John Bruning **DETAINED**

Kim Hunter Law, PLLC

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St. Paul, MN 55104

**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**BOARD OF IMMIGRATION APPEALS**

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| **In the Matter of:**  **SMITH, John**  **In Removal Proceedings** | File No.: A123-456-789 |

**RESPONDENT’S MOTION TO ACCEPT APPEAL BY CERTIFICATION**

**AUTOMATIC STAY OF REMOVAL PURSUANT TO 8 C.F.R. § 1003.6**

**January 20, 2020**

# INTRODUCTION

Respondent, John Smith, respectfully moves the Board to accept his untimely-filed appeal by certification for good cause, pursuant to 8 C.F.R. § 1003.1(c).

Mr. Smith was represented by prior counsel until September 26, 2019, when the Immigration Judge granted counsel’s motion to withdraw. IJ Order, attached at 19. When counsel withdrew, and as was indicated in the IJ’s order, Mr. Smith was scheduled for his individual hearing on October 8, 2019, and was required to continue *pro se* without the assistance of counsel and without sufficient time to retain new counsel. *Id.* Prior to the withdrawal, counsel had submitted only a bare-bones I-589—in fact, so bare bones that pages five through eight were left blank—and no supporting documents had been filed. I-589, attached at 25–28. Mr. Smith was therefore expected to proceed on virtually nothing, less than two weeks before his individual hearing. Further, as the motion to withdraw was filed the day after his last master calendar hearing, and the IJ issued her order by mail, which was further delayed by jail processing, Mr. Smith did not find out about the withdrawal until shortly before the hearing.

The IJ did not issue a decision at the individual hearing, but instead mailed out a written decision on December 3, 2019. IJ at 1. Mr. Smith did not find out about the decision until December 16, 2019, when he called the EOIR 1-800 hotline number. Declaration of Mr. Smith, attached at 1, ¶ 4. He filed a notice of appeal that same day, on December 16, 2019, *pro se*. *Id.*, Notice of Appeal, attached at 9–11. The notice of appeal, returned to Mr. Smith, was stamped by the Board as received on December 26, 2019. *Id.* When he filed the notice of appeal, he still had not received a copy of the IJ’s decision. Declaration of Mr. Smith, attached at 1, ¶ 4. Mr. Smith filed his notice of appeal without the assistance of counsel, and without much understanding of the appeal process. *Id.* at 1, ¶ 5. The notice of appeal itself underscores Mr. Smith’s lack of sophistication, as well as his lack of fluency in English. Notice of Appeal, attached at 10; Declaration of Mr. Smith, attached at 1, ¶ 3.

Mr. Smith’s difficulty preparing the notice of appeal was further complicated by the confiscation of all of his legal paperwork by jail or ICE staff. Declaration of Mr. Smith, attached at 2, ¶ 9. On December 17, 2019, Mr. Smith submitted a request form to ICE requesting his papers back. *Id.*, ICE Detainee Request Form, attached at 20. ICE responded to his request on December 23, 2019, with the following message: “Attached is the notice to appear, bond form and Judge’s order. This is all ICE can provide to you. Anything else you would need to file a FOIA request.” *Id.* Only at this time did Mr. Smith receive the IJ’s written order.

Mr. Smith retained undersigned counsel on January 3, 2020, the day after the appeal was due. Declaration of Mr. Smith, attached at 1, ¶ 6; Declaration of Counsel, attached at 4, at ¶ 1. At that time, Mr. Smith and counsel believed the appeal had been timely filed and accepted by the Board. Declaration of Mr. Smith, attached at 1, ¶ 6; Declaration of Counsel, attached at 4, at ¶ 1. Mr. Smith also did not retain a copy of the notice of appeal, as he sent his only copy to the Board.

On January 2, 2020, the appeal deadline, the Board mailed a notice of rejection of appeal to Mr. Smith. Rejection of Appeal, attached at 7–8. The notice indicates that the appeal was rejected for no proof of service on DHS and the notice of appeal was not signed by Mr. Smith. *Id.* at 7. Mr. Smith received the rejection notice in the mail on January 7, 2020. Declaration of Mr. Smith, attached at 2, ¶ 7. He called undersigned counsel’s office that day, however, counsel was out of the state for that week. *Id.*, Declaration of Counsel at 4, ¶ 2. Counsel was informed by his staff, and he instructed his staff to ask Mr. Smith to send a copy of the notice to his office. *Id.* The following day, on January 8, 2020, Mr. Smith mailed the notice to counsel. Declaration of Mr. Smith, attached at 2, ¶ 7. Counsel received the notice on January 13, 2020. Declaration of Counsel, attached at 4, ¶ 3. Counsel visited Mr. Smith in jail on January 16, 2020, to obtain his signature on the fee waiver form and review all of his legal papers, which he got back from ICE that morning, including filings by prior counsel. Declaration of Mr. Smith, attached at 2, ¶¶ 8–10; Declaration of Counsel at 4, ¶ 3. Counsel has since acted diligently to prepare the instant notice of appeal. *See* Declaration of Counsel, attached at 4. Counsel has submitted this motion and the enclosed notice of appeal by USPS overnight mail. Counsel has requested copies of Mr. Smith’s file from prior counsel and EOIR. *Id.* at 4, ¶ 4. The notice of appeal has been submitted within 30 days of Mr. Smith’s receipt of the IJ’s decision, within 15 days of his receipt of the notice, and as soon as practicable.

Given Mr. Smith’s timely filing of a *pro se* notice of appeal, his difficulty with the English language, rejection of the notice, delays caused by the holidays and the jail mail system, and undersigned counsel’s diligent attempts to file a new notice of appeal as soon as possible, Mr. Smith submits that these circumstances are extraordinary, meriting certification. *Matter of Liadov*, 23 I&N Dec. 990, 993 (BIA 2006).

For these reasons, Mr. Smith respectfully requests that the Board accept his appeal by certification.

Respectfully submitted,

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Date John Bruning, Attorney at Law

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**SUPPORTING DOCUMENTS**

Declaration of John Smith 1-3

Declaration of Counsel, John Bruning 4

Form EOIR-27, submitted via EOIR Portal on January 3, 2020 5-6

Rejection of Appeal, January 2, 2020 7-8

Pro Se Notice of Appeal, filed December 16, 2019, and received by the BIA on December 26, 2019 9-11

Original Fee Waiver Request, filed December 16, 2019, and received by the BIA on December 26, 2019 12

Copy of envelope containing rejection notice, sent by Mr. Smith to counsel on January 8, 2020 (postmarked January 9, 2020) 13

Copy of Motion to Withdraw as Counsel, filed September 24, 2019 14-17

Copy of IJ Order granting withdrawal, September 26, 2019 18-19

ICE Detainee Request Form, submitted December 17, 2019 20

Copy of I-589 believed to have been filed on September 4, 2019, by prior counsel 21-35

**PROOF OF SERVICE**

On January 20, 2020, I, John Bruning, mailed a true and correct copy of the **Respondent’s Motion to Accept Appeal by Certification (A123-456-789)** to the Office of Chief Counsel at the following address:

Office of the Chief Counsel

1 Federal Dr. Suite 1800

Fort Snelling, MN 55111

Signed: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_