



U.S. Citizenship
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FILE:



Office: ST. PAUL

Date: DEC 14 2006

IN RE:



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 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, Chief
Administrative Appeals Office

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

The record indicates that on December 21, 2000, 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 August 4, 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 August 25, 2003, at [REDACTED]. The obligor failed to present the alien, and the alien failed to appear as required. On August 25, 2003, the field office director informed the obligor that the delivery bond had been breached.

On appeal, counsel asserts that the alien was granted voluntary departure, but the obligor does not know whether: 1) the immigration judge set a voluntary departure bond; 2) the alien posted such a bond; or 3) 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 Principal Legal Adviser (OPLA) for ICE 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 materials submitted by counsel are not binding authority in this proceeding. First, as will be discussed, the statute relied upon by OGC when it issued the memorandum no longer exists. The materials provided by counsel are based on former section 242(c) of the Immigration and Nationality Act (the Act), a statutory provision that was deleted by section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996). 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).

Further, the legacy Immigration and Naturalization Service (INS) memoranda merely articulate internal guidelines for its personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)); see also *R.L. Inv. Ltd. Partners v. I.N.S.*, 86 F.Supp.2d 1014, 1022 (D. Haw. Mar 03, 2000); *aff'd*, 273 F.3d 874 (9th Cir.).

Finally, OGC opinions are advisory in nature and do not bind ICE or the AAO. See *R.L. Inv. Ltd. Partners*, 86 F.Supp.2d at 1022. Even apart from its advisory nature, the OGC opinion referred to by counsel is not a statement on which the obligor was entitled to rely. The AAO has held in a precedent decision that INS General Counsel memoranda are merely opinions. The OGC is not an adjudicative body and functions in an advisory capacity only; as such, adjudicators are not bound by its recommendations. See *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998).

The record reflects that a removal hearing was held on September 26, 2002, and the alien was granted voluntary departure from the United States on or before January 24, 2003 with an alternate order of removal to take effect in the event that the alien failed to depart as required. The immigration judge imposed no requirement for a voluntary departure bond, but ordered the alien not to work in the United States without authorization from the legacy INS.

On appeal, counsel states that ICE lost statutory detention authority and hence the authority to maintain the delivery bond if the immigration judge granted the alien voluntary departure without the requirement of a bond or other conditions. Counsel's arguments will be fully addressed below.

Counsel argues that ICE acknowledges that a loss of detention authority serves to terminate the delivery bond. 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)."¹ Following the rule accepted to have been established by *Shrode v. Rowoldt*, 213 F.2d 810 (8th Cir. 1954), the parties stipulated that ICE would cancel any bond which was not breached prior to the expiration of the six month period. As noted above, the provision, stipulation and case law were predicated on former section 242(c) of the Act, 8 U.S.C. § 1252(c), which was deleted by section 306 of the 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 that this determination ignores the statutory framework established by amendments to the Act by the IIRAIRA.

As argued by counsel, 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 argues that ICE lost detention authority and hence the authority to maintain the delivery bond when it failed to execute the removal of the bonded alien within 90 days of the final order of removal. Counsel also argues that the AAO's previous determinations 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.

¹ On April 6, 2005, the Acting Director for Detention and Removal, ICE, issued a memorandum clarifying that the provisions of the Amwest/Reno Settlement Agreement applied only to the signatories of the Agreement. This memorandum explained that ICE field offices were to be guided in these matters by statute, regulations, the terms of a given immigration delivery bond, and the April 2005 memorandum.

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*, Congress enacted section 305 of the IIRAIRA, adding 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. § 1241.3(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. § 1241.5(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.

Counsel is correct that under the terms of the Form I-352, the "types" of bonds are not interchangeable. The obligor is only bound by the terms of the Form I-352 to which it obligated itself. It is noted, however, that 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 until either exclusion, deportation or removal proceedings are finally terminated, or one of the other conditions occurs.

Counsel posits 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 without regard to 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. The court understood *Shrode* to have been based on the Attorney General's failure to promulgate a rule or regulation requiring a supervisory bond rather than his lack of detention authority. Even though these cases arose in the post-removal period, it is apparent from the rulings that detention authority is not the sole determining factor as to whether ICE can require a delivery bond.

The bond 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. For instance, in accordance with the instructions on the current Form I-352 (Rev. 06/23/00), which was approved by the Office of Management and Budget after changes implemented by IIRAIRA, the General Terms and Conditions provide that "[c]ancellation of a bond issued as a delivery bond shall occur upon...issuance of a new delivery [bond] or voluntary departure

bond on the bonded alien” and “[e]xecution of a voluntary departure bond for an alien cancels any existing delivery bond posted on behalf of the same alien, except in the circumstance when an immigration judge grants voluntary departure at the conclusion of a proceeding, and the alien appeals the finding of removability.” As the obligor has not shown that any of these circumstances apply, the bond is not canceled. *See also* Form I-352 at ¶ 1, providing that “[t]he express language of the bond contract shall take precedence over any inconsistent policies or statements.”

Further, the regulation at 8 C.F.R. § 103.2(a)(1) provides, in pertinent part that:

Every . . . document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

In accordance with the post-IIRAIRA instructions on the bond, incorporated into the regulations pursuant to 8 C.F.R. § 103.2(a)(1), there is no cancellation of the delivery bond if the immigration judge grants voluntary departure but does not require that a voluntary departure bond be posted. Under the express terms of the bond, it is only the execution of a voluntary departure bond that cancels the delivery bond. *See* Form I-352, General Terms and Conditions at ¶ 2.

That the immigration judge did not order the posting of a voluntary departure bond does not alter the terms of the bond or serve to extinguish the delivery bond. 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. Thus counsel’s arguments cannot be reconciled with the statutory, regulatory, and case law discussed above or with the express terms of the delivery bond.

Counsel raises additional arguments in a formulaic brief concerning bonded aliens who may be eligible for Temporary Protected Status. As these arguments are not applicable in this case, they will not be addressed here.

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 dated August 4, 2003 was sent to the obligor at [REDACTED] via certified mail. This notice demanded that the obligor produce the bonded alien on August 25, 2003. The domestic return receipt indicates the obligor received notice to produce the bonded alien on August 11, 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).

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 field office director will not be disturbed.

ORDER: The appeal is dismissed.