

# UP AGAINST THE ASYLUM CLOCK

*Fixing the Broken Employment Authorization Asylum Clock*



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## **II. Introduction**

The Center for Immigrants' Rights at the Penn State Dickinson School of Law (Center) and the American Immigration Council's Legal Action Center (LAC) collaborated to write this report on the asylum clock. The goals of the report are: (1) to identify problems with the government's management of the Employment Authorization Document (EAD) asylum clock; and (2) suggest a new policy for operation of the EAD asylum clock. The report incorporates information obtained by the Center and the LAC and analyzes information from attorneys, organizations, and individuals about their experiences with the "asylum clock."

Penn State's Center for Immigrants' Rights is an immigration clinic that works to promote a modernized immigration system through representation of immigrant advocacy organizations. The mission of the Center is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. The Legal Action Center of the Immigration Council advocates for fundamental fairness in immigration law through targeted legal work. One of these targeted issues is the EAD asylum clock. The LAC also works with other immigrants' rights organizations and immigration attorneys across the United States to promote the just and fair administration of our immigration laws.

This paper was written by Penn State Law students David G. Rodríguez and Jesús E. Saucedo under the supervision of the Center's director, Shoba Sivaprasad Wadhia. Invaluable guidance and review were provided by LAC staff attorney Emily Creighton and LAC's Executive Director Nadine Wettstein. The LAC and Center are very grateful to immigration attorneys from Baltimore, MD, New York, NY, Chicago, IL, Los Angeles, CA, Boston, MA, Denver, CO, Seattle, WA, St. Paul, MN, Houston, TX, and Salt Lake City, UT for sharing their expertise in and experiences with the EAD asylum clock. We also thank staff at USCIS's Asylum Division and EOIR for generously providing us with information about the EAD asylum clock.

While asylum applicants are waiting for their cases to be adjudicated, they must also wait to be eligible for employment authorization. The EAD asylum clock potentially affects more than 50,000 asylum applicants every year.<sup>1</sup> During this time, many must support themselves or rely on others for financial assistance. However, the government's current administration of the EAD asylum clock causes asylum applicants to encounter excessive delays in receiving work authorization and in some instances, results in them never receiving one at all. Some applicants eventually are forced to work without authorization at the risk of exploitation or rely on others while they wait for a decision on their asylum case. Work authorization allows asylum applicants to support themselves and their families independently and with dignity. Improving the current asylum clock system will ensure that asylum applicants become eligible for employment

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<sup>1</sup> See EOIR FY 2008 Asylum statistics (2008), <http://www.justice.gov/eoir/efoia/FY08AsyStats.pdf> (In 2008, there were 47,459 applicants); TRAC Immigration Affirmative Asylum Cases Received and Completed by USCIS (2004), <http://trac.syr.edu/immigration/reports/159/include/rep159table1.html> (Between 2000 and 2004 there were 250,929 applicants.). See also Department of Homeland Security Yearbook of Immigration Statistics, <http://www.dhs.gov/files/statistics/publications/YrBk08RA.shtm>; EOIR Statistics, Publications and Manuals, <http://www.justice.gov/eoir/efoia/foiafreq.htm>.

authorization without unnecessary delays and closer to the timeframe outlined in the Immigration and Nationality Act (INA).

### **III. Executive Summary**

Until 1994, asylum applicants could file an application for asylum and work authorization concurrently, and INS could authorize employment for up to one year.<sup>2</sup> In 1994, the Department of Justice's (DOJ) Immigration and Naturalization Service (INS) amended the regulations to require asylum applicants to wait 150 days after filing a completed asylum application before applying for an EAD.<sup>3</sup> The INS then had 30 days to adjudicate the EAD application and could not issue an EAD until the asylum application had been pending for 180 days or more.<sup>4</sup> This waiting period for applicants to obtain work authorization became known as the EAD asylum clock.

In 1996, Congress amended the Immigration and Nationality Act by codifying the 180-day waiting period for EAD applications.<sup>5</sup> Congress also implemented a 180-day case completion deadline for Immigration Judges (IJs) to adjudicate asylum applications.<sup>6</sup> These changes created a 180-day timeframe in which USCIS and EOIR<sup>7</sup> should endeavor to complete an asylum application.

USCIS and EOIR operate as if there were only one asylum clock. However the INA created two clocks: the asylum adjudication clock and the EAD asylum clock. The asylum adjudication clock measures the number of days an asylum claim has been pending adjudication.<sup>8</sup> The EAD asylum clock measures the number of days after an applicant files an asylum application before the applicant is eligible for work authorization.<sup>9</sup> The EAD asylum clock and the asylum adjudication clock usually are known jointly as the "asylum clock."<sup>10</sup> The 180-day period is referred to as the 180-day clock (KLOK) by USCIS.<sup>11</sup>

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<sup>2</sup> 8 C.F.R. § 274a.12(c)(8) (1994). *See also* 8 C.F.R. § 208.7 (1994).

<sup>3</sup> 8 C.F.R. § 208.7 (1994).

<sup>4</sup> The Homeland Security Act of 2002 abolished the INS and moved its functions to the Department of Homeland Security (DHS). DHS is divided into three components, the United States Citizenship and Immigration Services (USCIS), United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE). After the reforms the Department of Justice retained control over EOIR. *See* RICHARD A BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 19, (Stephanie L. Browning ed., American Immigration Lawyers Association Publication, 2009).

<sup>5</sup> Immigration & Nationality Act (INA) § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

<sup>6</sup> INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

<sup>7</sup> EOIR is responsible for adjudicating immigration cases. The Office of the Chief Immigration Judge, the BIA, and the Office of the Chief Administrative Hearing Officer comprise the adjudicatory offices of EOIR.

<sup>8</sup> "In [the] absence of exceptional circumstances, final administrative adjudication of the asylum application, not including an administrative appeal, shall be completed within 180 days after the date an application is filed." *See* INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

<sup>9</sup> "An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization [EAD] prior to 180 days after the date of filing of the application for asylum." INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

<sup>10</sup> American Immigration Law Foundation's Legal Action Center, *Practice Advisory, Employment Authorization and Asylum: Strategies to Avoid Stopping the Asylum Clock* 3 (2006), *available at*

USCIS's and EOIR's interpretation and application of the EAD asylum clock create many problems for practitioners and asylum applicants. Under the current system, both asylum officers (AOs) and IJs have the power to stop the EAD asylum clock for any delay in the adjudication process that the judge or AO determines was requested or caused by the applicant.<sup>12</sup> Although there are fewer reports of such problems at USCIS, asylum officers do improperly stop the clock. When IJs and AOs improperly stop the EAD asylum clock, applicants wait much longer than 150 days before they are eligible to apply for work authorization. Often the clock is stopped indefinitely.

This report focuses on the most common problems highlighted by practitioners and immigration advocates: (1) a lack of transparency in the management of the clock; (2) a lack of clarity and comprehensiveness of the government's clock policy; (3) misinterpretation of the regulations governing the clock; (4) improper implementation of the government's clock policy; and (5) problems associated with EOIR's case completion goals. These categories describe the areas of deficiency in the policy governing the functioning of the EAD asylum clock.

This report also recommends solutions to these problems. The chief recommendation is that EOIR develop better policy that is consistent with the regulations, and issue a new Operating Policies and Procedures Memorandum (OPPM) that reflects that policy.

The new EOIR policy must do five things: (1) treat the asylum clock as two separate clocks, an asylum adjudications clock and an EAD asylum clock – the two clocks should operate independently and sometimes stop at different times and for different reasons; (2) correctly interpret “delay requested or caused by the applicant” in 8 CFR § 208.7(a)(2) and 8 CFR § 1208.7(a)(2); (3) require that decisions to stop the EAD asylum clock be made on the record; (4) develop clear guidelines detailing when IJs should stop and re-start the EAD asylum clock; and (5) create a clear and consistent process for internally appealing or contesting an IJ's application of the EAD asylum clock.

EOIR should widely disseminate information about the new policy among EOIR personnel, asylum applicants, and their representatives; and should provide training to EOIR personnel on the substantive and procedural changes.

Similarly, USCIS should also implement a policy correctly interpreting the regulations relevant to the EAD asylum clock. USCIS should disseminate this policy widely. In addition, USCIS should develop a system to resolve disputes over the implementation of the asylum clock; develop ways to better transfer jurisdiction over the EAD asylum clock to EOIR; and better inform applicants about the status of their EAD asylum clock.

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[http://www.americanimmigrationcouncil.org/sites/default/files/lac\\_pa\\_022806.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/lac_pa_022806.pdf) [hereinafter AILF Practice Advisory].

<sup>11</sup> U.S. Citizenship and Immigration Services, Refugee, Asylum, and International Operations Directorate, *Affirmative Asylum Procedures Manual 90* (2007), available at <http://www.uscis.gov/files/natedocuments/AffirmAsyManFNL.pdf> [hereinafter *Affirmative Asylum Manual*].

<sup>12</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

Lastly, we recommend that the government appoint a task force made up of EOIR staff, USCIS staff, nongovernmental organizations, and private attorneys to discuss and implement the new policies and procedures outlined in this report.

#### **IV. Background and Legal Authority**

##### **A. Background of the Asylum Clock**

Procedures for an asylum application are governed by both regulation and statute, specifically Title 8 of the Code of Federal Regulations and the Immigration and Nationality Act.<sup>13</sup> Under the INA, to be eligible for asylum an applicant must show either past persecution or a well-founded fear of future harm on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>14</sup> There are three contexts in which asylum applications can be filed.<sup>15</sup> A noncitizen in valid nonimmigrant status can file an affirmative application for asylum with USCIS.<sup>16</sup> A noncitizen in expedited removal proceedings can file an asylum application as a defensive action.<sup>17</sup> A noncitizen in regular removal proceedings can file a defensive asylum application with an IJ.<sup>18</sup>

The EAD asylum clock was created in response to increasing numbers of asylum applications in the late 1980s and early 1990s.<sup>19</sup> In fiscal year (FY) 1991, INS received 56,310 asylum applications, but completed only 16,552.<sup>20</sup> By FY 1994, the number of asylum applications dramatically increased to 143,225, and INS decided less than a third of that number.<sup>21</sup> This gap contributed to a backlog of over 400,000 asylum applications by the end of 1994.<sup>22</sup> Critics charged that many of these applications were submitted by applicants in order to obtain EADs and not for obtaining asylum.<sup>23</sup> Prior to 1994, it was relatively easy for asylum applicants to obtain EADs. Applicants were not required to wait 150 days before applying for work authorization.<sup>24</sup> Asylum applicants could file for asylum and an EAD concurrently, and

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<sup>13</sup> 8 C.F.R. § 208.1; 8 C.F.R. § 1208.1 (2009); INA § 208, 8 U.S.C. § 1158 (2009).

<sup>14</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2009); INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

<sup>15</sup> CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 34.02 (2009).

<sup>16</sup> GORDON ET AL., *supra* note 15, § 34.02. *See* INA § 208(a), 8 U.S.C. § 1158(a) (2009); 8 C.F.R. § 208.11(a); 8 C.F.R. § 1208.11(a) (2009).

<sup>17</sup> GORDON ET AL., *supra* note 15 § 34.02. *See* INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (2009); 8 C.F.R. § 208.4(b)(2); 8 C.F.R. § 1208.4(b)(2) (2009). This paper will not discuss the procedure or operation of the EAD clock after an applicant files an asylum application in this context.

<sup>18</sup> GORDON ET AL., *supra* note 15 § 34.02. *See* INA § 208(a), 8 U.S.C. § 1158(a) (2009); 8 C.F.R. § 208.4(b)(2); 8 C.F.R. § 1208.4(b)(2) (2009).

<sup>19</sup> David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 Wash. L. Rev. 725, 733 (1995).

<sup>20</sup> *Id.* at 731.

<sup>21</sup> GORDON ET AL., *supra* note 15, at § 34.02.

<sup>22</sup> *Id.*

<sup>23</sup> Martin, *supra* note 19 at 735.

<sup>24</sup> Affirmative Asylum Manual, *supra* note 11, at 121. *See* 8 C.F.R. § 208.7 (1994).

AOs could authorize employment for up to one year.<sup>25</sup> AOs either approved or denied asylum applications; they did not refer applications to the immigration court.<sup>26</sup>

In addition, regulations that applied to asylum applicants and others provided “that interim work authorization [would be] issue[d] if no decision on an EAD application [was] forthcoming within ninety days.”<sup>27</sup> Therefore, an asylum applicant with an application pending for more than 90 days was entitled to work authorization, unless that claim was found to be frivolous.<sup>28</sup> In 1992, nearly two-thirds of asylum applicants received EADs because an interview could not be scheduled within ninety days.<sup>29</sup>

During the early 1990s, three outcomes were possible after the asylum interview: (1) if the asylum claim was judged frivolous, no EAD was issued, even if the applicant appealed;<sup>30</sup> (2) if the asylum application was judged as having merit, then the applicant would be granted asylum; and (3) if the asylum claim was not deemed sufficient to merit asylum, yet non-frivolous, the person would almost always receive an EAD because of the time it took to have *de novo* consideration by an IJ and possible further review.<sup>31</sup> In the last instance, the remaining adjudication of a case would almost always take longer than the 90-day waiting period required before becoming entitled to work authorization.<sup>32</sup>

### 1994 Changes

In 1994, the regulations were amended to state that “an asylum applicant [would] not be eligible to apply for employment authorization based on his or her asylum application until 150 days after the date on which the asylum application [was] filed.”<sup>33</sup> This new language created the EAD asylum clock.<sup>34</sup> The changes were designed to streamline the asylum adjudication process by discouraging frivolous applications. In theory, the changes were important because: (1) they sought to encourage INS and EOIR to adjudicate claims promptly within the 180-day period, since, by doing so, there would be fewer EADs being adjudicated while asylum cases were pending; and (2) they would authorize INS to deny employment authorization to those whose underlying asylum applications had been denied.<sup>35</sup> DOJ hoped that the reforms would reduce the number of asylum applications filed primarily to obtain employment authorization because under the new regulations, applicants could no longer file an asylum application and an EAD

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<sup>25</sup> 8 C.F.R. § 208.7 (1994).

<sup>26</sup> Affirmative Asylum Manual, *supra* note 11, at 121.

<sup>27</sup> Martin, *supra* note 19 at 734. See 8 C.F.R. § 274a.13(d) (1994).

<sup>28</sup> 8 C.F.R. § 274a.12(c)(8); 8 C.F.R. § 274a.13(d) (1994).

<sup>29</sup> Martin, *supra* note 19 at 734-35.

<sup>30</sup> Martin, *supra* note 19 at 734. See also 8 C.F.R. § 208.7 (1994).

<sup>31</sup> Martin, *supra* note 19 at 734.

<sup>32</sup> Martin, *supra* note 19 at 734. See 8 C.F.R. § 208.7(c) (1994). See also 8 C.F.R. § 274a.12(a)(5) (1994).

<sup>33</sup> 59 Fed. Reg. 62284, 62290 (Dec. 5, 1994) (codified as amended 8 C.F.R. § 208.7) (The amendments to 8 C.F.R. § 208.7 were first proposed in 59 Fed. Reg. 14779 (Mar. 30, 1994)). See 8 C.F.R. § 208.7(a); 8 C.F.R. § 1208.7(a) (2009).

<sup>34</sup> 59 Fed. Reg. at 62284, 62291 (Dec. 5, 1994).

<sup>35</sup> 59 Fed. Reg. at 62284.

application concurrently.<sup>36</sup> The 1994 regulatory changes, coupled with a massive backlog reduction effort, were intended to make abuse of the asylum system a thing of the past.<sup>37</sup>

Now, after an interview has taken place, an AO can find an applicant either: (1) eligible for an approval of asylum; or (2) ineligible for an approval of asylum.<sup>38</sup> If an applicant in the latter category appears deportable or removable, the asylum office provides him or her a Referral Notice and initiates removal proceedings.<sup>39</sup> A referral is not a final decision in the case, and an IJ will hear the applicant's claim anew.<sup>40</sup>

Some public comments submitted during the regulatory comment period supported the government's proposals as an appropriate balance between meeting the needs of asylum applicants and discouraging meritless claims.<sup>41</sup> A greater number of comments criticized these provisions for imposing economic hardship on asylum applicants.<sup>42</sup> The comments addressed the fact that many applicants arrive in the US with few belongings, no money, and no network of family or friends to provide them assistance.<sup>43</sup> One comment pointed out that the proposed rule was confusing because it did not specify that persons granted asylum are immediately eligible for work authorization and did not provide sufficient detail about how the 150-day waiting period would be measured.<sup>44</sup> Other comments expressed doubt that asylum applicants would actually receive work authorization 180 days after the filing of their applications because of the difficulty and confusion in applying the 150-day waiting period.<sup>45</sup> This concern in particular has proved to be prophetic.

DOJ argued that the 1994 regulations would provide legitimate refugees with lawful employment authorization. It did not address the recommendations from nongovernmental organizations that alternative means be established to adjudicate employment authorization on the basis of the merits of the claim or on the economic situation of the asylum applicant. In response to a comment that asylum applicants might find it necessary to disregard the law and work without authorization, DOJ explained that it did not believe that the solution to this problem was to loosen eligibility standards for employment authorization.<sup>46</sup> DOJ argued that the proposed reforms would discourage individuals from filing asylum applications solely to gain employment authorization. It also argued that the new regulations would enable INS to more promptly grant asylum and provide work authorization to those who merit relief.<sup>47</sup>

In 1996, Congress amended the INA to reflect the language of the regulations by adding the 180-day waiting period for EAD eligibility and the 180-day deadline to adjudicate asylum

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<sup>36</sup> 59 Fed. Reg. at 14780.

<sup>37</sup> Martin, *supra* note 19 at 733.

<sup>38</sup> In some situations, the AO may issue a Notice of Intent to Deny (NOID), giving a specified period of time for the applicant to rebut the reason for the proposed denial. Affirmative Asylum Manual, at 45-46.

<sup>39</sup> Affirmative Asylum Manual, *supra* note 11, at 122. See 59 Fed. Reg. at 62284.

<sup>40</sup> Affirmative Asylum Manual, *supra* note 11, at 122.

<sup>41</sup> 59 Fed. Reg. at 62290.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 59 Fed. Reg. at 62290-91.

<sup>47</sup> 59 Fed. Reg. at 62291.



applications.<sup>48</sup> The statute states that “[a]n applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General.”<sup>49</sup> It goes on to say that, “[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.”<sup>50</sup>

The Homeland Security Act of 2002 abolished the INS and moved its functions to DHS. DHS has three immigration-related components: USCIS, United States Customs and Border Protection (CBP), and United States Immigration and Customs Enforcement (ICE).<sup>51</sup> EOIR continues to be an agency within DOJ.<sup>52</sup> DOJ’s EOIR retained the immigration courts and the Board of Immigration Appeals (BIA).<sup>53</sup>

## **B. Legal Authority**

### *Statute and Regulations*

- INA § 101(a)(42)(A) defines the term refugee as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion...”<sup>54</sup>
- INA § 208 governs asylum and the procedures to apply for asylum.<sup>55</sup>
- INA § 208(b)(1)(B)(i) states that in general the “burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A). To establish that the applicant is a refugee within the meaning of this section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”<sup>56</sup>

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<sup>48</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 604, 110 Stat. 3009, 115 (1996) (codified as amended INA § 208).

<sup>49</sup> INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

<sup>50</sup> *Id.*

<sup>51</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 451 - 471, 116 Stat. 2135, 2195- 2205 (2002) (codified as 6 U.S.C. §§ 271- 279, 291 (2002)). See RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 18 (2d ed. 2009).

<sup>52</sup> See Dep’t of Justice, Exec. Office for Immigr. Rev., Background Information, *available at* <http://www.justice.gov/eoir/background.htm> (last visited Jan. 22, 2009).

<sup>53</sup> Homeland Security Act of 2002 § 1101, 6 U.S.C. § 521. See U.S. Citizenship and Immigration Services, Immigration Benefits in EOIR Removal Proceedings (Dec. 4, 2009), *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3ebc829cbf3ae010VgnVCM1000000ecd190aRCRD&vgnnextchannel=02729c7755cb9010VgnVCM10000045f3d6a1RCRD>.

<sup>54</sup> INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2009).

<sup>55</sup> INA § 208, 8 U.S.C. § 1158 (2009).

<sup>56</sup> INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2009).

- INA § 208(d)(5)(A)(iii) describes the adjudication clock and states, “in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed.”<sup>57</sup>
- INA § 208(d)(2) describes the EAD asylum clock. It states that, “[a]n applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.”<sup>58</sup>
- 8 CFR § 208.3 explains which form the applicant must file. The regulation states that “[a]n asylum applicant must file Form I-589, Applicant for Asylum and for Withholding of Removal, together with any additional supporting evidence in accordance with the instructions on the form.”<sup>59</sup>
- 8 CFR § 208.7(a)(1) explains the employment authorization process for asylum applicants. It states that “the application shall be submitted no earlier than 150 days after the date on which a complete asylum application submitted in accordance with §§208.3 and 208.4 has been received. In the case of an applicant whose asylum application has been recommended for approval, the applicant may apply for employment authorization when he or she receives notice of the recommended approval.”<sup>60</sup>
- 8 CFR § 208.7(a)(2) states that a “delay requested or caused by the applicant shall not be counted as part of [the 150-day time period], including delays caused by failure without good cause to follow the requirements for fingerprint processing. Such time periods shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to §103.2(b)(8) of this chapter and the receipt of the applicant's response to such request.”<sup>61</sup>
- 8 CFR § 208.14 gives the authority to and identifies the scenarios when an asylum officer or an immigration judge may approve, deny, refer, or dismiss an asylum application.<sup>62</sup>
- 8 CFR § 274a.12(c)(8)(ii) states that when the applicant receives a letter of recommendation for asylum from the asylum office, but has not received the approval notice, the applicant must apply for an EAD.<sup>63</sup>

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<sup>57</sup> INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

<sup>58</sup> INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

<sup>59</sup> 8 C.F.R. § 208.3; 8 C.F.R. § 1208.3 (2009).

<sup>60</sup> 8 C.F.R. § 208.7; 8 C.F.R. § 1208.7 (2009).

<sup>61</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>62</sup> 8 C.F.R. § 208.14; 8 C.F.R. § 1208.14 (2009).

<sup>63</sup> 8 C.F.R. § 274a.12(c)(8)(ii); 8 C.F.R. § 1274a.12(c)(8)(ii) (2009).

### **C. Policy and Guidelines**

#### *USCIS Asylum Division Policy and Guidelines*

USCIS has published a manual for Asylum Division staff on how to process affirmative asylum applications.<sup>64</sup> This manual is formally called the Affirmative Asylum Procedures Manual (AAPM). The AAPM contains USCIS written policy on the EAD asylum clock. Pages 90-91 of the AAPM explain to AOs how to handle the EAD asylum clock for affirmative asylum applicants. USCIS has control over the clock only in affirmative asylum applications because defensive applications are always filed in immigration court.<sup>65</sup>

In addition to pages 90-91 in the AAPM, the manual contains information about tolling and re-starting the clock in many of the manual's appendices.<sup>66</sup> Most of the appendices are form notices and letters that are sent to applicants to inform them about the status of their asylum applications.<sup>67</sup> Some of the form notices include language notifying the applicant of potential actions that may stop the clock, whether a certain action tolled the EAD asylum clock and/or when the asylum clock will re-start.<sup>68</sup> Perhaps the most relevant form in the appendices is Appendix 20. This form explains the impact of the Refugee Asylum and Parole System (RAPS) on the EAD asylum clock.<sup>69</sup> Appendix 20 is a list of codes and their effect on the stopping and re-starting of the EAD asylum clock.<sup>70</sup> For example, when an asylum applicant requests additional time to submit documents, USCIS will enter the code "HOLD-AD" into RAPS, causing the EAD asylum clock to stop. The clock does not re-start until USCIS removes the "HOLD."<sup>71</sup> USCIS will also use RAPS to stop the EAD asylum clock when an interview is cancelled "at fault of [the] [a]pplicant."<sup>72</sup> Here, USCIS will enter code "REMC"<sup>73</sup> (Cancelled at fault of applicant)" into the system, and the EAD asylum clock will re-start "on the date of the next interview, if the applicant appears."<sup>74</sup>

RAPS is an automated computer system used by USCIS to track "the processing of affirmative asylum and suspension/special rule cancellation applications through the affirmative asylum process."<sup>75</sup> Asylum Office personnel have access to update and change information in RAPS while the case is pending at the asylum office.<sup>76</sup> At the asylum office level, the clock query (KLOK) screen in the RAPS indicates how long the EAD asylum clock has been running, any stoppage (tolling) of the clock that has occurred at any time in the process, and the earliest

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<sup>64</sup> Affirmative Asylum Manual, *supra* note 11, at 1.

<sup>65</sup> *Id.* at 90-91.

<sup>66</sup> *Id.* app. 20.

<sup>67</sup> *Id.* app. 1.

<sup>68</sup> *Cf.* Affirmative Asylum Manual, *supra* note 11, apps. 6-7, 8-9, 11, 51.

<sup>69</sup> Affirmative Asylum Manual, *supra* note 11, app. 20.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> REMC is an acronym for "remove case from schedule."

<sup>74</sup> Affirmative Asylum Manual, *supra* note 11, app. 20.

<sup>75</sup> *Id.* at 2-3.

<sup>76</sup> *Id.* In some cases, Service Centers have access to RAPS. See e.g., Affirmative Asylum Manual, *supra* note 11, at 7. This report does not provide a detailed description about the role of Services Centers.

possible date the applicant is eligible to apply for an EAD.<sup>77</sup> Essentially, the EAD asylum clock is started, stopped, or re-started based on commands entered into RAPS—the KLOK screen in RAPS is how USCIS keeps track of each applicant’s EAD asylum clock.<sup>78</sup> The AAPM explains that actions by an asylum applicant that will toll the EAD asylum clock “include, but are not limited to, requests to reschedule, failure to appear for the interview or pick-up appointment, and failure to provide a competent interpreter, which may result in a rescheduling of the asylum interview.”<sup>79</sup>

AOs can also stop the EAD asylum clock if an applicant requests additional time to submit documents; fails to appear at the Application Support Center (ASC) for biometrics collection/fingerprinting within the required time period; or cancels a pick-up appointment.<sup>80</sup> In addition, an AO may stop the EAD asylum clock in, “[a] case in which the applicant appears eligible for an asylum grant but a final decision cannot be made because background security checks have not been completed, and a recommended approval is not permitted to be issued.”<sup>81</sup> Asylum office personnel will enter the “HOLD-AD” code into RAPS to select whether the delay in the security check processing is due to the applicant, thereby stopping the EAD asylum clock, or is due to the government, which keeps the KLOK running.<sup>82</sup> It is USCIS’s stated policy to inform asylum applicants of a decision to toll the EAD asylum clock, as well as when the EAD asylum clock will re-start, through notices sent in the mail.<sup>83</sup> Finally, RAPS contains an EOIR screen that allows asylum office personnel to see whether a particular alien-number (A-number) pertains to a case within the immigration court system, and the status of that case.<sup>84</sup>

### *EOIR Policy and Guidelines*

The Operating Policies and Procedures Memorandums (OPPMs) offer guidance to all EOIR staff, including IJs and immigration court personnel. OPPMs are published by EOIR in order to disseminate guidance and procedure on various immigration issues.<sup>85</sup> OPPM 97-6 explains EOIR’s Automated Nationwide System for Immigration Review (ANSIR) computer database.<sup>86</sup> ANSIR is the system used by EOIR and USCIS to schedule an applicant for a hearing before the immigration court.<sup>87</sup> EOIR guidance states that “when a case is adjourned or a call up date given, the reason for that adjournment must be provided by an [IJ] and then entered into ANSIR by a support staff member using a two-digit adjournment code, or a two-letter call-up code.”<sup>88</sup> These codes are used to stop the EAD asylum clock, but are not part of the record.<sup>89</sup>

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<sup>77</sup> Affirmative Asylum Manual, *supra* note 11, at 91.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Affirmative Asylum Manual, *supra* note 11, at 92-93, 104.

<sup>81</sup> *Id.* at 43.

<sup>82</sup> *Id.*

<sup>83</sup> *See e.g.*, Affirmative Asylum Manual, *supra* note 11, app. 5.

<sup>84</sup> Affirmative Asylum Manual, *supra* note 11, at 3.

<sup>85</sup> *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes, Jun. 16, 2005, available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm> [hereinafter OPPM 05-07].

<sup>86</sup> *See* OPPM 97-6, Definitions and Use of Adjournment and Call-up Codes, Aug. 22, 1997, available at <http://www.usdoj.gov/eoir/efoia/ocij/97-6.pdf> [hereinafter OPPM 97-6].

<sup>87</sup> Affirmative Asylum Manual, *supra* note 11, at 3.

<sup>88</sup> *See* OPPM 97-6, *supra* note 86. (These codes were revised to include changes required by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

An important OPPM related to the EAD asylum clock is OPPM 05-07. This OPPM contains the most current adjournment and call-up codes.<sup>90</sup> OPPM 05-07 defines what “adjournment, call-up and case identification codes” are and it explains to EOIR staff how to use them. EOIR’s adjournment codes reflect the agency’s interpretation of what stops the clock.<sup>91</sup> It includes a chart of codes listing whether an adjournment is “alien-related,” “DHS-related,” “IJ-related,” or “Operational.”<sup>92</sup> An “alien-related” adjournment stops both the EAD asylum clock and the asylum adjudication clock. The OPPM explains that “[a]ll Court Administrators are instructed to review OPPM [05-07] with their support staff to insure that the adjournment, call-up and case identification codes are properly entered.”<sup>93</sup> Furthermore, the relevant OPPM states that the use of all codes should be monitored to identify any improper use of them in the automated system.<sup>94</sup> OPPM 00-01 states that immigration courts must have a designated person for asylum case monitoring. Specifically, “[e]ach Court Administrator should have at least one member of the Court’s personnel under their supervision designated to be responsible for tracking and monitoring asylum cases within the court to ensure the timely completion of all appropriate asylum cases within the 180-day deadline.”<sup>95</sup>

The Immigration Court Practice Manual (ICPM) is another important part of EOIR policy on the EAD asylum clock. The manual is “provided for the information and convenience of the general public and for parties that appear before the Immigration Courts.”<sup>96</sup> The manual describes procedures, requirements, and recommendations for practice before immigration courts.<sup>97</sup> The ICPM outlines the Automated Status Query (ASQ) system that provides information to asylum applicants concerning the status of cases before the immigration court or BIA.<sup>98</sup>

ASQ contains a telephone menu in English and Spanish where the caller must enter the applicant registration number (A-number) of the applicant involved.<sup>99</sup> According to EOIR, ASQ is updated within 24 hours of a change to the EAD asylum clock<sup>100</sup> Also, for cases before the immigration court, ASQ contains information regarding the next hearing date, time, and location. In asylum cases, ASQ contains the elapsed time and status of the asylum clock, and IJ decisions.<sup>101</sup>

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<sup>89</sup> See OPPM 05-07, *supra* note 85.

<sup>90</sup> See *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Revised OPPM, 00-01, Asylum Request Processing, Aug. 4, 2000, available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf> [hereinafter OPPM 00-01].

<sup>96</sup> EOIR, Immigration Court Practice Manual Chapter 1, at 1 (2008), available at <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%201.pdf> [hereinafter Immigration Court Practice Manual].

<sup>97</sup> *Id.* at 1.

<sup>98</sup> *Id.* at 12-13.

<sup>99</sup> *Id.*

<sup>100</sup> AILA-EOIR Liaison Agenda, Mar. 16, 2005, Question 4, available at <http://www.justice.gov/eoir/statpub/eoiraila031605.pdf>.

<sup>101</sup> Immigration Court Practice Manual, *supra* note 96, at 13.

#### **D. The Government's Stated Procedure for the EAD Asylum Clock**

##### USCIS Asylum Division

Asylum applications are filed on DHS Form I-589.<sup>102</sup> The asylum adjudication clock starts when a completed application is filed with the appropriate USCIS service center or asylum office.<sup>103</sup> The EAD asylum clock begins to run once the I-589 has been reviewed and found properly filed and complete by the service center or the asylum office.<sup>104</sup> They then give the applicant an "A-number" if they do not already have one. If directly filed with the asylum office, the application is entered into RAPS on the Case Entry (I589) screen within one business day of receipt.<sup>105</sup>

An AO "may grant, in the exercise of his or her discretion, asylum to an applicant who qualifies as a refugee under section 101(a)(42) of the Act, and whose identity has been checked pursuant to section 208(d)(5)(A)(i) of the Act."<sup>106</sup> If the AO does not grant asylum to an applicant (after an interview conducted in accordance with §208.9, or if, as provided in §208.10, the applicant is deemed to have waived his or her right to an interview or an adjudication by an asylum officer) the asylum officer shall deny, refer, or dismiss the application.<sup>107</sup> The EAD asylum clock can be stopped by an AO for "[a]ny delay requested or caused by the applicant."<sup>108</sup> An applicant is ineligible for work authorization if her asylum application is denied within the 150-day period.<sup>109</sup>

An application for employment authorization, Form I-765, can be submitted to the USCIS 150 days after the date on which a complete application for asylum is filed.<sup>110</sup> USCIS then has 30 days to adjudicate the application for employment authorization from the date it is filed.<sup>111</sup>

AOs are instructed to notify applicants of decisions to stop the EAD asylum clock through notice letters when the applicant causes a delay. The notices do not generally indicate the tally of the applicant's clock, but some notify the applicant of potential actions that may stop

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<sup>102</sup> An asylum applicant must file an original and two copies of the completed I-589 form. An application must include a photograph of the applicant and each dependent, three copies of all passports or other travel documents, and three copies of evidence proving the relationship for each family member listed on the form. The application must also include the signature and complete mailing address of the applicant and of anyone other than an immediate relative who helped in preparing the application. Additional supporting information and documentation may be provided. GORDON ET AL. *supra* note 15, at § 34.02 (2009). Form I-589 is *available at* <http://www.uscis.gov/files/form/I-589.pdf>.

<sup>103</sup> 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009).

<sup>104</sup> Affirmative Asylum Manual, *supra* note 11, at 7.

<sup>105</sup> *Id.*

<sup>106</sup> 8 C.F.R. § 208.14(b); 8 C.F.R. § 1208.14(b) (2009).

<sup>107</sup> 8 C.F.R. § 208.14(c); 8 C.F.R. § 1208.14(c) (2009).

<sup>108</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>109</sup> 8 C.F.R. § 208.7(a); 8 C.F.R. § 1208.7(a) (2009).

<sup>110</sup> 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009). If the asylum application is denied by an immigration judge or an asylum officer within the 150-day period, the applicant is ineligible to apply for employment authorization. *Id.*

<sup>111</sup> 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009).

the clock, that the EAD asylum clock has stopped and/or when the clock will re-start. For example, a notice of scheduling of fingerprinting appointment notifies the applicant that her EAD asylum clock is stopped because she missed her fingerprinting appointment without good cause, and also informs the applicant that the EAD asylum clock will re-start once she gets her biometrics and returns to the asylum office for the rescheduled interview.<sup>112</sup> Another example is the notice for the rescheduling of an asylum interview due to interpretation problems. The notice informs the applicant that her clock will be tolled because she failed, without good cause, to produce a competent interpreter at the asylum interview. The notice also informs the applicant that if her case is referred to EOIR for failure to produce a competent interpreter, she will be ineligible for work authorization unless the applicant has exceptional circumstances or unless an immigration judge grants asylum.<sup>113</sup> In general, a case is referred to EOIR after an AO serves a Referral Notice and a NTA to the asylum applicant, thereby referring the applicant's case to an IJ.<sup>114</sup> The Referral Notice also includes the approximate date when the clock will reach 150 days and the applicant will be eligible to apply for work authorization.<sup>115</sup> After a case is referred, "[t]he Asylum Office prepares a packet to file with the Immigration Court" and "[o]nce this packet has been filed with the court, the Asylum Office no longer has jurisdiction over the asylum claim."<sup>116</sup> The packet sent to EOIR contains the following documents: (1) a photocopy of the I-589 that contains signatures of the applicant and AO, (2) copies of all documents in support of the I-589 application, (3) the NTA, with the original signature of the USCIS officer who signed and dated the document, (4) and a printout of the Removal screen from ANSIR showing the hearing date, time, and location, and the 150-day KLOK screen in RAPS.<sup>117</sup>

Currently, there is an interagency clock procedure in place to address any clock issues when cases are referred from an AO to an IJ.<sup>118</sup> Specifically, USCIS Asylum Division has indicated that each asylum office and immigration court has assigned a point of contact on all EAD asylum clock related issues.<sup>119</sup> USCIS has explained that "[t]he Asylum Division reached out in December [2007] to the Asylum Offices to designate EAD Point of Contacts (POCs) and EOIR [did] the same."<sup>120</sup> USCIS also has explained that "EOIR and the Asylum Offices have exchanged their lists with each other and the names of the POCs will not be released to the public."<sup>121</sup>

### EOIR

If a case is referred to an immigration court by an AO, or if an applicant files an asylum application initially in removal proceedings, a different procedure applies. The EAD asylum clock does not run in all cases before IJs. When an asylum applicant goes to immigration court to adjudicate her case, the IJ may ask during the master calendar hearing "whether the respondent

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<sup>112</sup> Affirmative Asylum Manual, *supra* note 11, apps. 5, 7.

<sup>113</sup> Affirmative Asylum Manual, *supra* note 11, apps. 7, 9.

<sup>114</sup> Affirmative Asylum Manual, *supra* note 11, at 43-44.

<sup>115</sup> Affirmative Asylum Manual, *supra* note 11, app. 51.

<sup>116</sup> 8 C.F.R. § 208.2(b); 8 C.F.R. §1 208.2(b) (2009). See Affirmative Asylum Manual, *supra* note 11, at 52.

<sup>117</sup> Affirmative Asylum Manual, *supra* note 11, at 52.

<sup>118</sup> Asylum HQ/NGO Liaison Agenda Question XIV, June 17, 2008 (On file with authors).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

wishes for the asylum clock to run.”<sup>122</sup> If the applicant answers in the affirmative, then the case is handled “expeditiously,” meaning that it is scheduled for completion within 180 days of the filing.<sup>123</sup> If the respondent does not ask for the asylum clock to run, the case is scheduled as any non-asylum case and the EAD asylum clock does not run.<sup>124</sup>

Under the regulations, the EAD asylum clock stops for any delay requested or caused by the applicant.<sup>125</sup> A delay in the adjudication “requested or caused” by the asylum applicant will stop the EAD asylum clock during the time the delay exists. The regulations provide two examples of what constitutes an applicant-caused delay. The regulations state that, “delays caused by failure without good cause to follow the requirements for fingerprint processing” stop the clock.<sup>126</sup> Also, the time between the issuance of a request for evidence under 8 CFR § 103.2(b)(8) and the receipt of a response to that request is excluded from the time accrued on the EAD asylum clock.<sup>127</sup>

Under the regulations, if an asylum applicant fails to receive and acknowledge the receipt of an AO’s decision, the EAD asylum clock stops until the applicant appears to receive such decision or “appears before an immigration judge in response to the issuance of a charging document.”<sup>128</sup> Applicants who have received EADs and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.<sup>129</sup> The EAD is renewable “for the continuous period of time necessary for the asylum officer or immigration judge to decide the asylum application and, if necessary, for completion of any administrative or judicial review.”<sup>130</sup>

## **V. Categories of EAD Asylum Clock Problems**

The problems with the government’s administration of the EAD asylum clock take many forms and result in an asylum applicant encountering delays in obtaining work authorization or never obtaining it at all. The EAD asylum clock is problematic in multiple jurisdictions and the American Immigration Lawyers Association (AILA) has continuously alerted EOIR of problems related to the clock.<sup>131</sup> In many cases, applicants wait much longer than 150 days to become eligible to apply for an EAD.<sup>132</sup> The most prevalent problems with the EAD asylum clock include: (1) lack of transparency in its management; (2) lack of clarity and comprehensiveness of the government’s policy; (3) misinterpretation of the regulations; (4) improper implementation of

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<sup>122</sup> Immigration Court Practice Manual, *supra* note 96, Chapter 4, at 71, available at <http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Under the cited regulation, 8 C.F.R. § 103.2(b)(8), USCIS may make a request for evidence in conjunction with an application or petition.

<sup>128</sup> 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d) (2009).

<sup>129</sup> 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b) (2009).

<sup>130</sup> *Id.*

<sup>131</sup> See e.g., AILA-EOIR Liaison Agenda Oct. 28, 2009, Question 27, available at <http://www.justice.gov/eoir/statpub/eoiraila102809.pdf>.

<sup>132</sup> GORDON ET AL. *supra* note 15, at § 34.02.



the government's policy; and (5) problems associated with EOIR's case completion goals. These categories describe the areas of deficiency in the policy governing the functioning of the EAD asylum clock. Because some of the deficiencies are not mutually exclusive, some repetition in description is unavoidable.

### **A. Lack of Transparency**

There is a general lack of transparency in the government's administration of the EAD asylum clock. IJs often do not inform asylum applicants that their EAD asylum clock is running, or that the IJ has stopped the clock. EOIR does not require IJs to make findings on the record when the IJ stops the clock.<sup>133</sup> As a result, the decision to stop the EAD asylum clock is made off the record and usually without notice to the applicant. Documentation from the Immigration Council and practitioner interviews reveal that applicants frequently learn that the EAD asylum clock has been stopped only when USCIS rejects their application for work authorization.<sup>134</sup> The result is that applicants cannot obtain EADs after the 180-day waiting period and may never obtain an EAD before the final adjudication of their asylum application.<sup>135</sup>

AILA has asked IJs to make the determination to stop the EAD asylum clock on the record.<sup>136</sup> In response, EOIR has suggested that attorneys check the status of the EAD asylum clock by calling EOIR's ASQ System.<sup>137</sup> As explained above, ASQ provides information about the status of cases, as well as the number of days accrued on the EAD asylum clock.<sup>138</sup> Even with the ASQ system in place, it is evident that a problem still exists. The ASQ system is supposed to be updated every 24 hours,<sup>139</sup> however at least one practitioner has commented that the ASQ system is not always up to date.<sup>140</sup> In some instances, it takes weeks for the applicant's status to be updated in the ASQ system.<sup>141</sup> Also, for attorneys who receive a case with a stopped clock, the ASQ system is not useful because it only provides the tally, but no information about when and why the EAD asylum clock stopped running. Therefore, the ASQ system also lacks transparency.

One attorney has commented that it can take several hours, even when looking through their own client's file, to determine when the IJ may have stopped the EAD asylum clock.<sup>142</sup> Attorneys who receive a case with a stopped EAD asylum clock may have no client file with attorney notes to scour to find the date on which the IJ may have stopped the clock.

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<sup>133</sup> AILA-EOIR Liaison Agenda Mar. 7, 2002, Question 2, available at <http://www.justice.gov/eoir/statspub/eoiraila0203.htm>.

<sup>134</sup> AILF Practice Advisory, *supra* note 10, at 2.

<sup>135</sup> Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009); Interview with Attorney A in Balt., Md. (Sept. 17, 2008) (On file with authors).

<sup>136</sup> AILA-EOIR Liaison Agenda Mar. 7, 2002, *supra* note 133, Question 2.

<sup>137</sup> AILA-EOIR Liaison Agenda Mar. 16, 2005, Question 4, available at <http://www.justice.gov/eoir/statspub/eoiraila031605.pdf>.

<sup>138</sup> Immigration Court Practice Manual, *supra* note 96, at 13.

<sup>139</sup> AILA-EOIR Liaison Agenda Mar. 16, 2005, *supra* note 137, at Question 4.

<sup>140</sup> Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

<sup>141</sup> *Id.*

<sup>142</sup> Interview with Attorney C in Denver, Colo. (Oct. 12, 2009) (On file with authors).

Another problem that results when IJs do not put their determinations to stop the clock on the record is that applicants are not alerted to the possibility of data input error by court staff.<sup>143</sup> Unless and until the applicant discovers the error, she cannot contact the court administrator to investigate the reason for stopping the EAD asylum clock.<sup>144</sup> The time involved for the applicant or an attorney to discover the problem, and for the court administrator to respond, further delays the applicant's eligibility for work authorization. Moreover, clerical errors stopping the EAD asylum clock are a serious problem in EOIR.<sup>145</sup> According to the government's own estimates "errors in clocking are due to coding mistakes and the . . . error rate is 60/40, i.e. [the government is] wrong 40% of the time."<sup>146</sup>

Finally, the process for contacting and communicating with POCs at an AO or an immigration court is unclear and does not appear to be working, as problems and inter-agency clock issues persist. Specifically, pro-bono attorneys have reported that they have contacted the EAD asylum clock POC in both venues several times, and have never received acknowledgment of their inquiry, nor a response to their request.<sup>147</sup>

## **B. Lack of Clarity**

There is a lack of clarity in the government's administration of the EAD asylum clock. For example, in some immigration courts it is not clear who controls this clock. Attorneys have asked on the record to have the clock re-started after an improper stoppage, only to have the IJ say she had no authority over the EAD asylum clock and that the attorney should speak to the court administrator.<sup>148</sup> In turn, court administrators have refused to correct EAD asylum clock information that was entered incorrectly, stating that it is "impossible" to re-start or correct the EAD asylum clock.<sup>149</sup> The problem sometimes has persisted even after the IJ issued an order on the record that the clock be re-started.<sup>150</sup> Reports from other courts vary. One practitioner reported: "The court administrator at the New York City immigration court accepts emails from attorneys regarding asylum clock issues and cooperates in fixing clock problems."<sup>151</sup> The disparate procedures at different jurisdictions for re-starting the EAD asylum clock illustrate the lack of clarity in EOIR's administration of the EAD asylum clock. If there were clear standards and procedures for the administration of the EAD asylum clock, immigration courts would not differ so greatly in how they administer it.

It also is not clear how to re-start the EAD asylum clock. The regulations would require that once an EAD asylum clock is stopped, it is re-started when the applicant is no longer

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<sup>143</sup> AILF Practice Advisory, *supra* note 10, at 14.

<sup>144</sup> AILA-EOIR Liaison Agenda Oct. 17, 2005, Question 3, available at <http://www.justice.gov/eoir/statspub/eoiraila101705.pdf>.

<sup>145</sup> Minutes from EOIR Quarterly Meeting, Jan. 16, 2009 (On file with authors).

<sup>146</sup> *Id.*

<sup>147</sup> Asylum HQ/NGO Liaison Agenda Question VIII, Dec. 9, 2008 (On file with authors).

<sup>148</sup> Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

<sup>149</sup> AILA-EOIR Liaison Agenda Oct. 28, 2009, *supra* note 131, at Question 27. Practitioners have recently reported this problem in the Baltimore, MD. and Arlington, VA. immigration courts.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* See Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

responsible for the delay.<sup>152</sup> But in practice, the EAD asylum clock often remains improperly stopped.<sup>153</sup> The problem stems directly from the lack of clarity about when and how to re-start the clock. Although OPPM 05-07's adjournment codes detail a long list of delays that cause the EAD asylum clock to stop, they do not similarly direct IJs or immigration court staff to re-start the clock or even when re-starting the clock is appropriate. Even when practitioners follow EOIR's instructions about how to re-start or correct the EAD asylum clock, issues are not successfully resolved.<sup>154</sup> Some court administrators and immigration judges alike tell respondents that they have no power over the issue.<sup>155</sup>

There is also a lack of clarity resulting from the transfer of control over the EAD asylum clock from USCIS to EOIR. A practitioner reported that some AOs always will stop the EAD asylum clock when referring cases to an IJ.<sup>156</sup> However, the EAD asylum clock should not stop if a case is referred to EOIR because referral, on its own, is not a delay requested or caused by the applicant.<sup>157</sup> Nevertheless, there is a lack of clarity in what to do when the clock is stopped by USCIS and a case is referred to EOIR. These issues have persisted even after USCIS and EOIR's attempt to resolve interagency issues by exchanging their lists of EAD clock POCs, as explained above in the Government's Stated Procedures Section.<sup>158</sup>

### **C. Interpretation Problems**

Interpretation problems occur because immigration courts and IJs have wide discretion to define "delay requested or caused by the applicant."<sup>159</sup> Different IJs will rule differently on what a delay is in order to determine whether to stop the EAD asylum clock. The regulations provide two examples of an applicant-caused delay. The two examples are: (1) "failure without good cause to follow the requirements for fingerprint processing;" and (2) "the time between issuance of a request for evidence . . . and the receipt of the applicant's response to such request."<sup>160</sup> These two situations, particularly the first one, indicate the kinds of delays that should stop the EAD asylum clock. The "good cause" language in the first example and the fact that the regulation was promulgated with the intention to prevent abuse of the asylum system, means that USCIS and EOIR should determine whether there is good cause for an applicant-caused delay before stopping the EAD asylum clock.

Further, IJs stop the EAD asylum clock based on an overly broad interpretation of the regulations. For example, IJs stop the clock after adjourning a case in order "to allow alien [sic] time to complete the required paperwork for a biometrics check or an overseas investigation."<sup>161</sup>

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<sup>152</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>153</sup> Interview with Attorney A in Balt., Md. (Sept. 17, 2009) (On file with authors); Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

<sup>154</sup> AILA-EOIR Liaison Agenda October 17, 2005, *supra* note 144, at Question 3.

<sup>155</sup> *Id.*

<sup>156</sup> Interview with Attorney F in L.A., Cal. (Oct. 2, 2009) (On file with authors).

<sup>157</sup> Affirmative Asylum Manual, *supra* note 11, at 1.

<sup>158</sup> Interview with Attorney A in Balt., Md. (Sept 17, 2009) (on file with authors).

<sup>159</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>160</sup> *Id.* A potential third example also appears at 8 § C.F.R 208.9(d); 8 C.F.R. § 1208.9(d) for asylum applicants who fail to appear to receive and acknowledge receipt of a decision from the AO.

<sup>161</sup> OPPM 05-07, *supra* note 85.

Similarly, an asylum applicant is allowed to amend or supplement the application, but the clock will stop because IJs consider this to be a delay requested or caused by the applicant.<sup>162</sup> For example, IJs stop the asylum clock if the applicant asks for more time to gather additional evidence by entering “Code 21.”<sup>163</sup> None of these adjournment codes take into account the facts surrounding the delays, or whether there is good cause for the delays.

One of the most persistent interpretation problems occurs when IJs stop the EAD asylum clock when respondents decline to take the next “open date” on the court’s calendar for the merits hearing, offered during the Master Calendar (MC) hearing.<sup>164</sup> In practice, declining an offer of the next “open date” will stop the EAD asylum clock at least until the next hearing. Although attorneys often reject the offered hearing date because the offered date is less than a month after the MC hearing (an extremely short time frame for preparing a case), EOIR does not always schedule the next hearing for a reasonably prompt date mutually agreed upon by the parties. Rather, EOIR will sometimes postpone the merits hearing for many months, sometimes up to a year, after the MC hearing.<sup>165</sup> The same problem occurs when an applicant’s attorney rejects the first open date for a hearing because of a time conflict.<sup>166</sup> During this waiting period, the clock is stopped and the applicant cannot obtain an EAD.<sup>167</sup>

In theory, the IJ’s reasoning for stopping the EAD asylum clock is that rejection of the proposed hearing date is an “alien caused delay.” Often times, attorneys reject the next hearing date for good cause and for legitimate reasons. In these cases, attorneys’ clients are penalized by the IJ because, according to EOIR, an attorney acts on behalf of the noncitizen and any delays caused by an attorney conflict should be considered alien-caused delays.<sup>168</sup> Again, EOIR does not always determine whether the applicant has good cause for these delays before ruling that the delay will stop the EAD asylum clock.

Further, pro bono attorneys or law school immigration clinics often must reject the first offered hearing dates because of their own scheduling challenges. EOIR guidance states, “judges should be cognizant of the unique scheduling needs of law school clinics operating on an academic calendar and pro bono programs which require sufficient time to recruit and train representatives.”<sup>169</sup> Recognizing this, the OPPM states “clinics and pro bono entities often face special staffing and preparation constraints, [therefore] judges should be flexible and are encouraged to accommodate appropriate requests for a continuance or to advance a hearing date.”<sup>170</sup> Despite this recognized need to continue a hearing, IJs’ interpretation of the OPPM

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<sup>162</sup> 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c) (2009). See OPPM 05-07, *supra* note 85.

<sup>163</sup> See OPPM 05-07, *supra* note 85.

<sup>164</sup> AILA-EOIR Liaison Agenda Mar. 30, 2000, at Question 11, available at <http://www.justice.gov/eoir/statpub/qaaoiraila.htm>.

<sup>165</sup> Attorney A from Balt., Md. (Sept. 17, 2009) (On file with authors).

<sup>166</sup> AILA-EOIR Liaison Agenda Mar. 30, 2000, *supra* note 164, at Question 11.

<sup>167</sup> Further, as described below in the section discussing implementation problems, some IJs erroneously stop the clock permanently by considering rejection of the first available hearing date to be the applicant’s waiver of EAD eligibility.

<sup>168</sup> AILA-EOIR Liaison Agenda Mar. 30, 2000, *supra* note 164, at Question 11.

<sup>169</sup> OPPM 08-01, Guidelines for Facilitating Pro Bono Legal Services Mar. 10, 2008, page 4, available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf> [hereinafter OPPM 08-01].

<sup>170</sup> *Id.*

adjournment codes for rejecting the first available hearing date could cause the EAD asylum clock to stop.<sup>171</sup>

Some IJs interpret the regulations to stop the EAD asylum clock whenever a delay *benefits* the applicant, even if the government sought the continuance.<sup>172</sup> This clearly is an erroneous interpretation of the regulatory language. Other courts, however, rarely stop the clock when the government asks for a delay.<sup>173</sup> Thus, an overly broad interpretation of the regulatory language leads to inconsistent applications of the regulations across immigration courts and among individual IJs.

EOIR's misinterpretation of the regulations also keeps the EAD asylum clock stopped even after an applicant's successful appeal. When a case is remanded to the immigration court from the BIA or federal court, the IJ will not re-start the clock or restore any time accrued while the case was on appeal. EOIR's interpretation is that the original denial makes the applicant ineligible for work authorization.<sup>174</sup> BIA precedent does not support this position.<sup>175</sup> Once on remand, the original denial is vacated, the case goes back to the trial level as if no denial was ever issued, and the respondent is restored to the same position she was in before the denial.<sup>176</sup> As the effect of a remand is that there is no longer an order denying asylum, barring applicants from getting back "on the clock" or applying for work authorization is a misinterpretation of the regulations.

The EAD asylum regulations were not intended to punish applicants who participate in the proper adjudication of their asylum claims. It is conceivable that an applicant with a frivolous asylum claim could seek delays to slow down the asylum process so he could obtain work authorization, but current EOIR interpretations punish legitimate asylum applicants.

Interpretation problems also occur at the USCIS level after claims are heard by AOs, for example, where the asylum officer stops the EAD asylum clock before referring the case to the IJ.<sup>177</sup> Here, USCIS, like EOIR, does not properly apply the good cause standard for determining when a delay stops the EAD asylum clock.<sup>178</sup> USCIS uses the good cause standard when deciding whether to toll the clock when the applicant causes a delay by failing to bring a competent interpreter to an interview; or when the applicant causes a delay by failing to appear at a scheduled biometrics appointment.<sup>179</sup> However, USCIS does not adopt the good cause standard when it stops the EAD asylum clock because the applicant did not provide sufficient evidence to

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<sup>171</sup> See OPM 05-07, *supra* note 85.

<sup>172</sup> Interview with Attorney A in Balt., Md. (Sept. 17, 2009) (On file with authors).

<sup>173</sup> Interview with Attorney B in N.Y., N.Y. (Sept. 21, 2009) (On file with authors).

<sup>174</sup> AILA-EOIR Liaison Agenda Oct. 17, 2005, *supra* note 144, at Question 1; Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

<sup>175</sup> *Cf. Matter of Lok*, 18 I&N Dec. 101 (BIA 1981); *Rivera v. INS*, 810 F.2d 540 (5<sup>th</sup> Cir. 1987); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996); *Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993).

<sup>176</sup> *Cf. id.*

<sup>177</sup> Interview with Attorney F in L.A., Cal. (Oct. 2, 2009) (On file with authors).

<sup>178</sup> Affirmative Asylum Manual, *supra* note 11, at 91.

<sup>179</sup> *Id.* apps. 9, 11.

establish residence.<sup>180</sup> USCIS's failure to apply the good cause standard for all delays requested or caused by an applicant violates the text and the spirit of the regulations.

#### **D. Implementation Problems**

Implementation problems are those created when the government stops the EAD asylum clock contrary to its own policy. A common example occurs when testimony at the asylum hearing could not be completed in the allotted time.<sup>181</sup> Even if the applicant has not purposefully delayed the hearing, but simply taken more than the scheduled time, the IJ may still stop the clock.<sup>182</sup> In liaison meetings between AILA and EOIR, EOIR has conceded that the clock should not be stopped when testimony does not fit within an allotted time, "unless the reason why the hearing was protracted was due to the alien's actions."<sup>183</sup> However, some IJs still improperly stop the clock, finding that the respondent was the cause for the delay.<sup>184</sup>

IJs also improperly implement the EAD asylum clock when they permanently stop the clock. The regulations indicate two situations when an EAD can be denied. These include: (1) when an applicant fails to appear at a scheduled hearing without exceptional circumstances; and (2) when the IJ denies the applicant's asylum claim.<sup>185</sup> The regulations do not authorize permanent clock stoppage in either of these situations.

IJs also improperly implement the EAD asylum clock, causing permanent stoppages in several other situations. Some IJs consider the rejection of the first available hearing date to be the applicant's waiver of EAD eligibility, authorizing the IJ to stop the clock permanently.<sup>186</sup> An attorney who described this problem referred to it as "two tracks" for asylum claims.<sup>187</sup> Applicants are on the "fast track" if they accept the first available hearing date and they remain eligible for work authorization. However, if they reject the first available hearing, they are placed on the "regular track," their clock is permanently stopped, and they cannot obtain an EAD.<sup>188</sup> IJs do not always explain these consequences and implications.<sup>189</sup>

Further, some immigration courts stop the EAD asylum clock when there is a change of venue,<sup>190</sup> or a change of the IJ assigned to the case.<sup>191</sup> Finally, some courts refuse to re-start the EAD asylum clock after it has been stopped. In these cases, a minor delay may constitute complete waiver of eligibility for an EAD.<sup>192</sup> For example, some attorneys report encountering

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<sup>180</sup> Affirmative Asylum Manual, *supra* note 11, apps. 38, 47.

<sup>181</sup> AILA-EOIR Liaison Agenda Mar. 27, 2003, Question 8, available at <http://www.justice.gov/eoir/statspub/eoiraila0303.pdf>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1) (2009); 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4) (2009).

<sup>186</sup> As noted in the Interpretation Problems discussion, other IJs in this situation stop the clock until the next merits hearing date.

<sup>187</sup> Interview with Attorney A in Balt., Md. (Sept 17, 2009) (On file with authors).

<sup>188</sup> *Id.*

<sup>189</sup> AILA-EOIR Liaison Agenda Mar. 30, 2000 *supra* note 164, at Question 11.

<sup>190</sup> Interview with Attorney E in Seattle, Wash. (Sept. 17, 2009) (On file with authors).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

uncooperative court administrators and IJs who refuse to hear persuasive arguments for restarting the EAD asylum clock or refusing to correct clock stoppages caused by clerical errors.<sup>193</sup>

Stopping the clock in each of these situations is contrary to EOIR guidance, but applicants have little recourse to remedy the clock problem once it has occurred. EOIR has set out a loose framework for resolving clock problems in its liaison efforts with AILA. It has stated that attorneys should first contact the court administrator in order to fix a problem with the EAD asylum clock.<sup>194</sup> In a liaison meeting, EOIR has explained further:

[I]f a party believes there is a problem with the asylum clock in an individual case and that case is pending before an Immigration Judge, the first step is to try to resolve the issue locally. If the concern arises during a hearing, it should be addressed to the IJ and if the concern arises after a hearing, it should be addressed to the court administrator. If necessary, the question may also be raised with the Assistant Chief Immigration Judge having jurisdiction over the particular court.<sup>195</sup>

Although this procedure for fixing the EAD asylum clock is theoretically in place, practitioners continue to report clock problems and are not able to easily resolve them through EOIR's recommended channels.

### **E. Case Completion Goals**

The Office of the Chief Immigration Judge (OCIJ) is responsible for managing the 53 immigration courts located throughout the United States where over 200 immigration judges adjudicate immigration cases.<sup>196</sup> These immigration courts “are faced with the challenge of adjudicating their caseload (all cases awaiting adjudication) in a timely manner, while at the same time ensuring that the rights of the immigrants appearing before them are protected.”<sup>197</sup> IJs are overwhelmed by their dockets and find it challenging to meet the 180-day deadline.<sup>198</sup>

EOIR evaluates the performance of the immigration courts based on the courts' success in meeting case completion goals.<sup>199</sup> Case completion goals set deadlines for the timely adjudication of immigration cases.<sup>200</sup> In order to ensure that the immigration courts adjudicate

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<sup>193</sup> Interview with Attorney C in Denver, Colo. (Oct. 12, 2009) (On file with authors); Interview with Attorney D in Chi., Ill. (Sept. 25, 2009) (On file with authors).

<sup>194</sup> AILA-EOIR Liaison Agenda Oct. 17, 2005, *supra* note 144, at Question 3.

<sup>195</sup> AILA-EOIR Liaison Agenda Oct. 28, 2009 *supra* note 131, at Question 28.

<sup>196</sup> See U.S. Government Accountability Office, Report to the Chairman, Committee on Finance, U.S. Senate, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 2 (August 2006), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-06-771> [hereinafter GAO EOIR Study]. More recent data from EOIR states that OCIJ has more than 230 immigration judges in more than 55 immigration courts nationwide. See Dep't of Justice, Executive Office for Immigration Review, Fact Sheet: EOIR at a Glance (Dec. 14, 2009), available at <http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf>.

<sup>197</sup> See *id.* at 2.

<sup>198</sup> See Julia Preston, *Immigration Judges Found Under Strain*, N.Y. TIMES, July 10, 2009, at A11. See also Letter from Tony G. Snow, Acting Director, Executive Office for Immigration Review, to Editors of the N.Y. Times, (July 14, 2009), available at <http://www.justice.gov/eoir/press/09/SnowToNYTimesEditor071409.pdf>.

<sup>199</sup> See GAO EOIR Study, *supra* note 196, at 20.

<sup>200</sup> See *id.* at 20-21.

cases fairly and in a timely manner, EOIR has established target time frames for each of the OCIJ's 11 case types.<sup>201</sup> Each case type has an associated case completion goal. The case completion goal for both affirmative and defensive asylum cases is 180 days.<sup>202</sup> Therefore, asylum cases under EOIR policy and the statute have to be adjudicated within 180 days.<sup>203</sup>

EOIR holds IJs accountable for the length of time an asylum application is pending on their dockets.<sup>204</sup> Given this system of accountability, IJs reasonably could be primarily or solely concerned with the adjudication deadlines and their case completion goals when stopping and starting the asylum clock (by which, almost invariably, they mean both the asylum adjudication and EAD asylum clocks). Those case completion goals may be unrealistic. By stopping the clock, IJs may believe they are better able to comply with case completion goals. In these situations IJs appear to believe they are forced to choose between meeting case completion goals and allowing the applicant's EAD clock to run. The potential consequence of case completion goal pressure is the frequent and improper stopping of the EAD clock.

## **VI. Proposed Solutions**

### **A. Brief overview**

The problems examined in this report stem from a misinterpretation of agency regulations; poor implementation of EOIR guidance; gaps in EOIR guidance that leave IJs and applicants in the dark about how to handle routine EAD asylum clock issues; and a lack of transparency that makes it difficult to resolve EAD asylum clock problems when they arise. The following recommendations are designed to address these problems employing the current regulatory framework.

First, EOIR should implement a new comprehensive policy interpreting the EAD asylum clock. This interpretive policy should be clear, explicit, and in accordance with the regulations in 8 CFR §208.7(a)(2). The policy should distinguish between the asylum adjudication clock and the EAD asylum clock. Second, EOIR should develop a well-defined internal appeals process for EAD asylum clock disputes. This process will allow applicants to resolve disputes over the interpretation of the new substantive policy, and also allow for the efficient resolution of clerical errors. Third, EOIR should provide for the dissemination of the new policy and appeals process. Broadly disseminating the new information will give notice of the policy changes to EOIR staff across the country, and result in consistency across immigration courts. Fourth, EOIR should provide for training of IJs, court administrators, EOIR staff, and the Assistant Chief Immigration Judges (ACIJs) to instruct these parties on implementing the new policy and appeals process. Finally, EOIR should create a task force made up of AOs, non-governmental organizations, private attorneys, and EOIR staff to discuss EAD asylum clock issues and implementation of the

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<sup>201</sup> *See id.* at 22.

<sup>202</sup> *See id.*

<sup>203</sup> INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009). The statute, however, provides an exception for "exceptional circumstances."

<sup>204</sup> *See* GAO EOIR Study, *supra* note 196, at 20.



policy. The task force will enable these groups to collaborate in the implementation of the new policy and resolve systemic issues as they arise.

USCIS has control over the EAD asylum clock in affirmative asylum claims from the time they are filed until they are referred to immigration court. USCIS should develop ways to properly administer the EAD asylum clock. Specifically, USCIS should develop a system to better inform applicants of an AO's decision to stop the clock and to correct improper clock stoppages. USCIS should instruct AOs and/or USCIS Asylum Supervisory Officers to review the status of the EAD asylum clock before they transfer the case to EOIR to check whether a stopped clock should be re-started. When AOs determine that a stopped EAD asylum clock should remain stopped, they should provide a rationale justifying the continued stoppage, and detail when the delay should end. USCIS and EOIR should improve their communication about the EAD asylum clock. Finally, applicants should receive detailed information about the status and tally of their EAD asylum clock when their case is referred to EOIR.

## **B. Proposed Solutions for EOIR**

### *Develop comprehensive new policy and procedures interpreting and applying the EAD asylum clock*

This report details the pervasive problems stemming from the lack of clear guidance to immigration courts on how to interpret and apply the EAD asylum clock. EOIR must adopt a new, clear, and explicit policy. This policy will benefit both agencies and practitioners. The new policy must do five things: (1) treat the asylum clock as two separate clocks – a two-clock system means that the EAD asylum clock and adjudication clock should operate independently and sometimes stop at different times and for different reasons; (2) correctly interpret “delay requested or caused by the applicant” in 8 CFR § 208.7(a)(2) and 8 CFR § 1208.7(a)(2); (3) require that decisions to stop the EAD asylum clock be made on the record; (4) develop clear guidelines and a new OPPM detailing when it is appropriate to stop and re-start the clock; and (5) create a clear process for internally appealing or contesting an IJ's application of the EAD asylum clock.

#### *Treat the asylum clock as two separate clocks*

The asylum adjudication clock and the EAD asylum clock usually have been inappropriately treated as one asylum clock. INA provisions setting forth each of these clocks are statutorily distinct and resemble each other only in that they both have language referring to “180 days.”<sup>205</sup> The two clocks serve very distinct purposes. The EAD asylum clock is intended to provide a waiting period before asylum applicants can apply for and receive authorization to work in order to reduce fraud, while preserving the privilege of work authorization as asylum applicants wait for the final adjudication of their applications.<sup>206</sup> The asylum adjudication clock, on the other hand, sets a goal for the timely and efficient adjudication of asylum claims.<sup>207</sup> Its primary purposes are: (1) to eliminate or minimize asylum claim backlogs so that asylum seekers do not wait years for their claims to be resolved; and (2) to maintain an efficient court system.

<sup>205</sup> See, INA §§ 208(d)(2), 208(d)(5)(a)(iii), 8 U.S.C. §§ 1158(d)(2), 1158(d)(5)(a)(iii).

<sup>206</sup> INA § 208(d)(2), 8 U.S.C. § 1158(d)(2) (2009).

<sup>207</sup> INA § 208(d)(5)(A)(iii), 8 U.S.C. § 1158(d)(5)(A)(iii) (2009).

Finally, the asylum adjudication clock apparently is the statutory basis for the IJs' case completion goals. These goals set target deadlines for the full adjudication of asylum claims.<sup>208</sup>

EOIR should issue an interpretive policy recognizing the distinction between the two clocks. Effective agency policy would help prevent IJs from stopping both clocks when they should only stop the asylum adjudication clock, or vice versa.<sup>209</sup> The policy also must acknowledge the importance of stopping the EAD asylum clock only when there is a delay truly "requested or caused by the applicant" without good cause, and include a presumption that the EAD asylum clock will run unless there has been such a delay.<sup>210</sup>

*Correctly interpret "delay requested or caused by the applicant"*

EOIR's new policy statement should also interpret "delay requested or caused by the applicant" as it relates to the EAD asylum clock.<sup>211</sup> The policy should be consistent with legislative intent and the governing regulations. For example, the regulatory language illustrates the type of delays EOIR envisions would stop the clock: "delays caused by failure without good cause to follow the requirements for fingerprint processing."<sup>212</sup> The qualification "without good cause" suggests that not every delay requested by the applicant should stop the EAD asylum clock. Since the regulation was originally promulgated to reduce fraud and abuse of the asylum process,<sup>213</sup> the language should be interpreted in a way that furthers this intent. EOIR policy should recognize that an overly broad interpretation of the regulations unduly burdens the asylum seeker beyond the original intent of the regulations. The new EOIR policy on this issue should also expressly prohibit certain broad interpretations of the language and include a non-exhaustive list of common misinterpretations. An example of a misinterpretation is stopping the clock whenever there is any delay that benefits the applicant.

*Require that decisions to stop the EAD asylum clock be made on the record*

One of the central complaints of applicants and attorneys who deal with the EAD asylum clock is that current EOIR policy does not require that IJs make their decisions to stop the clock on the record.<sup>214</sup> Although EOIR has expressed some resistance to applying this recommendation,<sup>215</sup> it is vital that it be one of the central tenets of the new policy. Currently, when attorneys encounter an unexpectedly stopped EAD asylum clock, it may be very difficult to determine when and why the clock was stopped. If an IJ puts the decision to stop the clock on the record during hearing, and states the adjournment code being applied, an applicant may express opposition to that determination. This exchange could lead to quick resolutions of

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<sup>208</sup> *Id.* The statute also, however, provides that "exceptional circumstances" would allow deviation from the 180-day requirement.

<sup>209</sup> Currently, the regulations in 8 C.F.R. § 1208.7(a)(2) allow EOIR to toll the asylum adjudication clock and the EAD asylum clock when there is a "delay requested or caused by the applicant." This report focuses on interpreting this language as it applies to the EAD asylum clock, not the asylum adjudication clock.

<sup>210</sup> 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* Part IV.

<sup>214</sup> AILA-EOIR Liaison Agenda Mar. 7, 2002, *supra* note 133, at Question 2.

<sup>215</sup> AILA-EOIR Liaison Agenda Mar. 16, 2005, *supra* note 137, at Question 3.

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disputes between the IJ and the applicant. Even if the IJ and applicant cannot come to a resolution quickly, the applicant would know that the clock was stopped and could take additional action, such as filing a motion to re-start the clock. Requiring that decisions to stop the EAD asylum clock be made on the record also would reduce the number of errors that occur (for example, if an IJ assigns the incorrect adjournment code), because applicants would be able to voice an objection to the mistake. This reform undoubtedly would lead to fewer problems for both applicants and EOIR. It also would promote procedural fairness. EOIR should strive for transparency in proceedings, including in decisions relating to the EAD asylum clock. Making these determinations on the record encourages cooperation between IJs and applicants seeking asylum.

*Develop clear guidelines and a new OPPM detailing when it is appropriate to stop and re-start the EAD asylum clock*

One of the most glaring effects of EOIR's unclear guidance on the EAD asylum clock is the IJs' uncertainty about when it is appropriate to stop and re-start the clock after a delay has ended. EOIR should develop clear policy explaining when it is appropriate to stop and start the EAD asylum clock; should then issue a new OPPM with clear instructions; and should rescind OPPM 05-07.

*Develop an internal appeals process to deal with EAD asylum clock disputes*

EOIR should develop an internal appeals process to deal with EAD asylum clock disputes. The new policy should be clear, consistent with regulatory language and implemented properly and consistently across all immigration courts.

EOIR's internal appeals process should start when the IJ makes the determination, on the record, to stop the EAD asylum clock during a hearing. At that point, the applicant can express on the record his opposition to the determination and make arguments for why it is inappropriate to stop the clock. If the applicant does not prevail, she can then file a written motion with the court. This step of the internal appeals process incorporates EOIR's current recommendation advising applicants/attorneys to file written motions with the immigration court when they disagree with a determination to stop the EAD asylum clock.

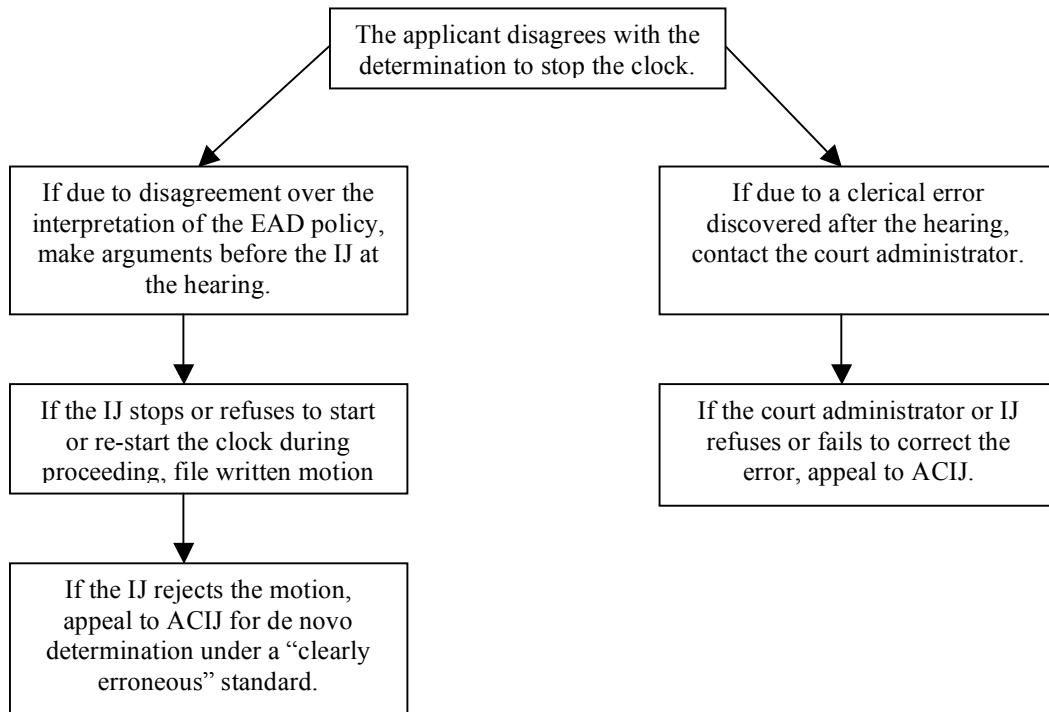
If the IJ rejects the written motion, it is imperative that the applicant have recourse to an appeal mechanism. The ACIJ should have the clear authority to review *de novo* and overrule an IJ's ruling on a "clearly erroneous" standard, and a specific time line for making the decision. Oversight of the IJs on this very limited basis and a deadline for resolution will preserve the integrity of the process and ensure procedural fairness to the applicant; it also recognizes and acknowledges the ACIJs' limited resources for adjudicating these appeals. This would be the final step of the internal appeals process for disputes over the interpretation of the new policy relating to clock stoppages.

A separate track should be available if the attorney discovers that the clock stopped due to a code-entry error. Although the new policy requiring IJs to stop the EAD asylum clock on the record should reduce the frequency of clerical errors, these errors may still occur. If the applicant

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discovers, after the hearing, that the clock was stopped because of a clerical error he should contact the court administrator. The court administrator should be able to check the adjournment code and confirm the applicant's contention. Upon discovering a clerical error, the court administrators can then contact the IJ to have the correct code entered. This may entail a review of the record to determine which code should have been entered. If the court administrator or the IJ refuses or fails to correct the mistake, the applicant should then contact the ACIJ to fix the problem. The ACIJ should be authorized to resolve problems both from the IJs and the court administrators.

Below is an outline of the internal appeals process detailed above:



This simple internal appeal process would preserve procedural fairness to the applicant and effectively resolve disputes within the immigration court. It provides for review by the ACIJ to guarantee oversight of IJs in relatively narrow circumstances and seeks to resolve conflicts using a minimally litigious framework.

*Widely disseminate information about the new policy and provide for training of IJs, court administrators, and the ACIJs*

The solutions outlined above will set the foundation for the resolution of the problems examined in this report, but for the changes to be effective, every IJ, court administrator, and other EOIR personnel must be aware of the new policy and appeals process. EOIR must provide for the wide dissemination of this information. The foregoing interpretive and procedural policy should be incorporated into a new OPPM and also should be published and posted in updated

versions of EOIR documents, including the following: EOIR Benchbook; EOIR Practice Manual; EOIR Fact Sheet; and EOIR Training Materials for IJs and Board of Immigration Appeals members.

EOIR also should provide training on the substantive and procedural changes to IJs, law clerks, court administrators, EOIR personnel, and the Assistant Chief Immigration Judge. The training should explain the tenets of the new policy and the role of each party in the internal appeals process. It should also instruct EOIR personnel to communicate and work with each other as the applicant moves through the appeals process.

*Create a task-force made up of AOs, NGOs, private attorneys, and EOIR staff to discuss EAD asylum clock issues and implementation of the new policy*

EOIR should create a task-force made up of stakeholders involved in the EAD asylum clock, including, but not limited to AOs, NGOs, private attorneys, and EOIR personnel to discuss EAD asylum clock issues and implementation of the policy. The creation of this task force would put the finishing touches on the new EOIR interpretive and procedural changes. Its two primary purposes would be to help with the implementation of new EOIR policy and to address systemic issues that arise after the policy is in place. Members of the task force could collaborate with each other and develop a system that would allow for the smooth transfer of EAD asylum clock administration from DHS to EOIR as applicants are referred to immigration court after their AO interviews. One focus of the task force could be to identify the best ways to handle the EAD asylum clock, including the possibility of shifting the burden of EAD asylum clock administration to USCIS. The recently appointed Director of USCIS Alejandro Mayorkas acknowledged the need to revisit the agency's handling of the EAD asylum when he stated during his confirmation hearing:

If I am confirmed, I commit to working with the Office of Refugee, Asylum, and International Operations to review and better understand the dilemma asylum seekers face when confronted with the workings of the “asylum clock,” and I will seek to ensure that the policies and procedures of USCIS to implement statutory mandates to prevent fraud and abuse are met while at the same time recognizing the asylum seeker’s right to retain counsel and need to prepare adequately his or her case and ensuring that an asylum seeker is not unfairly punished by the passage of time occasioned for good cause . . . . I also commit to evaluating how the “asylum clock” works and determining whether the process needs to be revised to strike the right balance between the legitimate case preparation needs of an asylum seekers and the Department’s interest in discouraging the submission of frivolous or fraudulent asylum applications in order to protect program integrity.<sup>216</sup>

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<sup>216</sup> Written Questions for Alejandro Mayorkas, Nominee to Serve as Director of USCIS from Chairman Patrick Leahy, Hearing before the Senate Judiciary Committee, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009) (testimony of Alejandro Mayorkas).

### **C. Proposed Solutions for DHS**

#### *AOs should better inform applicants of the status of their EAD asylum clock*

AOs should better inform applicants of the status of their EAD asylum clock. Currently, limited information about the EAD asylum clock is included in various form letters generated by the USCIS Asylum Office while an application is under its jurisdiction.<sup>217</sup> These form letters generally do not include a tally of the days accrued on their EAD asylum clock. The asylum clock information should be included in the letter. USCIS should include a note on each of the letters sent to applicants notifying them of the count on their EAD asylum clock and all notices should be promptly sent to applicants after USCIS identifies a delay requested or caused by the applicant without good cause. Unlike EOIR, USCIS does not have a system applicants can call for inquiries about the status of their clock.<sup>218</sup> Therefore, USCIS should inform applicants of each determination that will toll and re-start the EAD asylum clock, along with the count on their EAD asylum clock.

In addition, there is no way of knowing that the form notices in the appendices of the AAPM include the universe of reasons USCIS tolls the EAD asylum clock, or how promptly the notices are sent to applicants after the EAD asylum clock is tolled. USCIS should develop a list of the actions that stop and re-start the clock, all of which should be consistent with a proper interpretation of the regulations, as discussed above. The list should be posted in a conspicuous place in USCIS's website, and should be more clearly stated in the AAPM. This would enable asylum applicants, many of whom do not have attorneys, to have greater access to and understanding of USCIS policy on the EAD asylum clock. USCIS should also expand the "frequently asked questions" section in its website to address the most common EAD asylum clock-related questions.

These solutions should be coupled with a clear presumption that the EAD asylum clock is running once the applicant files a complete asylum application, and that it will continue to run unless the applicant receives notice that the EAD asylum clock is being stopped. USCIS also should provide the applicant with written notice when the EAD asylum clock re-starts after a delay has ended.

#### *USCIS should review the status of the EAD asylum clock when it transfers the case to EOIR*

The USCIS should review the status of the EAD asylum clock when it transfers jurisdiction over the individual's claim to EOIR.<sup>219</sup> This will avoid the dilemma some applicants face when they discover during immigration court proceedings that their EAD asylum clock was stopped by the AO and never re-started at the immigration court. It will also prompt USCIS to provide justifications for not re-starting a clock when it refers the case to EOIR, thus allowing EOIR to review the rationale and determine if and when the EAD asylum clock should re-start.

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<sup>217</sup> See Affirmative Asylum Manual, *supra* note 11.

<sup>218</sup> See USCIS Customer Service Reference Guide, Ch. 3.4, available at [http://www.uscis.gov/files/nativedocuments/Vol\\_3\\_File.pdf](http://www.uscis.gov/files/nativedocuments/Vol_3_File.pdf).

Develop a system to correct improper clock stoppages

USCIS should develop a system to correct improper clock stoppages. USCIS currently allows applicants to call the Asylum Office in their jurisdiction when they have problems with the EAD asylum clock.<sup>220</sup> However, USCIS's procedure for fixing an improperly stopped clock is not clearly stated in any policy manuals and currently, the roles of the AOs, Asylum Office, and USCIS Asylum Headquarters are not clearly defined.<sup>221</sup> New policy should grant the local Asylum Offices authority over all determinations that affect the running of the EAD asylum clock. Asylum Headquarters then should have the ability to consider appeals from AO determinations and overrule those determinations on a clearly erroneous standard, similar to the standard developed in the appeals process proposed for EOIR.

**D. How proposed solutions will address each category of EAD asylum clock problems**

Lack of Transparency

The new policy will greatly improve current problems caused by the lack of transparency with the government's management of the EAD asylum clock. Requiring IJs to make determinations to stop the clock on the record and implementing an internal appeals process will increase the transparency of EOIR's management of the EAD asylum clock. These changes will help ensure that applicants understand the status of their EAD asylum clock at all times. The appeals process also will help IJs clearly articulate their reasons for stopping the clock and make sure the reasons conform to new EOIR policy. Similarly, requiring USCIS to include a tally of the days accrued on an EAD asylum clock on each of its letters; post detailed information about actions that stop and re-start the clock on its website; and adopt a system for correcting improper clock stoppages will also increase transparency.

Increased transparency also will help reduce the number of clerical errors that improperly cause EAD asylum clocks to stop. Applicants will be able to alert the IJ of a mistaken adjournment code at the hearing because the IJ will state the adjournment code and its justifications out loud and on the record. In addition, the internal appeals process contains a fail-safe for clerical mistakes if applicants become aware of the error after their hearing. In these situations, an applicant can contact the court administrator to correct the error. If for any reason he or she refuses to correct the error, the applicant can appeal to the ACIJ.

Lack of Clarity

The problems related to a lack of clarity in guidance will be ameliorated by a more comprehensive, explicit, and clear EAD policy. As the new policy will include instructions on how to handle frequently encountered delays, IJs will know when to stop and re-start the clock. Similarly, requiring USCIS to review the status of the EAD asylum clock and provide justifications for why a clock has been stopped will mitigate the lack of clarity that exists when a case is transferred to EOIR.

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<sup>220</sup> Asylum HQ/ NGO Liaison Agenda Question XIV, June 17, 2008 (On file with authors).

<sup>221</sup> *Id.*

Moreover, OPPM 05-07 lists a series of adjournment codes that stop the clock, but there is no similar list of codes or cues to re-start the clock.<sup>222</sup> EOIR's new policy memorandum will include a list of common delays and directives for appropriately re-starting the clock after the delay. For example, the list of common delays will include the delay caused when an applicant asks for a continuance to amend his application and will direct the IJ to re-start the clock once the court receives the applicant's amended application. Clarity and explicit guidance will help simplify decisions to stop and re-start the clock. For scenarios that are not on the list of common delays, the new interpretive policy will assist IJs in determining when the applicant-caused delay no longer exists.

### Interpretation Problems

The new policy will address EOIR's current problems interpreting the regulations in 8 CFR § 208.7(a)(2) and CFR § 1208.7(a)(2). This report details several examples of inappropriate EAD asylum clock stoppages that are directly the result of EOIR's overly broad interpretation of *delay caused or requested by the applicant*. As a starting point, the EAD asylum clock should never stop simply because a delay *benefits* the applicant; this is not the appropriate standard set forth by the regulations. Similarly, the EAD asylum clock should never stop when the government asks for or causes a delay or continuance. New policy will make clear that these kinds of interpretations are inappropriate. This report also expresses concern that the OPPM stops the EAD asylum clock in response to actions that are part of the normal adjudication of an asylum case. For example, this report points out that the OPPM stops the EAD asylum clock when the IJ stops the clock "to allow alien [sic] time to complete the required paperwork for a biometrics check or an overseas investigation." This kind of delay should not stop the EAD clock, unless the applicant fails to comply in a timely manner without good cause.

Also, currently IJs stop the EAD asylum clock indefinitely (or sometimes, permanently) if an applicant declines the first available date for the merits hearing. In many cases, the hearing is rescheduled for over a year after the MC hearing. This policy is clearly contrary to the regulations for the reasons outlined in this report. The new policy would resolve this problem in two ways: (1) by providing clear guidelines on when to stop and re-start the clock; and (2) by correctly interpreting "delay caused or requested by the applicant."

The new policy for stopping and re-starting the clock must provide a viable solution for this widespread problem. The EAD asylum clock should not stop when an applicant has declined the first available hearing date *with* good cause. On the other hand, the new policy could specify that if the applicant rejects the first available date *without* good cause, the court will stop the clock from the date of the court-suggested first available date to the applicant's first available date. The court will re-start the EAD asylum clock on the date the applicant is available for a merits hearing. The new policy should recognize that an applicant only causes a delay until she is available for the merits hearing. If the court is backlogged and cannot reschedule a hearing until many months into the future, this should not delay the EAD asylum clock because the applicant is not causing this delay.<sup>223</sup>

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<sup>222</sup> OPPM 05-07, *supra* note 85.

<sup>223</sup> There also should be recognition of the special needs of law school clinics and pro bono attorneys.



Finally, requiring USCIS to develop a list of the actions that stop and re-start the clock under a “good cause” standard, coupled with a presumption that the EAD asylum clock will continue to run unless the applicant receives notice that such clock has been stopped will improve some of the interpretation problems that occur at the USCIS level.

### Implementation Problems

There are problems with proper implementation of EOIR policy because of the current lack of a clearly delineated, widely understood internal appeals process. Many of the steps articulated in the appeals process proposed in this report incorporate the recommendations of current EOIR policy. However, this report emphasizes that applicants must have notice of the process in order to take advantage of it. The appeals process will prevent immigration courts from developing their own interpretation of EOIR policy by making them accountable for their actions.

The appeals process will be especially useful to applicants who face permanent clock stoppages over a temporary problem. The new policy statements will make it clear when temporary delays end and when the clock should be re-started, but if an immigration court refuses to comply with new EOIR policy, its determination can be overturned by the ACIJ.

### Case Completion Goals

The case completion goals have lead IJs to find ways to stop the asylum clock to take pressure off their dockets. Treating the asylum clocks as two separate clocks will allow IJs to keep their dockets in check, while not improperly depriving applicants of work authorization. The adjudication clock is different from the EAD asylum clock in its statutory origin and purpose. This means that, under the new policy, the IJ will be able to stop the adjudication clock when adjudication must be delayed, but allow the EAD asylum clock to continue to run unless the delay is caused by the applicant without good cause.

## **VII. Conclusion**

The problems with the EAD asylum clock are extensive, but they can be resolved. This report summarizes some of the most persistent clock problems, explains how they manifest in real world settings, and proposes solutions to fix the problems. The solutions proposed aim to resolve many of the implementation and interpretation problems attorneys and applicants face every day when dealing with stopped EAD asylum clocks. Confusing EOIR guidance on the EAD asylum clock is unfair to IJs because it leaves them exposed to criticism from applicants who must deal with inadequately defined and incomplete EOIR policy. EOIR, USCIS, and advocates must work together to implement these solutions and create a fair and predictable process for obtaining work authorization.