U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22624043

Date: NOV. 4, 2022

Motion on Administrative Appeals Office Decision

ICE Form I-352, Immigration Bond

The 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 New York, New York ICE Field Office declared the bond breached, concluding that the Obligor did not deliver the bonded Foreign National to ICE upon written request. The Obligor appealed ICE's decision to the AAO, and we dismissed her appeal. The Obligor then filed a joint motion to reopen and reconsider our decision, which we also dismissed. The Obligor now files a second joint motion to reopen and reconsider our initial decision, and she reiterates all prior arguments submitted in support of her appeal and first motion.

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 review, we will dismiss the motions.

I. RELEVANT MOTION REQUIREMENTS

Motions generally must be filed within 33 days of the adverse decision. 8 C.F.R. §§ 103.5(a)(1), 103.8(b). However, as part of its response to the coronavirus (COVID-19) pandemic, USCIS extended the deadline for filing a Form I-290B, Notice of Appeal or Motion. This temporary flexibility allows for the filing of a Form I-290B within 93 calendar days of an adverse decision so long as the decision was issued between March 1, 2020, and January 24, 2023. USCIS Policy Alert, *USCIS Extends COVID-19-related Flexibilities* (Oct. 24, 2022), https://www.uscis.gov/newsroom/alerts/uscis-extends-covid-19-related-flexibilities-0. Since we issued the decision that is this motion's subject on January 27, 2021, the COVID-19-related flexibilities apply.

In this case of a motion to reopen, the filing deadline may be excused in the agency's discretion when it is demonstrated that the delay was both: (1) reasonable and (2) beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1). There is no provision for an untimely motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a)(4) mandates dismissal of a motion that does not meet applicable requirements.

II. THE JOINT MOTION'S UNTIMELINESS MANDATES ITS DISMISSAL

As noted, we issued our prior decision on January 27, 2021. Given the COVID-19-related flexibilities discussed above, it was due 93 days later. Because this joint motion was not received in filing condition until August 30, 2021—215 days later—it was untimely. The regulations therefore mandate dismissal of the motion to reconsider as well as the motion to reopen. That lack of timeliness mandates dismissal of both the motion to reopen and the motion to reconsider.

As noted, the regulations make no provision for an untimely motion to reconsider. The Obligor's motion to reconsider therefore does not meet the applicable requirements, and it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The regulation at 8 C.F.R. § 103.5(a)(1) does make provision for an untimely motion to reopen. For us to adjudicate the Obligor's untimely motion to reopen, she would have to demonstrate that her filing delay was both: (1) reasonable and (2) beyond her control. *Id.* She has not done so. The Obligor's motion to reopen therefore does not meet the applicable requirements, and it must also be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The Obligor's joint motion to reopen and reconsider will therefore be dismissed.

III. ADDITIONAL COMMENTS

As discussed, 8 C.F.R. § 103.5(a)(4) mandates the joint motion's dismissal. Even though we are not addressing this matter on its merits, we will nonetheless enter the following additional comments to place the Obligor on notice that even if we were to address those merits, we would still not find in her favor.

A. Background

On May 5, 2014, the Obligor signed Form I-352, Immigration Bond, on behalf of the bonded Foreign National. The bonded Foreign National has a procedurally complex immigration history. The Immigration Court granted him relief under the Convention against Torture, which the Department of Homeland Security (DHS) appealed to the Board of Immigration Appeals (Board). The Board remanded the matter to the Immigration Court to consider new facts, and upon review, the Immigration Court denied his applications for relief and ordered him removed to Colombia on [redacted] 2012. The bonded Foreign National appealed this decision to the Board, and his appeal was denied on [redacted] 2012. On that date, the Immigration Court's removal order became final.

On [redacted] 2019, the New York, New York ICE Field Office mailed, via certified mail, return receipt, a Form I-340, Notice to Obligor to Deliver Alien. The file contains evidence that the Obligor received and accepted the Form I-340. ICE required the Obligor to deliver the bonded Foreign

National on [redacted] 2019. On April 22, 2019, the bonded Foreign National filed motions to reopen and reconsider the Board's denial of his appeal along with an emergency motion for stay of removal. The Obligor did not deliver the bonded Foreign National on [redacted] 2019. On April 29, 2019 ICE declared the bond breached, concluding that the Obligor's failure to deliver the bonded Foreign National was a violation of the obligations set forth in the Immigration Bond. On July 29, 2021, the Board denied the motions filed on April 22, 2019.

Pursuant to the terms of the Immigration Bond, the Obligor was required to produce the bonded Foreign National to "an immigration officer or an immigration judge of the United States, as specified in the appearance notice, upon each and every written request until . . . removal proceedings in his case are finally terminated." The Immigration Bond also specified that if "the obligor fails to surrender the [bonded Foreign National] in response to a timely demand while the bond remains in effect, the full amount of the bond . . . becomes due and payable."

B. 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).

Generally, ICE may require performance from an obligor is until the occurrence of one of the following events: DHS takes custody of the foreign national; the foreign national departs or is removed from the United States; the foreign national is granted permanent residence in the United States; a law enforcement agency detains the foreign national for 30 or more days; the foreign national's exclusion or removal proceedings terminate (but not under circumstances of administrative closure or stay); or the death of the foreign national. There is no limitation on the number of times ICE may require performance from an obligor during a bond's validity period. If an obligor performs the terms of a bond and one of the preceding events occurs, the bond will cancel automatically, in which case the obligor is no longer obligated to perform or pay ICE the bond amount. *See* ICE Form I-352, General Terms and Conditions; *see also* 8 C.F.R. § 103.6(c).

C. Discussion

If we were to address the merits of this case, we would consider two issues. The first would be whether the Obligor's failure to deliver the bonded Foreign National constituted a substantial violation of the bond's conditions. As we did in our prior decisions, we would conclude that it did.

Under the *Kubacki* factors noted above, to determine if a breach is a substantial violation of the bond's terms, we must examine: (1) the extent of the violation; (2) whether the breach was intentional or

accidental; (3) whether it was in good faith; and (4) whether the obligor took steps to comply with the terms of the bond. The extent of the violation requires an examination of how many days past the delivery date the bonded Foreign National stayed in the United States. To date, there is no evidence the bonded Foreign National has been delivered to ICE for removal and it appears he remains in the United States. The extent of the violation is substantial.

The second *Kubacki* factor looks at whether the violation was intentional or accidental. The Obligor argues that because the bonded Foreign National filed a motion to reopen his removal proceedings and an emergency motion for stay of removal (Board motions) with the Board [redacted] before the Obligor was required to deliver the bonded Foreign National, "bond forfeiture should not then result. There was no cancellation event." The Obligor does not cite to any law, regulation, or provision in the Immigration Bond to support her assertion and we find no independent legal basis for it. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (assertions are not evidence). As such, the Obligor's argument would lack merit, as her violation was intentional.

The third *Kubacki* factor looks at whether the violation occurred in good faith. As a general principle, good faith can be expressed in terms of the absence of acting in bad faith, which includes "evasion of the spirit of the bargain, lack of diligence . . ., and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205, cmt. d (1981). The Obligor does not make any explicit argument related to this factor. As before, if we were to consider the Obligor's contention that she did not deliver the bonded Foreign National because he had filed Board motions, we find the lack of legal support for this assertion problematic. As such, there would be insufficient evidence to establish the Obligor acted in good faith when she failed to deliver the bonded Foreign National. This factor would further support a finding that her violation was substantial.

The last *Kubacki* factor looks at whether the Obligor took steps to comply with the terms of the bond. There is no evidence that the Obligor took any steps to comply, and the Obligor does not allege that she attempted to deliver the bonded Foreign National. As such, the Obligor has substantially violated the terms of the bond by failing to deliver the bonded Foreign National to ICE. We note that the foregoing analysis is consistent with our prior two decisions, and we further note that any future motions filed by the Obligor should address how her actions relate to the *Kubacki* factors and the substantial violation of her obligations under the Immigration Bond.

A second issue we would address would be whether the Immigration Bond was cancelled when the bonded Foreign National filed his Board motions. There are five scenarios in which the filing of a motion to reopen and reconsider automatically stays the removal of a foreign national. *See* https://www.justice.gov/eoir/reference-materials/bia/chapter-6. The first is if a party appeals an immigration judge's decision on the merits of the case (not including bond and custody determinations) to the Board during the appeal period. In that case, the stay remains in effect until the Board renders a final decision in the case. The second is when the Board is adjudicating a case certified to it. In that case, the removal order is stayed until the Board renders a final decision in the case or declines to accept certification of the case. The third scenario is when a motion to reopen removal proceedings conducted *in absentia* is filed. The stay is automatic during an immigration judge's ruling on that motion. The fourth scenario is during the Board's adjudication of an appeal of an immigration judge's ruling in certain motions to reopen filed by battered spouses, children, and parents. The final scenario that results in an automatic stay of a removal order is when a federal court remands to the

Board and the matter before the federal court involved a direct appeal of an immigration judge's decision on the merits of the case (excluding bond and custody determinations). Alternatively, if the Board's decision before the federal court involved an appeal of an immigration judge's denial of a motion to reopen deportation proceedings conducted *in absentia* under prior INA § 242B. None of these scenarios are relevant to the bonded Foreign National's Board motions.

The Board's practice manual also explains that discretionary stays are permitted, but the Board entertains stays only when there is an appeal from an immigration judge's denial of a motion to reopen removal proceedings or a motion to reopen or reconsider a prior Board decision pending before the Board. *Id.* The Board may also consider a stay of an immigration judge's bond decision while a bond appeal is pending in order to prevent the respondent's release from detention. *Id.*

On April 22, 2019, the bonded Foreign National filed the aforementioned Board motions. On July 29, 2021 the Board denied these motions. During the pendency of the motions, the bonded Foreign National was neither entitled to an automatic stay of his removal order nor granted a discretionary stay of his removal order. It was within ICE's authority to request delivery of the bonded Foreign National and remove him during the pendency of his Board motions.

In our prior decisions, incorporated here by reference, we noted the circumstances in which an Immigration Bond is cancelled. The Obligor does not allege any of these scenarios relate to her decision not to deliver the bonded Foreign National, and we do not find them relevant to this Immigration Bond. Furthermore, approximately 15 months have passed since the Board denied the bonded Foreign National's motions, and the evidence suggests the Obligor has yet to deliver the bonded Foreign National to ICE. As such, the Immigration Bond was not cancelled on the date ICE demanded delivery, and the Obligor has not established any valid reason for believing she was not required to comply with the terms of the Immigration Bond and deliver him on [redacted] 2019.

Thus, even if we were to consider the merits of the Obligor's filing, we would still not find in her favor. The Obligor substantially violated the conditions of the Immigration Bond, resulting in a breach. The Obligor has not established that she is entitled to reinstatement of the Immigration Bond or that a cancellation event took place.

IV. CONCLUSION

The regulations make no provision for an untimely motion to reconsider. The Obligor's motion to reconsider therefore does not meet the applicable requirements, and it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

The regulation at 8 C.F.R. § 103.5(a)(1) does make provision for an untimely motion to reopen. For us to adjudicate the Obligor's untimely motion to reopen, she would have had to demonstrate that her filing delay was both: (1) reasonable and (2) beyond her control. *Id.* She did not do so. The Obligor's motion to reopen therefore does not meet the applicable requirements, and it must also be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.