NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-3366

KONG MENG XIONG,
Petitioner

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency No. A027-987-091)
Immigration Judge: William McDermott

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 5, 2026
Before: CHAGARES, *Chief Judge*, HARDIMAN and FREEMAN, *Circuit Judges*

(Opinion filed November 5, 2026)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Kong Meng Xiong petitions for review of the Board of Immigration Appeals' ("BIA" or "the Board") decision summarily dismissing his appeal as untimely. We will grant the petition and remand for further proceedings.

On September 8, 2025, an Immigration Judge ("IJ") orally denied Xiong's applications for relief and ordered his removal to Laos. The Executive Office for Immigration Review ("EOIR") then mailed Xiong a letter dated September 10, 2025, with a written summary memorandum of the oral decision attached. The letter notified Xiong: "Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the mailing of this written decision." AR 40. At the bottom of the written summary, below the IJ's signature, however, the following conflicting notation appeared: "Appeal Due: 10/08/2025." *Id.* at 44.

Xiong, a federal prisoner, deposited his notice of appeal in a prison mailbox on October 1, 2025. The Board received it on October 9, 2025, within 30 days of September 10, as the letter had directed. However, the Board summarily dismissed the appeal as

untimely under 8 C.F.R. §§ 1003.38(b), (c), and 1003.1(d)(2)(i)(G). Xiong petitions for review of that decision.[1]

We have jurisdiction under 8 U.S.C. § 1252(a)(1). Because Xiong's underlying removal order rests on criminal convictions described in 8 U.S.C. § 1227(a)(2)(A)(iii) and/or (B)(i), our jurisdiction is limited to constitutional claims and questions of law, which we examine de novo.[2] 8 U.S.C. § 1252(a)(2)(C)–(D); *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 224 (2020); *Ndungu v. Att'y Gen.*, 126 F.4th 150, 164, 168 (3d Cir. 2025).

As the Government summarizes, the issue on appeal is whether the Board erred in concluding that the administrative notice of appeal was untimely when it was received by the Board within 30 days of the date that the summary order was mailed. Under the circumstances of the case, we conclude that the Board did err.

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[1] Xiong timely moved for reconsideration, arguing that the 30-day appeal window should run from the September 10 mailing date, and alternatively, that the Board should extend him equitable tolling or self-certify the appeal because, due to a federal appropriations lapse ("the Shutdown") beginning on October 1, the Bureau of Prisons ("BOP") was unable to transmit his notice of appeal to the United States Postal Service ("USPS") until approximately October 6, 2025. The Board denied the motion, ruling that, under *In re Iskandarani*, 29 I. & N. Dec. 26 (BIA 2025), a summary memorandum does not reset the 30-day jurisdictional clock. CA Doc. 15 at 29–30. Addressing equitable tolling, the Board did not consider what happened in Xiong's BOP facility. Instead, the Board took administrative notice that the USPS and "immigration detention facilities" remained operational during the Shutdown and found that Xiong failed to present evidence detailing how the funding lapse disrupted his specific delivery. *Id*. at 30. Xiong did not file a separate petition for review of this decision, so we do not review it.

[2] Because the BIA summarily dismissed Xiong's appeal without reaching the merits, the record contains no transcription of the IJ's oral decision or the removal hearing. It is therefore unclear how many of the charges of removability were sustained. However, it is clear that at least one was sustained, and any single sustained charge under 8 U.S.C. § 1227(a)(2)(A)(iii) or (B)(i) is sufficient to implicate the jurisdiction-stripping provision.

We agree with the Government that the Board was correct regarding how the filing window is ordinarily calculated. The relevant regulation provides that a notice of appeal must be filed "within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing or electronic notification of an Immigration Judge's written decision." 8 C.F.R. § 1003.38(b)(3). The regulations draw a clear distinction between an oral decision accompanied by a summary memorandum and a standalone written decision. 8 C.F.R. § 1003.37(a); *In re Iskandarani*, 29 I. & N. Dec. 26, 27–28 (BIA 2025).

However, under the circumstances of this case, Xiong's appeal should have been considered timely filed within the 30-day window from the September 10 mailing date. The Board has ruled that the 30-day period in § 1003.38(b) is a non-jurisdictional claim-processing rule, not a jurisdictional bar. *In re Morales-Morales*, 28 I. & N. Dec. 714, 715–16 (BIA 2023). The Board will apply "the equitable tolling rule from *Holland v. Florida*, 560 U.S. 631 (2010)" to accept late-filed appeals. *Id.* at717. Under that rule, equitable tolling is appropriate where the "[g]overnment has misled a petitioner about what course of action to follow." *Alzaarir v. Att'y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011); *see also Brinson v. Vaughn*, 398 F.3d 225, 230 (3d Cir. 2005) ("One such potentially extraordinary situation [warranting equitable tolling] is where a court has misled a party regarding the steps that the party needs to take to preserve a claim."). EOIR notified Patel that an appeal was due within 30 days of its September 10, 2025 mailing. The Board received Xiong's notice of appeal on October 9, within the deadline EOIR

provided.[3] Under the circumstances of this case, it should have been deemed timely filed.[4]

Accordingly, we will grant the petition for review and remand for the Board to consider the substance of Xiong's appeal in the first instance.

[3] The Government argues that we cannot accept Xiong's argument that his appeal was timely filed because it "is premised on his mistaken belief that the Immigration Court mailed him a 'written decision.'" CA Doc. 16 at 14. We are not saying that a petitioner's belief about, or characterization of, a decision, in a vacuum, sets the deadline to appeal. In the context of this case, EOIR characterized the decision it sent Xiong as the "written decision" and told him that he had 30 days from the mailing of that decision (on September 10) to appeal. AR 40. EOIR does not always do this when it sends an order summarizing an IJ's oral decision. *See, e.g., Khamrokilov v. Att'y Gen.*, C.A. No. 26-1270, AR 10.

[4] Relatedly, in considering a time limit considered jurisdictional, some courts have held that when an agency misleads a litigant about the time within which to file a notice of appeal, "the late notice may be deemed to have been constructively filed within . . . jurisdictional limits." *Singh v. INS*, 315 F.3d 1186, 1188 (9th Cir. 2003) (quoting *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355 (9th Cir. 1980) (citation marks omitted)).