Zadvydas*, the Supreme Court expressly recognized the authority of the legacy INS to require the posting of a bond as a condition of release after it lost detention authority over the alien, even though a bond was not provided as a condition of release by the statute. In *Doan*, the 9th Circuit held the legacy INS had the authority to require a \$10,000 delivery bond in a supervised release context even though it did not have detention authority. These cases arose in the post-removal period, and it is obvious from the rulings that detention authority is not the sole determining factor as to whether ICE can require a delivery bond.

The bond contract provides that it may be canceled when (1) exclusion/deportation/removal proceedings are finally terminated; (2) the alien is accepted by ICE for detention or deportation/removal; or (3) the bond is

otherwise canceled. The circumstances under which the bond may be "otherwise canceled" occur when the Secretary or the Attorney General imposes a requirement for another bond, and the alien posts such a bond, or when an order of deportation has been issued and the alien is taken into custody. As the obligor has not shown that any of these circumstances apply, the bond is not canceled.

Counsel alternatively argues that the obligor is entitled to cancellation of the bond for equitable reasons, as the chances of the alien becoming a flight risk increase significantly after a final order is issued. As stated in the preceding paragraph, the obligor is bound under the terms of the contract to deliver the alien until the bond is canceled or breached.

On appeal, counsel asserts that the director failed to provide the obligor with a properly completed questionnaire as it was not signed.

Exhibit F of the Amwest/Reno Settlement Agreement entered into on June 22, 1995 by the legacy INS and Far West Surety Insurance Company, provides that "a questionnaire prepared by the surety with approval of the INS [now ICE] will be completed by [ICE] whenever a demand to produce a bonded alien is to be delivered to the surety. The completed questionnaire will be certified correct by an officer of [ICE] delivered to the surety with the demand." ICE is in compliance with the Settlement Agreement when the questionnaire form is provided to the obligor with the alien's identifying information, such as his or her name, alien number and if available, a photograph. The Settlement Agreement does not require a signature by the certifying officer. Counsel has not alleged or established any prejudice resulting from ICE's failure to sign the questionnaire. More importantly, failure to sign the questionnaire does not invalidate the bond breach.

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 ICE 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 evidence of record indicates that the Notice to Deliver Alien was sent to the obligor at [REDACTED] on April 29, 2002 via certified mail. This notice demanded that the obligor produce the

bonded alien on June 12, 2002. The domestic return receipt indicates the obligor received notice to produce the bonded alien on May 13, 2002. 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 an ICE officer upon each and every request of such officer until removal proceedings are either finally terminated or the alien is accepted by ICE 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 ICE for hearings or removal. Such bonds are necessary in order for ICE 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 the alien's 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 order of October 9, 2003 rejecting the appeal is withdrawn. The district director's decision declaring the bond breached is affirmed.