

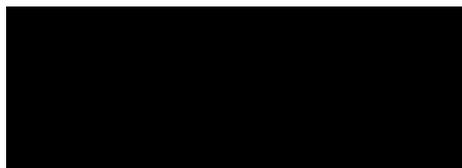
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: EL PASO

Date: **JAN 27 2005**

IN RE:

Obligor:

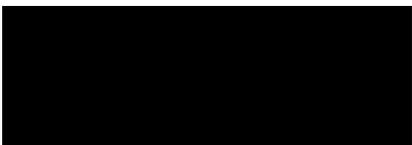


Bonded Alien:

EMIGRATION BOND:

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

OFFICIAL 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

 Robert F. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The delivery bond in this matter was declared breached by the District Director, El Paso, Texas. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted. The order dismissing the appeal will be affirmed.

The record indicates that on October 19, 2001, the obligor posted a \$10,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated May 24, 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 2:30 p.m. on June 4, 2002, at 6451 Boeing Drive, 1st Floor, El Paso, TX 79925. The obligor failed to present the alien, and the alien failed to appear as required. On June 21, 2002, the district director informed the obligor that the delivery bond had been breached.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or ICE policy. 8 C.F.R. § 103.5(a)(3).

On appeal, counsel argued that the Form I-340, Notice to Deliver Alien, was untimely as the obligor received the notice on June 3, 2002 with a surrender date of June 4, 2002. The certified mail receipt included in the record indicated that the obligor received the Form I-340 on May 31, 2002.

On motion, counsel acknowledges that the obligor received the notice on May 31, 2002, but asserts that, as that day was a Friday, the surrender date of June 4, 2002 did not give the obligor a "reasonable" time in which to produce the alien. Counsel asserts that the deletion of 8 C.F.R. § 243.3 removed any temporal notice requirements and that the AAO's reliance upon *International Fidelity Ins. Co. v. Crosland*, 516 F. Supp. 1249 (S.D.N.Y. 1981), which interprets the notice requirements of 8 C.F.R. § 243.3, is erroneous as the case no longer has precedential value.

Counsel's argument is without merit. As the court specifically noted in *International Fidelity Ins. Co.*, the notice requirement of 8 C.F.R. § 243.3 pertained to the alien and that section 243.3 required no specific notice to the surety. The court further noted that even if the Immigration and Naturalization Service (legacy INS) was required to give the surety 72 hours notice under the regulation, as the surety was arguing, that the surety received sufficient notice even though it did not receive the demand notice until one day before it was required to produce the alien. The court noted that 8 C.F.R. § 103.5a(b) (1981), provided that when service is made by mail, three days may be added to the prescribed period of the notice. The court noted that the surety received seven days constructive notice and the fact that it did not receive the letter until one day before the alien was to be surrendered was technically irrelevant. Therefore, the court's decision regarding notice to the obligor, as opposed to the alien, is still relevant.

Counsel further argues that as "there is no longer any regulatory basis for determining what constitutes timely notice to the obligor on an immigration delivery bond (if there ever was), we must look to the parties to the contract's reasonable understanding of their rights and duties under that contract." As discussed above, prior regulations provided no specific time in which the obligor must be provided with notice to produce the bonded alien. The Amwest v. Reno Settlement Agreement, entered into on June 22, 1995 between the legacy INS and Far West Surety Insurance Company, requires that the obligor be given a "reasonable period" in which to comply with the notice to deliver the bonded alien, but sets no specific time frame for the notice

other than when a Form I-166 is mailed to the bonded alien.¹ Counsel does not argue, and the record does not reflect, that the mailing of the Form I-166 is an issue in the present case.

Counsel asserts in a footnote that, "any notice less than 10 days does not give the obligor a reasonable opportunity to perform." We note, however, as the court did in *International Fidelity Ins. Co.*, that the obligor has not alleged that it would have been able to produce the bonded alien had it been given ten days notice, or that it has produced the alien since receipt of the surrender demand.

On motion, counsel for the obligor again states that the director failed to include a photograph of the alien with the questionnaire, or to indicate affirmatively that none was available.² Counsel indicates:

I am attaching a questionnaire brief, which is a history of the I-340 questionnaire and the requirements under *Amwest I*, *Amwest II*, and many INS [now ICE] memorandums, wires and training materials dedicated to this particular issue. They make it clear that each District must attach a properly completed questionnaire and a photograph, if available (or otherwise state "none is available"), to each I-340 at the time they send it to the surety. An improperly completed questionnaire without the photograph does not satisfy the *Amwest Settlements'* requirements.

Counsel fails to submit the ICE memoranda, wires and training materials to support his arguments. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 17 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, training materials written by the INS office of General Counsel, now Office of the Principal Legal Adviser (OPLA), are not binding on ICE.

The Settlement Agreement, Exhibit F, provides that "a questionnaire prepared by the surety with approval of the INS [now ICE] will be completed by the [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 the [ICE] delivered to the surety with the demand."

ICE is in substantial compliance with the Settlement Agreement when the questionnaire provides the obligor with sufficient identifying information to assist in expeditiously locating the alien, and does not mislead the obligor. Each case must be considered on its own merits. Failure to include a photograph, which is not absolutely required under the terms of the Agreement, does not have the same impact as an improper alien number or wrong name. The AAO must look at the totality of the circumstances to determine whether the obligor has been prejudiced by ICE's failure to fill in all of the blanks, or to attach a photograph if one is available.

¹ The Agreement requires that if ICE "intends to notify the alien of the date and time of [removal], such notice will not be mailed to the alien before, and not less than 3 days after, the demand to produce the alien is mailed to the bond obligor.

² Capital Bonding Corporation executed a settlement agreement with the legacy INS on February 21, 2003, in which it agreed not to raise certain arguments on appeals of bond breaches. The AAO will adjudicate the motion notwithstanding Capital Bonding Corporation's failure to comply with the settlement agreement in this case.