



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

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

In Re: 22001839

Date: SEP. 12, 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 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 Phoenix, Arizona ICE Field Office declared the bond breached, concluding that because the Bonded Noncitizen did not depart the United States, the Obligor substantially violated the terms of the bond. 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 is a contract between the U.S. Government and an obligor. In exchange for 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 the noncitizen's voluntary departure within 30 days after the date specified in the order granting voluntary departure. An obligor's substantial performance of a bond's conditions. 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

¹ In this instance, the Bonded Noncitizen posted the voluntary departure bond, providing herself 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 she is serving.

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. Procedural History

On [REDACTED] 2021, an Immigration Judge granted the Bonded Noncitizen voluntary departure, giving her until July 9, 2021, to depart the United States. On May 11, 2021, the Bonded Noncitizen signed an ICE Form I-352, Immigration Bond, agreeing to depart the United States on or before the date specified on her order of voluntary departure. On June 1, 2021, the Bonded Noncitizen filed an appeal to the Board of Immigration Appeals (the Board), which stayed the execution of the voluntary departure decision. 8 C.F.R. § 1003.6(a). The appeal was dismissed on September 21, 2021, at which time the stay ended. *Id.* The Board's decision gave the Bonded Noncitizen 60 days from the decision date, until November 20, 2021, to voluntarily depart the United States.

Because the Bonded Noncitizen failed to depart the United States within the time allotted, ICE issued a bond breach notice to the Obligor on [REDACTED] 2022. On April 13, 2022, the Bonded Noncitizen filed a motion to reopen with the Board.² The motion remains pending, and the Bonded Noncitizen has not departed the United States.

B. Ineffective Assistance of Counsel

The issue on appeal is whether the Obligor has substantially violated the terms of the bond. On appeal, the Obligor asserts that her violation of the bond's terms was due to ineffective assistance of counsel. According to the affidavit provided on appeal, the attorney who represented the Bonded Noncitizen in her asylum proceedings also prepared the Bonded Noncitizen's Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge. The affidavit states that when doing so, the attorney did not include the Bonded Noncitizen's apartment number in her mailing address. However, evidence in the record indicates that the attorney did not agree to represent the Bonded Noncitizen on appeal to the Board, and the appeal to the Board did not include a Form EOIR-27, Notice of Entry of Appearance as Attorney, to indicate that the Bonded Noncitizen was represented by counsel.

The Bonded Noncitizen states that approximately a month after filing her appeal, she had not received a receipt notice from the Board regarding her appeal,³ so she called the attorney's office. According to the affidavit, the attorney's assistant told the Bonded Noncitizen that her appeal had arrived with the Board and that the receipt notice was delayed by the COVID-19 pandemic.

In December 2021, approximately five months later, the Bonded Noncitizen contacted the attorney again because it was time to renew her work permit. The Bonded Noncitizen states that at this time, she told the attorney she hadn't received any receipt notice from the Board. The attorney told the

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

³ The Board routinely issues receipts for Form EOIR-26. *See Board of Immigration Appeals Policy Manual* 3.1(d)(1), <https://www.justice.gov/eoir/eoir-policy-manual/iii/3/1> (last visited Aug. 24, 2022).

Bonded Noncitizen to make a copy of the certified mail receipt from mailing the appeal so that the receipt could be included in the work permit renewal filing. The Bonded Noncitizen states that when she subsequently texted the attorney regarding the receipts, and the attorney directed her to call the office instead.

At this time, the Bonded Noncitizen decided to retain a new attorney and contacted present counsel. The day she contacted present counsel's office, they received her case information and informed her that her appeal with the Board had been dismissed.

The copy of the Bonded Noncitizen's Form EOIR-26 provided on appeal confirms that the mailing address given for the Bonded Noncitizen does not include her apartment number. The record also includes a brief email exchange between the Bonded Noncitizen's former attorney and present counsel regarding the appeal. When asked about the appeal, the former attorney stated in relevant part:

I helped her file her [Form EOIR-26] but, did not put in a notice of appearance. She could not afford an attorney at the time and I did not want her to miss the deadline. I stressed to her the importance of always keeping her address up to date and told her that if she moved she can come to my office and we would help her with that. I told her to find an attorney as soon as she was financially able.

When asked whether they prepared the Form EOIR-26, the former attorney only stated that they did not charge the Bonded Noncitizen a fee.

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 claimant 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 that they were given an opportunity to respond. Any response by former counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.
- If the claimant asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the claimant filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation of why the claimant did not file such a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claims and to deter meritless claims. *Id.*

In the current case, the Obligor provided an affidavit attesting to her former attorney's actions. However, the affidavit and other supporting evidence in the case do not clearly indicate what specific actions the attorney agreed to take regarding the appeal with the Board. The affidavit states that the former attorney "filled out the appeal form" as part of the service agreement for the Bonded

Noncitizen's underlying asylum case. However, the former attorney's email states that they "helped" the Bonded Noncitizen file the Form EOIR-26 because the Bonded Noncitizen could not afford a lawyer, not because this was part of the agreed-upon services for the underlying asylum case. The former attorney also states that they did not agree to represent the Bonded Noncitizen on appeal, a claim which is supported by the fact that they didn't file a notice of entry of appearance with the Board. The email messages neither confirm nor deny that the former attorney actually filled in the address on the Form EOIR-26. Therefore, the evidence in the record conflicts with the affidavit submitted by the Obligor.

Furthermore, the second and third *Lozada* requirements have not been fulfilled in this case. The record does not contain evidence that the Bonded Noncitizen informed her former attorney of the allegation of ineffective assistance or that they were given the opportunity to respond. The emails between current counsel and the former attorney only inquire as to whether the latter knew why the appeal was dismissed and whether they filled in the Form EOIR-26. Finally, there is no indication that the Bonded Noncitizen has filed a complaint with the appropriate disciplinary authorities regarding her former attorney's actions or an explanation of why they have not done so.

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. These goals include providing a clear and detailed factual basis for assessing the ineffective assistance claim, reducing the ability to make meritless claims, and promoting professional responsibility in immigration practitioners. *See Reyes v. Ashcroft*, 358 F.3d 592, 596 (9th Cir. 2004).

The second *Lozada* requirement serves both to inform attorneys of the allegations against them and to give them an opportunity to respond, which in turn supplements the factual record being used to assess the merits of the ineffective assistance claim. In instances where the ineffective assistance is obvious and undisputed on the face of the record, strict compliance with this requirement may not be required. *Id.* However, that is not the case in this instance.

As noted above, the record contains conflicting accounts of what services the attorney agreed to carry out in relation to the appeal and whether they filled in the address on the Form EOIR-26. Therefore, the ineffective assistance is not obvious and undisputed on the face of the record, and the failure to meet the second *Lozada* requirement cannot be excused. *Reyes v. Ashcroft*, 358 F.3d at 596. Additionally, the Obligor has not met the third *Lozada* requirement of filing a complaint with an appropriate disciplinary authority or provided a reason why they did not do so. This does not fulfill the *Lozada* policy goals of holding immigration attorneys to appropriate standards of performance. *Matter of Melgar*, 28 I&N Dec. 169, 170 (BIA 2020).

C. Substantial Violation

The record indicates, and the Obligor does not dispute, that the terms of the voluntary departure bond have been violated due to the Bonded Noncitizen's failure to depart the United States within the period of time granted to her. The issue is whether this violation was sufficiently substantial to constitute a breach.

The Bonded Noncitizen's voluntary departure period expired in November 2021. She remains in the United States nearly ten months later, making the breach extensive. We acknowledge that the Bonded Noncitizen has remained in the United States in order to file a motion to reopen her appeal before the Board. However, as previously noted, the filing of a motion after the time allowed for voluntary departure has already expired does not impact the period of time allowed for voluntary departure. 8 C.F.R. § 1240.26(c)(2). We further acknowledge that the Bonded Noncitizen has been placed under an order of supervision at her request, and reported to an ICE field office in May 2022 for this purpose. However, while the Obligor states that her violation was accidental and due to the actions of her former counsel, the documentation of record does not meet the procedural requirements of an ineffective assistance claim under *Lozada*. Therefore, we conclude that she has substantially violated the terms of her bond, and the bond has been breached. We deny her request to reinstate the bond.

ORDER: The appeal is dismissed.