U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20313875

Date: FEB. 28, 2022

Appeal of U.S. Immigration and Customs Enforcement Decision

ICE Form I-352, Immigration Bond

The Co-Obligor seeks to reinstate a delivery bond. See 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 foreign national'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 Santa Maria, California ICE Field Office declared the bond breached, concluding that the obligors failed to deliver the alien in accordance with the terms of the Form I-352, Immigration Bond (the Immigration Bond), requiring delivery of the bonded foreign national upon notice. As stated in the Immigration Bond "[i]f, however, the obligor fails to surrender the alien in response to a timely demand while the bond remains in effect, the full amount of the bond . . . becomes due and payable."

In these proceedings, it is the Co-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 dismiss the appeal.

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 foreign national 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

A. The Co-Obligor Received Notice of the Time and Place to Deliver the Foreign National

The first issue on appeal is whether the Co-Obligor received notice of when and where to deliver the bonded foreign national. The ICE Field Office determined that the Co-Obligor breached a delivery bond, as the foreign national was not delivered upon request.

The regulation at 8 C.F.R. § 103.8(c) states that ICE must personally serve an obligor with notice demanding delivery of a foreign national. The regulation at 8 C.F.R. § 103.8(a)(2) states that personal service may consist of any of the following:

- Delivery of a copy personally;
- 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;
- Delivery of a copy at the office of an attorney or other person, including a corporation, by leaving it with a person in charge;
- Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address; or
- If so requested by a party, advising the party by electronic mail and posting the decision to the party's USCIS account.

The Co-Obligor contends that the initial Form I-862, Notice to Appear (NTA), which caused the bonded foreign national to enter immigration proceedings did not include a time and place for the foreign national to appear, and that therefore the Co-Obligor could not produce the foreign national. "[T]he [obligors] were not made aware of any court date by the government, and as a result the government is responsible for the failure of the alien to appear in Court."

First, we note that bond proceedings are separate from immigration removal proceedings. Removal proceedings are between the United States government and a foreign national, whereas bond proceedings concern a contract between an obligor and ICE. An NTA is issued to a foreign national to provide notice of their immigration court removal proceedings. However, because obligors are not a party to such proceedings, they do not receive an NTA. It is not apparent from the Co-Obligor's brief how the contents of the foreign national's NTA affected the Co-Obligor's ability to produce the foreign national upon written request.

On [redacted] 2017, a representative of the Co-Obligor signed the Immigration Bond, agreeing to produce the foreign national upon each and every written request until the obligation terminates. On May 21, 2021, ICE sent an ICE Form I-340, Notice to Obligor to Deliver Alien, to the Co-Obligor's address of record via certified mail, return receipt requested. The record indicates that the notice was delivered to the Co-Obligor on May 24, 2021. The record also establishes that the signatory for the Co-Obligor signed for receipt of the notice. The Form I-340 requested that the Co-Obligor produce the foreign national on [redacted] 2021. The record further establishes that the notice specified the place, time, and purpose for the Co-Obligor to deliver the foreign national.

The evidence of record indicates that ICE correctly sent the notice to deliver the foreign national via personal service, and the Co-Obligor received notice to deliver the foreign national, including the pertinent time and location. Therefore, we conclude that the Co-Obligor was properly served notice of when and where to deliver the foreign national.

B. The Breach of the Immigration Bond's Terms was Substantial

The second issue on appeal is whether the Co-Obligor substantially violated the terms of the immigration bond. In order to determine whether a bond violation is substantial, we consider the following Kubacki factors:

- The extent of the violation;
- Whether the violation was accidental or intentional;
- Whether the violation was made in good faith; and
- Whether steps were taken to get in compliance with the bond.

Kubacki, 18 I&N Dec. at 44. In this instance, the Co-Obligor claims that pursuant to Pereira v. Sessions, 138 S. Ct. 2105 (2018), and Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021), the foreign national's NTA was invalid, and that this "severely prejudiced" the Co-Obligor's ability to deliver the bonded foreign national. Second, the Co-Obligor claims that because of the alleged invalidity of the NTA, the foreign national's removal proceedings never actually commenced, and thus the Co-Obligor "could not have possibly produced the [foreign national]." Third, the Co-Obligor argues that the issuance of an invalid NTA "negates any 'substantial violation' contemplated by 8 C.F.R. [§] 103.6(e)."

Before addressing these arguments, we note that the Supreme Court's holding in Pereira was limited to the narrow issue of whether the "stop-time" rule can be triggered by an NTA that omits the time and place of the initial hearing. See Santos-Santos v. Barr, 917 F.3d 486, 489 (6th Cir. 2019); Karingithi v. Whitaker, 913 F.3d 1158, 1161 (9th Cir. 2019). The Niz-Chavez ruling held that an NTA must consist of a single document containing the time and place of an immigration hearing to trigger the "stop-time" rule in cancellation of removal cases. ICE Form I-340 is distinguishable from a "notice to appear" under section 239(a) of the Act, and the Courts in Pereira and Niz-Chavez did not address any notice requirements with respect to ICE Form I-340 or immigration bond proceedings. An ICE Form I-340 is a "Notice to Obligor to Deliver Alien" to ICE for several possible reasons, and not a notice to a foreign national to appear at an immigration court for proceedings. Therefore, we do not find the holdings of Pereira or Niz-Chavez applicable to the current case.

However, in the interest of justice, we will address the Co-Obligor's remaining arguments regarding whether the bond violation was substantial.

With respect to the first aforementioned argument, the Co-Obligor contends that the NTA which initiated proceedings did not include a time and place for the foreign national to appear, and that this omission somehow prejudiced the Co-Obligor in carrying out the responsibilities to which it voluntarily agreed in the immigration bond. However, as noted above, the NTA is not intended as notice for an obligor in immigration bond proceedings. The record indicates that ICE properly issued notice to the Co-Obligor via ICE Form I-340, requesting that the Co-Obligor deliver the bonded

foreign national at a specified time and location. The Co-Obligor does not provide a rationale as to how the content of an NTA could affect their ability to deliver the bonded foreign national upon request, and as it voluntarily agreed to do. As such, we are unpersuaded by this argument.

With respect to the second argument, the Co-Obligor contends that because the NTA was not properly issued, the bonded foreign national was never actually placed in removal proceedings. However, the AAO does not have appellate jurisdiction over the decisions of Immigration Judges in removal or exclusion proceedings. This authority is vested in the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.1(b)(1), (3). The BIA's jurisdiction also includes decisions regarding the issuance of immigration bonds. 8 C.F.R. § 1003.1(b)(7). As such, the validity of the NTA which initiated immigration removal proceedings is beyond the scope of the AAO's jurisdiction because the AAO does not exercise appellate authority over it.

Finally, regarding the Co-Obligor's third argument, the Co-Obligor contends that "the government's failure caused the initial violation of the terms of the bond" and that the issuance of an invalid NTA "negates any 'substantial violation' contemplated by 8 C.F.R. Sec. 103.6(e)." However, the content of an NTA is not mentioned in the terms or conditions of the ICE Form I-352, Immigration Bond, which the Co-Obligor signed and to which it agreed. It is, therefore, not apparent how the content of an NTA could violate the bond's terms.

The record indicates that a violation of the terms of the bond occurred when the Co-Obligor failed to deliver the bonded foreign national upon written request. By failing to deliver the foreign national upon request, the Co-Obligor violated the main condition of the immigration bond. There is no indication that this violation was accidental or made in good faith, or that the Co-Obligor has attempted to comply with the terms of the immigration bond. Therefore, the violation of the bond's terms is substantial.

III. CONCLUSION

The Co-Obligor substantially violated the conditions of the bond and the bond has been breached. The Co-Obligor is not entitled to reinstatement of the bond.

ORDER: The appeal is dismissed.