



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 23671594

Date: AUG. 16, 2022

Appeal of U.S. Immigration and Customs Enforcement Decision

ICE Form I-352, Immigration Bond

The Obligor seeks to reinstate a delivery bond. Immigration and Nationality Act section 103(a)(3), 8 U.S.C. § 1103(a)(3). An obligor posts an immigration bond as security for a bonded noncitizen's compliance with bond conditions, and U.S. Immigration and Customs Enforcement (ICE) may issue a bond breach notice upon substantial violation of these conditions.

The Sioux Falls, South Dakota, ICE Field Office declared the bond breached, concluding that the Obligor did not deliver the bonded noncitizen upon written request. On appeal, the Obligor asserts that she timely informed ICE of her change of mailing address and that the reason she did not deliver the bonded noncitizen to ICE on the requested date is because she did not receive written notice to do so.

In these proceedings, it is the Obligor's burden to establish substantial performance of a bond's conditions. *Matter of Allied Fid. Ins. Co.*, 19 I&N Dec. 124, 129 (BIA 1984). Upon *de novo* review, we will remand the matter for further review and entry of a new decision.

I. LAW

A delivery bond creates a contract between the U.S. Government and an obligor. *United States v. Minn. Tr. Co.*, 59 F.3d 87, 90 (8th Cir. 1995); *Matter of Allied Fid. Ins. Co.*, 19 I&N Dec. at 125. An obligor secures its promise to deliver a noncitizen by paying a designated amount in cash or its equivalent. 8 C.F.R. § 103.6(d). A breach occurs upon substantial violation of a bond's conditions. 8 C.F.R. § 103.6(e). Conversely, substantial performance of a bond's conditions releases an obligor from liability. 8 C.F.R. § 103.6(c)(3). Several factors inform whether a bond violation is substantial: the extent of the violation; whether it was intentional or accidental; whether it was in good faith; and whether the obligor took steps to comply with the terms of the bond. *Matter of Kubacki*, 18 I&N Dec. 43, 44 (Reg'l Comm'r 1981) (citing *Int'l Fidelity Ins. Co. v. Crosland*, 490 F. Supp. 446 (S.D.N.Y. 1980)); see also *Aguilar v. United States*, 124 Fed. Cl. 9, 16 (2015).

II. ANALYSIS

The two issues on appeal are: (1) whether ICE properly served written notice to the Obligor to deliver the bonded noncitizen; and (2) whether the Obligor substantially violated the terms of the delivery bond. However, as a preliminary matter, we must first address the procedural history of the Form I-290B, Notice of Appeal or Motion.

The Sioux Falls, South Dakota, ICE Field Office declared the bond breached on [] 2018, and purported to serve notice by mail, thereby creating an appeal filing deadline of August 15, 2018. *See* 8 C.F.R. §§ 103.3(a)(2)(i), 103.6(e), 103.8(b). However, the mailing address on the ICE Form I-323, Notice – Immigration Bond Breached, is the same mailing address that the U.S. Postal Service (USPS) informed ICE was not a valid mailing address for the recipient and that it was unable to forward mail sent to that address. On appeal, the Obligor asserts that she received a copy of the Form I-323 in person on [] 2018, when she delivered the bonded noncitizen to ICE, thereby creating an appeal filing deadline of October 9, 2018. *See id.*; *see also* 8 C.F.R. § 1.2 (providing that the period for filing an appeal shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday when the last day of the period computed falls on a Saturday, Sunday, or legal holiday).

U.S. Citizenship and Immigration Services (USCIS) received the Form I-290B¹ on November 6, 2020, more than two years after the appeal filing deadline. The Obligor explains that, during the two years following her receipt of the Form I-323, she had sought the assistance of numerous attorneys—beginning on [] 2018, when she learned that ICE had declared the bond breached—who failed to provide it until her current attorney filed the appeal.

Generally, an appeal which is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). However, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, it must be treated as a motion, and a new decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2). Here, the untimely appeal meets the requirements of a motion to reopen because it states new facts and is supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The official with jurisdiction over the motion is the official who made the last decision in the proceeding, in this case the Sioux Falls, South Dakota, ICE Field Office. 8 C.F.R. § 103.5(a)(1)(ii). Therefore, we will remand the matter to the Sioux Falls, South Dakota, ICE Field Office for the entry of a new decision on the merits of the case. On remand, ICE should consider the new evidence submitted with the Form I-290B and determine: (1) whether it properly served written notice to the Obligor to deliver the bonded noncitizen; and (2) whether the Obligor substantially violated the terms of the delivery bond.

Regarding the first issue—whether ICE properly served written notice to the Obligor to deliver the bonded noncitizen—the Obligor executed a delivery bond with ICE on [] 2016, to secure the bonded noncitizen’s release from custody. In relevant part, the bond requires the Obligor to deliver the bonded noncitizen to ICE upon written request until his removal proceedings are finally terminated or he departs from the United States. On [] 2018, the Sioux Falls, South Dakota, ICE Field

¹ Although the Form I-290B and documents submitted in support of it refer to it interchangeably as an appeal, a motion to reopen, and a motion to reconsider, we consider it to be filed as an appeal, over which we exercise jurisdiction. *See* 8 C.F.R. § 103.6(b)(3)(i), (e).

Office sent an ICE Form I-340, Notice to Obligor to Deliver Alien, dated May 11, 2018, to the Obligor at the mailing address provided on the delivery bond via USPS Certified Mail. The Form I-340 requested the Obligor to deliver the bonded noncitizen to the ICE Field Office on [] 2018. On May 30, 2018, the USPS determined that it was unable to deliver the envelope as addressed and furthermore that it was unable to forward it to another address, and it returned the envelope to the ICE Field Office. On or about June 6, 2018, the ICE Field Office sent a second Form I-340 to the Obligor at the mailing address provided on the delivery bond via USPS First Class Mail, requesting the Obligor to deliver the bonded noncitizen to the ICE Field Office on [] 2018. Then, on July 13, 2018, the ICE Field Office sent an Form I-323 to the Obligor at the mailing address provided on the delivery bond via USPS First Class Mail, concluding that the Obligor breached the bond on [] 2018, by failing to deliver the bonded noncitizen as requested in writing. On September 5, 2018, the Obligor delivered the bonded noncitizen to the ICE Field Office during a visit she describes as “a regular check-in appointment.”

In the Form I-290B filing, the Obligor asserts that she submitted an ICE Form I-333, Obligor Change of Address, in person to the Sioux Falls, South Dakota, ICE Field Office on October 17, 2017. She submits affidavits from herself and her husband, who asserts that he accompanied her when she delivered the Form I-333. The Obligor further asserts that she notified the USPS of her change of address when she signed the lease for her new address and requested mail forwarding service. The Obligor also submits a copy of a Form I-333, signed by the Obligor and dated October 17, 2017, providing the mailing address on the delivery bond as her former address and her new mailing address; however, the name, title, location, and signature fields for the DHS official receiving the change of address are all blank. The Obligor’s husband specifically recalls the name of the ICE officer who provided the Form I-333 for the Obligor to complete in person and asserts that, when the Obligor returned the completed Form I-333, the ICE officer “told us that they changed the address, and we were all done. They did not give us any receipt or paperwork confirming the address change, even though we asked for a confirmation.” The name of the ICE officer recalled by the Obligor’s husband in his affidavit matches the name of the ICE officer who completed both Forms I-340 in the following May and June.

Other than the information provided with the Form I-290B by the Obligor, the record does not contain evidence that the Obligor informed ICE of her new mailing address, such as a Form I-333 with the DHS official receiving the change of address fields completed, or other sufficient notice. However, the record contains a Form EOIR-33/IC, Change of Address/Contact Information Form, with which the bonded noncitizen informed the Executive Office for Immigration Review that he changed his address from that provided on the delivery bond (matching the Obligor’s original address) to a new address (matching the Obligor’s new address provided on the Form I-333).

The information submitted with the Form I-290B presents new facts material to whether ICE provided sufficient written notice—as required by the language of section G.1 of the bond—to the Obligor to deliver the bonded noncitizen before ICE declared the bond breached. *See* 8 C.F.R. § 103.5(a)(2). The information submitted with the Form I-290B also presents new facts material to whether ICE took sufficient additional reasonable steps when its initial attempt to provide written notice to the Obligor

was unsuccessful. *See* 8 C.F.R. § 103.5(a)(2); *see also Echavarria v. Pitts*, 641 F.3d 92, 96 (5th Cir. 2011).

Regardless of whether, based on the preponderance of evidence standard, ICE provided sufficient written notice to the Obligor to deliver the bonded noncitizen before declaring the bond breached, on remand, ICE should also address the second issue—whether the Obligor substantially violated the terms of the delivery bond. *See Matter of Kubacki*, 18 I&N Dec. at 44; *see also Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We note several points regarding this issue below.

First, the Obligor delivered the bonded noncitizen to the ICE Field Office on September 5, 2018, [] days after the requested date of [] 2018. Although *Matter of Kubacki* does not provide a bright-line rule regarding when “the extent of the breach (how many days overstayed)” would constitute substantial performance as opposed to a substantial violation, we note that, in *Matter of Kubacki*, the obligor substantially performed the terms of the bond despite the bonded noncitizen’s 21-day overstay. *Matter of Kubacki*, 18 I&N Dec. at 43.

Second, the []-day period between the requested delivery date and the date on which the Obligor delivered the bonded noncitizen appears accidental, not intentional, on the part of both the Obligor and the bonded noncitizen. *See id.* at 44. Information from USPS in the record indicates that it was unable to deliver or forward the Forms I-340 and I-323 to the Obligor; therefore, neither she nor the bonded noncitizen were aware in the interim that ICE had requested the Obligor to deliver the bonded noncitizen before the “regular check-in appointment” on September 5, 2018.

Third, the Obligor’s nondelivery of the bonded noncitizen appears to have been in good faith because, not only was she unaware that ICE had requested her to deliver the bonded noncitizen on [] 2018, nevertheless she delivered the bonded noncitizen to ICE on September 5, 2018, the next date on which she was aware that she was required to do so. *See id.* There is no evidence that the Obligor was unable or unwilling to deliver the bonded noncitizen not later than the “regular check-in appointment,” which would demonstrate bad faith noncompliance with the terms of the bond.

Fourth, both the Obligor and the bonded noncitizen took steps to make amends and put them in compliance with the terms of the bond. *See id.* Specifically, as discussed above, the Obligor made amends and put herself in compliance with the terms of the bond by delivering the bonded noncitizen to ICE on September 5, 2018, the moment that she became aware that ICE had issued a Form I-340.

As detailed above, the untimely appeal meets the requirements of a motion to reopen. Therefore, we will remand the matter to the Sioux Falls, South Dakota, ICE Field Office for the entry of a new decision on the merits of the case.

III. CONCLUSION

We will remand the matter to the Sioux Falls, South Dakota, ICE Field Office to consider the new evidence submitted with the Form I-290B and determine whether it properly served written notice to

the Obligor to deliver the bonded noncitizen and whether a substantial violation of the bond's terms in fact occurred.

ORDER: The decision of the ICE field office is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.