



U.S. Citizenship
and Immigration
Services

GA

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT (LSC)

Date:

NOV 26 2004

IN RE:

Obligor:

Bonded Ali

[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.

Mari Johnson

to Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The delivery bond in this matter was declared breached by the Director, Headquarters, Detention and Removal, Williston, Vermont, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The record indicates that on March 13, 1998, the obligor posted a \$2,500 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated October 31, 2003, 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 Immigration and Customs Enforcement (ICE) at 9:00 a.m. on November 18, 2003, at [REDACTED]

[REDACTED] The obligor failed to present the alien, and the alien failed to appear as required. On November 19, 2003, the 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.

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 legacy Immigration and Naturalization Service 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 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 dated October 31, 2003 was sent to the obligor at [REDACTED] via certified mail. This notice demanded that the obligor produce the bonded alien on November 18, 2003. The domestic return receipt indicates the obligor received notice to produce the bonded alien on November 3, 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).

On appeal, counsel asserts that because the Form I-166 was attached to and dated the same date as the Form I-340, the obligor has no way of knowing if ICE waited the required three days to mail the Form I-166 to the alien.

The Amwest/Reno Settlement Agreement provides that the Form I-166 notice will not be mailed to the alien before, and not less than three days after the demand to surrender is mailed to the obligor.

The record contains a Form 3800, certified mail receipt for the Form I-166. However, because the Form 3800 does not include a postmarked date, and the record does not contain any evidence of the date the Form I-166 was mailed, it cannot be ascertained whether the director waited the required three days to mail the Form I-166. Consequently, the record does not establish that the Form I-166 was mailed at least three days after the notice to surrender was mailed.

On appeal, counsel further asserts that the sending of a Form I-166 has had such a prejudicial effect on the obligor's ability to produce the alien that the bond should be canceled.

Form I-166 has not been required since July 25, 1986, which is the effective date of an amendment to former 8 C.F.R. § 243.3. That amendment had no effect on the obligor's agreement to produce the alien upon request. Further, the obligor's contractual obligation to surrender the alien is not affected by ICE's discharge of its responsibility to locate and remove an alien by sending the Form I-166 to the alien's last known address.

Based on the provisions of the Amwest Agreement and the fact that the record does not establish that the Form I-166 was sent more than 3 days after the Form I-340 was mailed to the obligor, the appeal will be sustained and the director's decision declaring the bond breached will be withdrawn.

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