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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

[Redacted]

FILE:

[Redacted]

Office: MIAMI

Date: **MAR 29 2004**

IN RE:

Obligor:  
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

ON BEHALF OF OBLIGOR:

[Redacted]

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The delivery bond in this matter was declared breached by the Field Office Director, Detention and Removal, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record indicates that on November 24, 1999, the obligor posted a \$3,500 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated June 23, 2003, was addressed to the obligor via certified mail, return receipt requested. The notice demanded the bonded alien's surrender into the custody of an officer of Immigration and Customs Enforcement (ICE) at 9:00 a.m. on July 23, 2003, at [REDACTED]. The obligor failed to present the alien, and the alien failed to appear as required. On September 5, 2003, the field office director informed the obligor that the delivery bond had been breached.

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). 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 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 asserts that the immigration judge issued an order of removal on January 9, 2001. Counsel further asserts that because ICE failed to execute the order for over two and half years, the delivery bond should be canceled.

The record reflects that a removal hearing was held on January 9, 2001 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 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.

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.

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.

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 record fails to contain the domestic return receipt to indicate that the Notice to Deliver Alien was sent to the obligor [REDACTED] on June 23, 2003, or to indicate that the obligor had received the notice to produce the bonded alien on July 28, 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 field office 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 field office director's decision declaring the bond breached is rescinded and the bond is continued in full force and effect.