

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to
prevent
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

425 I Street N.W.

Washington, D.C. 20536



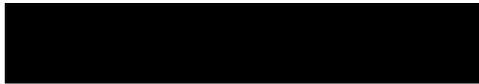
FILE:

Office: San Diego

Date:

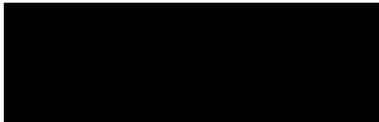
JAN 16 2004

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:



PUBLIC COPY

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, San Diego, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record indicates that on March 23, 2001, the obligor posted a \$7,500 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated December 6, 2002, was addressed to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender to the Immigration and Naturalization Service (legacy INS), now Immigration and Customs Enforcement (ICE), at 1:00 p.m. on January 7, 2003, at [REDACTED]

[REDACTED] The obligor failed to present the alien, and the alien failed to appear as required. On February 13, 2003, the district director informed the obligor that the delivery bond had been breached.

On appeal, counsel asserts that the alien was granted voluntary departure on March 16, 2001. Counsel indicates that the obligor does not know whether the immigration judge set a voluntary departure bond, whether the alien posted such a bond or whether the alien has departed the United States. Counsel states that one of these events constitutes sufficient grounds for sustaining the appeal and canceling the bond.

Counsel provides documentation developed by the Office of General Counsel (OGC), now Office of the Chief Counsel (OCC), that states a delivery bond must be canceled if an immigration court grants voluntary departure in a removal proceeding without the requirement of a voluntary departure bond and without setting other conditions on the grant of voluntary departure. The AAO has held in a precedent decision that OCC memoranda are merely opinions. The OCC is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OCC recommendations. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998). Further, the AAO is not bound to follow a policy that violates procedure established by statute or regulation. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

The record reflects that a removal hearing was held on March 16, 2001, and the alien was granted voluntary departure from the United States on or before July 16, 2001, with an alternate order of removal to take effect in the event that the alien failed to depart as required. The court ordered that a voluntary departure bond be imposed in the amount of \$7,500 on or before March 23, 2001. A voluntary departure bond was not posted, and the delivery bond remains in effect. The court did not set other conditions on the grant of voluntary departure. The right of appeal was waived.

On appeal, counsel states that ICE lost statutory detention authority and hence the authority to maintain the delivery bond as ICE failed to execute the final order of removal within the 90

statutory days post-removal period. Counsel further argues that ICE lost detention authority if the immigration judge granted the alien voluntary departure without the requirement of a bond or other conditions. Notwithstanding that ICE maintains detention authority in this case, as the alien failed to post a voluntary departure bond as ordered by the court, counsel's arguments will be fully addressed below.

Counsel states that ICE acknowledges that a loss of detention authority serves to terminate the delivery bond contract. As evidence, he cites the Amwest/Reno Settlement Agreement, entered into on June 22, 1995 by the legacy INS and Far West Surety Insurance Company. Under that agreement, the parties agreed that, pursuant to statute, the authority of the Attorney General, now the Secretary, Department of Homeland Security (Secretary), to detain an alien subject to a final order of deportation generally expires six months after the order of deportation becomes final. The agreement also contains a passage from the Deportation Officer's Handbook, as it then existed, that stated "upon the expiration of the six month period . . . the alien, as a rule, cannot . . . be continued on bond. Any outstanding bond or order of recognizance must be cancelled (emphasis added)." The parties, following the rule established by *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954), stipulated that ICE would cancel any bond which was not breached prior to the expiration of the six month period.

The provision, stipulation and case law were predicated on former section 242(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1252(c), which was deleted by section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), effective April 1, 1997. Because former section 242 (c) of the Act no longer exists, this language contained in the Settlement Agreement is no longer applicable.

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 ignores the statutory framework established by amendments to the Act by the IIRAIRA.

ICE authority to arrest and detain an alien under section 236 of the Act terminates when a decision is made whether an alien is to be removed from the United States, as for example, upon the grant of voluntary departure without the setting of conditions. ICE detention and removal authority under section 241 of the Act begins with an order of removal, for example, upon the alien's overstay of the voluntary departure period. Counsel argues that during the period of voluntary departure where the alien has not reserved appeal, and without conditions on departure such as an order to produce a travel document or to post a voluntary departure bond, ICE has no authority to detain the alien, and thus no authority to maintain a delivery bond.

Counsel also argues that the AAO's previous rulings are contrary to the court's holding in *Shrode, supra*, in that bonding authority is a form of constructive detention, and a loss of detention authority requires cancellation of the delivery bond.

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 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.

The obligor is bound by the terms of the contract to which it obligated itself. The terms of the Form I-352 for bonds conditioned upon the delivery of the alien establish the following condition: "the obligor shall 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.

Counsel suggests that once ICE no longer has detention authority over the alien, it can no longer require a delivery bond. However, this ignores 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. Even though these cases arose in the post-removal period, 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 removal 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.

The immigration court's failure to order the posting of a voluntary departure bond does not alter the terms of the bond contract, and does not serve to extinguish the delivery bond despite ICE loss of detention authority during the period of voluntary departure. The delivery bond requires delivery of the alien to ICE upon demand or until proceedings have terminated, and is not conditioned upon a theory of constructive detention.

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.

On appeal, counsel asserts that the obligor has no record of having received the Notice to Deliver Alien requiring the alien's surrender on January 7, 2003.

The record fails to contain the domestic return receipt to indicate that the Notice to Deliver Alien was sent to the obligor at [REDACTED] on December 6, 2002, or to indicate that the obligor had received the notice to produce the bonded alien on January 7, 2003. Consequently, the record fails to establish that the district director properly served notice on the obligor in compliance with 8 C.F.R. § 103.5a(a)(2)(iv).

Because the record fails to establish proper service of the Form I-340 on the obligor as required, the appeal will be sustained. The district director's decision declaring the bond breached will be rescinded and the bond will be continued in full force and effect.

ORDER: The appeal is sustained. The district director's decision declaring the bond breached is rescinded and the bond is continued in full force and effect.