

Supplement to Notice of Appeal (Form EOIR-26)

Respondent is entitled to an automatic stay of removal as a result of this appeal. The regulation at 8 C.F.R. § 1003.6(a) provides an automatic stay of deportation while an appeal is pending before this Board. The regulation provides:

- (a) Except as provided under § 236.1 of this chapter, § 1003.19(i), and paragraph
- (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, *nor shall such decision be executed while an appeal is pending* or while a case is before the Board by way of certification.

8 C.F.R. § 1003.6(a) (emphasis added). Late filed appeals fit squarely within the plain language of the regulation, which makes no accommodation for subjective opinion about the timeliness of an appeal. Moreover, because the 30-day appeal period set forth in 8 C.F.R. § 1003.38(b) is a claim-processing rule, the BIA must conduct individualized, administrative review to determine whether it will accept the late appeal. An appeal would remain pending while the BIA makes such a determination. As a result, unless and until the Board dismisses the appeal, Respondent's deportation must be automatically stayed pursuant to the regulation.

The BIA Practice Manual incorrectly purports to require an appeal “during the appeal period” to trigger an automatic stay. BIA Practice Manual, Ch. 6.2(b) (June 7, 2019). Significantly, the Manual lacks the force of law¹ and conflicts with the plain language of the automatic stay regulation. Under the plain terms of the governing regulation, Respondent's removal must be stayed while this appeal is pending. It also is inconsistent with the requirement that, because 8 C.F.R. § 1003.38(b) is a claim-processing rule, the Board must individually review an appeal prior to determining whether it should be treated as filed within the appeal period. Because Respondent has requested equitable tolling of the appeal deadline, the appeal must be stayed, at a minimum, until the Board determines whether the filing deadline was must be tolled and the appeal treated as filed during the appeal period.

¹ The Board recognizes that the Manual “does not carry the weight of law or regulation” and “is not intended, nor should it be construed in any way, as legal advice, nor does it extend or limit the jurisdiction of the Board as established by law and regulation.” BIA Practice Manual, Ch. 1.1(c) (June 7, 2019).