



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

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

In Re: 10649879

Date: MAR. 10, 2022

Appeal of U.S. Immigration and Customs Enforcement Decision

ICE Form I-352, Immigration Bond

The Obligor¹ seeks to reinstate a voluntary departure bond. *See* Immigration and Nationality Act (the 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 Los Angeles, California ICE Field Office declared the bond breached, concluding that because the Noncitizen did not depart the United States by the agreed-upon date, the Obligor had not substantially performed the bond's conditions. The matter is now before us on appeal.

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 dismiss the appeal.

I. LAW

A voluntary departure 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. In exchange a grant of voluntary departure, an obligor posts a bond as security for the noncitizen's departure from the United States, or the noncitizen's return to ICE custody, on or before the date specified in an order granting voluntary departure. *See* 8 C.F.R. § 103.6(c)(2); *see also* 8 C.F.R. § 1240.26. An obligor must provide to ICE probative documentation of a noncitizen's voluntary departure within 30 days after the date specified in the order granting voluntary departure. 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)

¹ In this instance, the Bonded Noncitizen posted the voluntary departure bond, providing himself as the Obligor. We refer to the bonded Noncitizen in this decision either as such or as the Obligor, depending on the capacity in which he is serving.

(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

On [] 2018, an immigration judge denied the Noncitizen's application for cancellation of removal and granted him voluntary departure. The Noncitizen then signed ICE Form I-352, Immigration Bond, agreeing to depart the United States on or before [] 2018 and providing himself as the Obligor. The issue on appeal is whether the Obligor substantially violated the terms of the bond.

The Noncitizen failed to depart by the agreed-upon date, which violates the central term of the bond agreement. He also continues to remain in the United States over three years after the agreed-upon departure date, an extensive period of time. The evidence further indicates that the failure to depart has been intentional.

On appeal, the Obligor states that his violation of the bond's terms was due to ineffective assistance of counsel. According to the brief submitted with the appeal, after the Noncitizen was denied cancellation of removal, his attorney missed the February 15, 2018, deadline to file an appeal with the Board of Immigration Appeals (the Board). If the appeal had been filed timely, the Noncitizen asserts that it would have stayed the execution of the voluntary departure the Noncitizen had been granted. 8 C.F.R. § 1003.6(a). Instead, the appeal was dismissed in December 2018, the Noncitizen filed a timely motion to reconsider, and that motion remains pending.²

In *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), the Board established a framework for asserting and assessing claims of ineffective assistance of counsel. The Board set forth the following documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the noncitizen attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.
- Evidence that the noncitizen informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.
- If the noncitizen asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the noncitizen filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the noncitizen did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his or her version of events discourages baseless allegations, and

² Filing a motion after the time allowed for voluntary departure has expired does not impact the time allowed for voluntary departure. 8 C.F.R. § 1240.26(e)(2).

the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his or her client in disparaging the quality of the representation. *Id.* Counsel's acceptance of responsibility for error does not satisfy the requirement to file a complaint with the appropriate disciplinary authority, particularly where the ineffective assistance allegation is provided by the same attorney. *Matter of Melgar*, 28 I&N Dec. 169, 170 (BIA 2020).

In the present case, the attorney who allegedly provided ineffective assistance continues to represent the Noncitizen on appeal. The record does not contain any evidence that the Noncitizen filed a complaint with the appropriate disciplinary authorities regarding missing the filing deadline for his appeal to the Board. Instead, the brief states that since the attorney admitted to providing ineffective counsel, he has substantially complied with *Lozada*, and it is not necessary to report him to the bar or other relevant authorities. We disagree.

While some courts have been flexible in enforcing the *Lozada* documentation requirements, they have done so when the record establishes that the policy goals of *Lozada* have been met. *See Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003). The goals of *Lozada* include holding attorneys to appropriate standards of performance and assessing the merits of claims of ineffective assistance of counsel. As stated by the Board in *Melgar*:

Requiring notification of disciplinary authorities is important because this is the most effective way of informing disciplinary authorities of allegations of potential violations of ethical or legal responsibilities. While a single instance of malpractice may not be sufficient for disciplinary authorities to act, the notification requirement allows disciplinary authorities to assess whether there is a pattern of misconduct that should be addressed.

Melgar, 28 I&N at 170. Further, requiring a complaint be made to the appropriate authorities is meant to ensure that counsel and clients cannot collude to use claims of ineffective assistance to achieve delay. *Id.* (citing *Matter of Rivera*, 21 I&N Dec. 599, 604 (BIA 1996)); *Lo*, 341 F.3d at 938 (citation omitted).

In this instance, the Noncitizen neither filed a complaint about his attorney with the appropriate disciplinary authorities nor gave a satisfactory reason as to why he did not do so. This does not meet the goals of holding attorneys to appropriate standards of performance or discouraging meritless claims of ineffective assistance. As stated by the Board in *Melgar*, "the obligation of the complaint cannot be so easily discharged, otherwise the purpose of the requirement is rendered inconsequential. This is particularly true... where the ineffective assistance allegation is rendered by the same attorney against himself." *Melgar*, 28 I&N at 170. Therefore, the Noncitizen failed to satisfy the procedural requirements of an ineffective assistance claim under *Lozada*.

As noted above, the Obligor's violation of the terms of his voluntary departure bond was intentional and extensive. We therefore find that he has substantially violated the terms of the bond, and that the bond has been breached. We deny his request to reinstate the bond.

ORDER: The appeal is dismissed.