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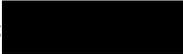
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Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536



FILE: 

Office: New York

Date: JAN 02 2004

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 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that on March 9, 1998, the obligor posted a \$3,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated May 2, 2003 was sent to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender to an officer of the Immigration and Naturalization Service (legacy INS), now Immigration and Customs Enforcement (ICE), at 9:00 a.m. on May 29, 2003, at [REDACTED]

[REDACTED] The obligor failed to present the alien, and the alien failed to appear as required. On June 25, 2003, 2003, the district director informed the obligor that the delivery bond had been breached.

On appeal, counsel states that the bonded alien is a national of Honduras who has been continuously residing in the United States since her entry on February 17, 1998. Counsel further states the bonded alien is therefore eligible for Temporary Protected Status (TPS) and her eligibility raises questions as to whether her bond has "ceased to exist as a matter of law" since a grant of TPS terminates ICE's detention and removal authority.

TPS is a temporary immigration status granted to eligible nationals of designated countries. During the period for which the Attorney General has designated a country under the TPS program, approved nationals of the designated country are not required to leave the United States. However, TPS is not a grant of permanent residence. When the Attorney General terminates a country's TPS status, the beneficiaries revert to the same immigration status they maintained before they were granted TPS. There are several factors to be considered before an alien may be eligible to apply for and receive TPS benefits. Although counsel does not state how he knows the alien has resided continuously in the United States since her entry, continuous residency is but one factor to consider. Section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

Jurisdiction to determine whether an alien is eligible for TPS lies with CIS or the immigration judge, and counsel has submitted no evidence that the bonded alien has been granted TPS status.

Counsel also asserts on appeal that ICE "has an affirmative duty to inform [the alien] of her eligibility" for TPS.

Sections 244(a)(3)(B) and (C) of the Act require notice to aliens in removal proceedings of their eligibility for TPS. While the alien within the context of removal proceedings must be provided notice of his or her eligibility for TPS, this requirement has no bearing on the obligor's contractual duty to deliver the alien. Even assuming that ICE were to lose detention authority over an

alien who may be eligible for TPS, as noted *infra*, this would not require cancellation of the delivery bond.

On appeal, counsel states that the immigration judge entered an order of removal on November 5, 1998. Counsel argues that because ICE made no attempt to execute this order for over 54 months, it lost detention authority over the alien and the bond should be canceled.

The record reflects that a removal hearing was held on November 5, 1998 and the alien was ordered removed in absentia.

In *Bartholomeu v. INS*, 487 F. Supp. 315 (D. Md. 1980), the judge stated regarding former section 242(c) of 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.

Counsel argues on appeal that a loss of detention authority requires cancellation of the delivery bond. As noted above, the Secretary maintains detention authority in this case, as the alien failed to appear for her 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.

The obligor is bound by the terms of the contract to which it obligated itself. Under the terms of the Form I-352 for bonds conditioned upon the delivery of the alien, the obligor contracted to "cause the alien to be produced or to produce

himself/herself . . . upon each and every written request until exclusion/deportation/removal proceedings . . . are finally terminated." (Emphasis added). Thus, the obligor is bound to deliver the alien by the express terms of the bond contract until either exclusion, deportation or removal proceedings are finally terminated, or one of the other conditions occurs.

Recent cases make it clear that detention authority is not the sole determining factor as to whether ICE can require a delivery bond. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), 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 v. INS*, 311 F.3d 1160 (9th Cir. 2002), the court 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.

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 delay in action after the removal order prejudices the obligor's ability to perform. 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 ICE 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). 5 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 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.

It is noted that the present record contains evidence that a properly completed questionnaire 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 legacy INS and Far West Surety Insurance Company.

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, as specified in the appearance notice, upon each and every written request until removal proceedings are finally terminated, or until the said 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 May 2, 2003 via certified mail. This notice demanded that the obligor produce the bonded alien on May 29, 2003. The domestic return receipt indicates the obligor received notice to produce the bonded alien on May 12, 2003. 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 appeal is dismissed.