

CHECKLIST FOR LATE-FILED APPEAL

Some courts have held that the 30-day period to file an appeal with the Board of Immigration Appeals (BIA) set forth in 8 C.F.R. § 1003.38(b) is a non-jurisdictional claims-processing rule. Historically, claims-processing rules are subject to equitable tolling.

Once a notice of appeal is filed, 8 C.F.R. § 1003.6(a) provides an automatic stay of deportation while the appeal is pending before the Board. Arguably, this regulation should apply to a late-filed appeal unless and until the Board decides whether to accept the appeal. Individuals with a basis to argue that the Board should accept a late-filed appeal—i.e., that they pursued their appeal diligently and extraordinary circumstances prevented timely filing—may wish to file a late Notice of Appeal to the Board and alert U.S. Immigration and Customs Enforcement (ICE) of the likelihood of an automatic stay. As with any appeal, counsel subsequently would need to file an appeal brief with the Board arguing both the merits and that the 30-day period merits equitable tolling. For template briefing, contact Kristin Macleod-Ball (kmacleod-ball@immcouncil.org), Trina Realmuto (trealmuto@immcouncil.org), or Emma Winger (ewinger@immcouncil.org).

To file with the BIA:

- Cover Letter (*template included*)
- EOIR-27: Notice(s) of Entry of Appearance as Attorney for Each Respondent
 - <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir27.pdf>
- EOIR-26: Notice(s) of Appeal for Each Respondent
 - <https://www.justice.gov/eoir/file/eoir26/download>
- Supplement to Notice(s) of Appeal (*template included*)
- Fee Waiver Request (Form EOIR-26A) or \$110 Filing Fee made out to U.S. Department of Justice
 - <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir26a.pdf>

To send to the ICE Office with authority over client's place of detention:

- Letter notifying ICE of automatic stay of removal (*template included*)