U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: WASHINGTON, D.C. Date: JAN 10 2007

IN RE: Obligor: [redacted]
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:

[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

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, Washington, D.C., and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The record indicates that on November 12, 2002, the obligor posted a $5,000 bond conditioned for the delivery of the above referenced alien. A Notice to Deliver Alien (Form I-340) dated September 26, 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 the Immigration and Customs Enforcement (ICE) at 10:00 a.m. on December 3, 2003, at [redacted] The obligor failed to present the alien, and the alien failed to appear as required. On January 2, 2004, 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 on May 22, 2003. 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 asserts that according to handouts at numerous INS training sessions any one of these events constitutes sufficient grounds for sustaining the appeal and canceling the bond.

Counsel does not provide copies of any of the handouts to which he refers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the obligor's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

If these handouts were in the form of memoranda or opinions, it should be noted that 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.).

Likewise, documentation developed by the Office of General Counsel (OGC), now Office of the Principal Legal Adviser (OPLA) 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, an OGC opinion 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 May 22, 2003, and the alien was granted voluntary departure from the United States on or before September 19, 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 and did not set other conditions on the grant of voluntary departure.

The obligor is only bound by the terms of the Form I-352 to which it obligated itself. It is noted 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 appears to be suggesting 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. 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.

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 dated September 26, 2003 was sent to the obligor at [redacted] or to indicate that the obligor had received the notice to produce the bonded alien on December 3, 2003. Consequently, the record fails to establish that the field office 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.