LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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EMPLOYMENT AUTHORIZATION AND ASYLUM: STRATEGIES TO AVOID STOPPING THE ASYLUM EAD CLOCK

By the Legal Action Center[2]

I. INTRODUCTION

Applicants for asylum in the United States are not immediately or automatically granted employment authorization.[3] In order to receive an employment authorization document (EAD), an asylum application must remain pending for 180 days without a decision. This 180-day waiting period is calculated according to an "asylum EAD clock," which tracks how many days are credited towards it.[4] Exempted from this count are periods of delay "requested or caused" by the asylum applicant.[5] This asylum EAD clock "starts" when a complete asylum application is filed or "lodged." Once started, the clock will "stop" for periods of applicant-caused delay. Once the delay has been resolved, the asylum EAD clock should start again. The asylum EAD clock tracks the 180-day waiting period for all asylum applicants, whether they applied for asylum affirmatively with United States Citizenship and Immigration Services' (USCIS) Asylum Office; applied defensively while in removal proceedings before the Executive Office for Immigration Review (EOIR); or were referred by the Asylum Office to EOIR for removal proceedings.

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[2] Emily Creighton and Mary Kenney authored this practice advisory. Special thanks to Legal Action Center intern, Kristina Ramos, for her edits to the advisory.

[3] An asylee is automatically eligible for an EAD only after his or her asylum application is granted. 8 C.F.R. § 274a.12(a)(5).

[4] There are two 180-day periods that must be measured in asylum cases pursuant to statute. The first, referred to as an "adjudications" period, is a 180-day period in which an immigration judge (IJ) is to decide an asylum case. INA § 208(d)(5)(A)(iii). The second, addressed in this practice advisory, is the 180-day waiting period for an asylum applicant to become eligible for an EAD. INA § 208(d)(2).

[5] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).

Historically, problems with the asylum EAD clock have arisen from: 1) implementation – when EOIR and USCIS do not follow their own guidance regarding the clock; and 2) interpretation – when EOIR and USCIS develop and implement policies that wrongly interpret the regulations and adversely impact the asylum EAD clock. Both types of problems with the clock prevented asylum applicants from lawfully securing work authorization. A nationwide class action, *A.B.T. v. USCIS*[6] filed in 2011 by the Legal Action Center (LAC) and its partners challenged several agency interpretations that caused the most widespread harm to asylum applicants. The settlement agreement [hereinafter "Settlement Agreement"] reached by the parties required EOIR and USCIS to implement significant changes to policies affecting the asylum EAD clock. The Settlement Agreement was effective December 3, 2013.[7]

This practice advisory discusses the employment authorization process for asylum applicants and current interpretations of the asylum EAD clock set forth in agency guidance, including all changes resulting from the Settlement Agreement.[8] It also suggests strategies for taking advantage of this guidance and the use of novel arguments to start or restart an asylum EAD clock.

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[6] *A.B.T. et al. v. U.S. Citizenship and Immigration Services*, No. 11-02108 (W.D. Wash. *filed* December 15, 2011). *See* pleadings and other information about the lawsuit at http://www.legalactioncenter.org/litigation/asylum-clock. Other counsel in the case are Northwest Immigrant Rights Project; Massachusetts Law Reform Project; and Gibbs, Houston and Pauw.

[7] For in-depth discussion of the Settlement Agreement and to determine if your client benefits from the terms of the Agreement, see Frequently Asked Question about the Asylum Clock Class Action Settlement (Updated Feb. 4, 2014), at http://www.legalactioncenter.org/sites/default/files/FAQ%202-5-14%20FIN.pdf. In general, the changes resulting from the Settlement Agreement apply prospectively only.

[8] *See generally* EOIR Operating Policies and Procedures Memorandum ("OPPM") 13-02: *The Asylum Clock* (Dec. 2, 2013), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-02.pdf [hereinafter OPPM 13-02: *The Asylum Clock*]; EOIR OPPM 13-03: *Guidelines for Implementation of the A.B.T. Settlement Agreement* (Dec. 2, 2013) [hereinafter OPPM 13-03: *A.B.T. Settlement*], *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-03.pdf; Memorandum from U.S. Citizenship and Immigration Services, Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests (Oct. 17, 2013), *available at* http://legalactioncenter.org/sites/default/files/USCIS%20failure%20to%20appear%2010-17-13.pdf; Memorandum from U.S. Citizenship and Immigration Services, Application of the "Exceptional Circumstances" standard in cases where an applicant has failed to appear for an asylum interview (Oct. 17, 2013), *available at* http://legalactioncenter.org/sites/default/files/USCIS%20exceptional%20circumstances%20standard%2010-17-13.pdf.

II. HOW THE ASYLUM EAD CLOCK FUNCTIONS

1. Are all asylum applicants eligible to apply for an EAD?

In addition to the 180-day waiting period, the regulatory eligibility requirements for an EAD are 1) that the asylum applicant is not an aggravated felon; 2) that the applicant has filed a complete asylum application; 3) that the asylum application has not been denied at the time the EAD application is decided; and 4) that, absent exceptional circumstances, the asylum applicant has not failed to appear for an interview or hearing.[9]

2. Are there any exceptions to the 180-day waiting period for EAD eligibility?

There are three categories of applicants who are exempt from the 180-day waiting period. They are individuals: 1) who filed an asylum application prior to January 4, 1995; 2) who filed an asylum application pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) ("ABC" cases);[10] and 3) whose asylum application has been recommended for approval.[11] In these three situations, the asylum applicant is eligible to apply for an EAD without having to wait 180 days.

3. When can a person file an EAD application?

Once the asylum EAD clock reaches 150 days in affirmative or defensive cases, the asylum applicant may apply for an EAD with USCIS.[12] After the applicant has filed an application for an EAD, USCIS has 30 days from the date of the filing to grant or deny the EAD application. However, USCIS cannot grant the application before the clock has reached 180 days after the initial filing of the asylum application.[13]

4. When does the 180-day waiting period begin?

The 180-day waiting period begins when a "complete asylum application" has been "filed" affirmatively with USCIS or defensively with the immigration court.[14] Pursuant to the terms of the Settlement Agreement, the 180-day waiting period also begins when an application is "lodged" with the immigration court.[15]

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[9] 8 C.F.R. §§ 208.7(a), 1208.7(a).
[10] *See* OPPM 13-02: *The Asylum Clock*, at 4.
[11] 8 C.F.R. §§ 208.7(a)(1), (3),1208.7(a)(1), (3).
[12] 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1).
[13] *Id.*
[14] *Id.*
[15] *See infra* Part II.7 for discussion of process for "lodging" an asylum application.

5. What is a complete asylum application?

A "complete" asylum application must: 1) have all the questions answered; 2) be signed by the applicant; and 3) include additional supporting evidence as required on the application instructions.[16] An incomplete application will be returned to the applicant. If the application has not been returned to the applicant within 30 days, it is deemed complete.[17]

The requirement that a "complete" application must be filed to start the asylum EAD clock does not mean that the application can never be supplemented at a later date. To the contrary, the instructions for the application specifically state that amendments or supplemental information can be submitted at the asylum interview or the IJ hearing.[18]

6. What does it mean to "file" an asylum application?

Affirmative filing: An applicant who is not in removal proceedings files the asylum application with USCIS. An affirmative applicant attends an interview with a USCIS asylum officer, who then grants, denies or dismisses the application, or refers the case to EOIR for removal proceedings.[19] When a case is referred for removal proceedings, the asylum application is then considered a "defensive" asylum application. A referral to an IJ is not a final decision in the case and does not constitute a denial of the asylum application.[20] Instead, an IJ reviews the previously filed asylum application *de novo* without the applicant having to file a new asylum application. Generally, in referred cases, the asylum EAD clock will continue to run following the referral.[21]

Defensive filing: When an individual is placed in removal proceedings prior to filing an asylum application, he or she will file the asylum application directly with EOIR in the first instance. The regulations require that the application be filed with the "immigration court."[22] As mentioned, the application may be "lodged" at the court window or filed with an immigration judge at a hearing.

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[16] 8 C.F.R. §§ 208.3, 1208.3.

[17] 8 C.F.R. §§ 208.3(c)(3), 1208.3(c)(3). As discussed later in this advisory, EOIR guidance does not require supporting evidence to be submitted when the application is "lodged" at a court window. The guidance requires only that the application have the applicant's name, A-number and be signed by the applicant. OPPM 13-03: *A.B.T. Settlement* at 3.

[18] "I-589, Application for Asylum and Withholding of Removal" at 5, *available at* http://www.uscis.gov/files/form/i-589instr.pdf.

[19] 8 C.F.R. §§ 208.9(b), 208.14(c), 1208.9(b), and 1208.14(c).

[20] 8 C.F.R. §§ 208.14(c), 1208.14(c).

[21] 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1). In cases in which USCIS does not issue charging documents, the asylum officer shall dismiss an application instead of referring the case to immigration court. 8 C.F.R. §§ 208.14(c)(1), 1208.14(c)(1). With no pending asylum application, the asylum clock does not apply.

[22] 8 C.F.R. § 1208.4(b)(3).

7. What does it mean to "lodge" an asylum application?

Pursuant to the Settlement Agreement, the 150-day waiting period for an EAD also will begin when a defensive asylum application is stamped "lodged, not filed" by an EOIR clerk at an immigration court filing window.[23] USCIS will consider the date the application was stamped as the filing date for the purpose of calculating the time period for EAD eligibility.[24]

An application may not be lodged in all cases. For example, if an application is already filed with USCIS and the case is referred to immigration court, an applicant may not also lodge the application. In addition, if an applicant already has an asylum application pending with the immigration court, he or she may not lodge an application. Finally, an applicant may only lodge an application once.[25]

When court staff lodges an application, they will stamp the application "lodged not filed," enter the "lodged not filed" date in the Case Access System for EOIR ("CASE"),[26] and will provide the applicant with the 180-day Asylum EAD Clock Notice.[27] The "lodging" date should not change when the asylum application is filed or when the Immigration judge issues a decision on the application.[28]

Court staff *will not lodge* an application in the following circumstances:

- the Form I-589 does not have the applicant's name;
- the Form I-589 does not have the A-number;
- the Form I-589 is not signed by the applicant (Part D on page 9 of the Form I-589);
- the Form I-589 has already been lodged with the court;
- the Form I-589 has already been filed with the court;
- the Form I-589 was referred to the court from USCIS;
- the Form I-589 is being submitted for lodging at the incorrect court location;
- the case is pending before the Board of Immigration Appeals ("BIA"); or
- the case is not pending before EOIR.[29]

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[23] *See* OPPM 13-03: *A.B.T. Settlement*, at 3-5.
[24] *Id.*, at 3.
[25] *Id*.
[26] Entering the "lodged not filed" date in CASE provides the date to USCIS electronically for purposes of calculating EAD eligibility.
[27] The 180-day Asylum EAD Clock Notice is a document developed pursuant to the Settlement Agreement which provides asylum applicants with information about the treatment of the asylum EAD clock by EOIR and USCIS. *See* OPPM 13-03: *A.B.T. Settlement*, at Attachment B, *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-03.pdf [hereinafter EAD Clock Notice].
[28] *Id*.
[29] OPPM 13-03: *A.B.T. Settlement*, at 3. If the application is rejected at the window, the court staff will not stamp the application and will not provide the applicant with the 180-day Asylum EAD Clock Notice. *See* EAD Clock Notice.

An applicant also may lodge an application by mail or courier. Importantly, an application for lodging that is submitted by mail or courier must be accompanied by the following:

- a self-addressed stamped envelope or comparable return delivery packaging; and
- a cover page with a prominent annotation on the top of the front page of the form stating that it is being submitted for the purpose of lodging.[30]

When the court accepts a "lodged" application sent by mail or courier, it will be processed in the same way it is processed when "lodged" in person at the court. If an application submitted by mail or courier is rejected because of the defects listed above, the court will issue a Rejected Lodging Notice and will not provide the Asylum EAD Clock Notice.[31]

Note that "lodging" is only for purposes of starting the asylum EAD clock. When an application is "lodged" with the court clerk, it is not considered "filed." The application must still be "filed" with the immigration judge during a hearing. However, lodging the asylum application may help to preserve the one year deadline. The EOIR guidance now states that immigration judges may "consider the legal effect of lodging an asylum application when considering whether an exception to the one-year bar applies."[32]

8. How does a person determine how many days have elapsed on the asylum EAD clock?

Asylum applicants whose cases are with an Asylum Office should direct any questions regarding the time accumulated on the asylum EAD clock to the 180-day Asylum EAD Clock "point of contact" at the Asylum Office with jurisdiction over the case.[33]

Asylum applicants who are in removal proceedings – both those that have filed affirmatively with the Asylum Office and been referred to the immigration court or those that have filed defensively - may call the EOIR hotline at 1-800-898-7180 to obtain information about their asylum EAD clock.[34] The hotline will provide a calculation of the number of days that have elapsed between the date an asylum application was filed with an Asylum Office or at a hearing before an IJ and the date an IJ first issued a decision on the application, not including delays requested or caused by the applicant.[35]

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[30] OPPM 13-03: *A.B.T. Settlement*, at 4.
[31] *Id*. at 3. *See* EAD Clock Notice.
[32] *OPPM 13-03: A.B.T. Settlement*, at 6.
[33] *See* EAD Clock Notice; USCIS Website, Asylum Employment Authorization and Clock Contacts, *at* http://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Asylum/EAD_and_KLOK_POCs_10_09_13.pdf.
[34] *See* EAD Clock Notice.
[35] *See* EAD Clock Notice.

Importantly, the hotline will not always provide an accurate calculation of the days that have accumulated on the asylum EAD clock because the number of days provides by the hotline *will not include*:

- The time after an applicant has lodged an asylum application at an immigration court window prior to filing the application at a hearing before an immigration judge; or
- The time USCIS will credit to an applicant's 180-day Asylum EAD Clock if the asylum application was remanded to an immigration judge by the BIA for further adjudication of an asylum claim.[36]

To determine the number of days on an applicant's 180-Day Asylum EAD Clock, an applicant may rely on the number of days reported by the EOIR hotline if the applicant has not lodged his or her application at an immigration court window or if the asylum application was not remanded from the BIA for further adjudication of an asylum claim.[37]

Applicants who lodged an application at an immigration court window should add the number of days between the date of lodging of the application and the date when the application was filed at a hearing before an IJ (or the current date if the applicant has not yet had a hearing at which the application could be filed). Applicants whose cases were remanded from the BIA should add the number of days from the IJ's initial decision on the asylum application to the date of the BIA's order remanding the case. These applicants continue to accumulate time toward the asylum EAD clock after the case is remanded, excluding delays requested or caused by the applicant.[38]

9. What is an "expedited" asylum case versus a "non-expedited" asylum case and what are the implications for the asylum EAD clock?

EOIR considers asylum cases subject to the 180-day adjudications deadline to be "expedited cases," while those exempt from this deadline are "non-expedited cases."[39] An asylum case is treated as an "expedited" case if it is referred to EOIR with fewer than 75 days on the asylum adjudications clock; it is not considered "expedited" if it was referred to EOIR after 75 days or more had elapsed since the filing of the application.[40] A case that is not expedited is not subject to EOIR's 180-day adjudications deadline; despite this, the asylum EAD clock will run and stop as usual.[41]

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[36] *See* EAD Clock Notice; *see also supra* Part II.7 for more on lodging an application; *infra* Part III.10 for more on the effect of a remand to an IJ on a person's asylum EAD clock.
[37] *See* EAD Clock Notice.
[38] *See infra* Part III.10 for discussion of effects of remand.
[39] *See* OPPM 13-02: *The Asylum Clock*, at 5, 8.
[40] *Id.*
[41] *Id*.

EOIR states that the asylum EAD clock will stop in an "expedited case" if the applicant does not accept an "expedited hearing date" or a date that is within the 180-day adjudications period.[42] The Settlement Agreement requires that immigration judges set individual hearings no earlier than 45 days after a master calendar hearing, lessening the need for asylum applicants to decline the first offered hearing date. However, if an applicant is not able to accept the first offered hearing date, this action will be considered applicant-caused delay and will stop the asylum EAD clock.

EOIR policy is specific about procedures an IJ is to follow before stopping the clock because of the inability to accept the first offered hearing date.[43] After determining that the case is an expedited case, EOIR guidance states that the judge should then evaluate whether to offer an expedited hearing date. In the following three types of cases, the judge need not offer an expedited hearing date: when 1) the case is being adjourned for an applicant-related reason; 2) the case is being adjourned for an applicant or DHS-related reason that permanently exempts the case from the 180-day adjudications deadline; or 3) the case *previously* was adjourned due to applicant-caused or DHS-caused delay that permanently exempts the case from the 180-day adjudications deadline.[44] If none of these three situations applies, the IJ should ask on the record whether the applicant wants an "expedited asylum hearing date." If the applicant declines an "expedited asylum hearing date," then the adjournment code 22 (Alien or Representative Rejected Earliest Possible Asylum Hearing)," will be entered."[45]

Pursuant to the Settlement Agreement, an immigration judge should not set an individual hearing date earlier than 45 days after the master calendar hearing. EOIR guidance now states "[g]enerally, when setting a non-detained case from a master calendar hearing to an individual calendar hearing, a minimum of 45 days must be allowed, even if the 180-day adjudications deadline is imminent."[46] This 45-day period should only be shortened "if requested by the applicant."[47] When setting a detained case from a master calendar hearing to an individual calendar hearing, an immigration judge should allow a minimum of 14 days.[48]

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[42] *See* EAD Clock Notice ("Common reasons why an asylum applicant may stop accumulating time toward the 180-day Asylum EAD Clock" include "[a]n applicant, or his or her attorney, declin[ing] an expedited asylum hearing date").
[43] *See* OPPM 13-02: *The Asylum Clock*, at 9-11. Though this OPPM addresses the asylum *adjudications* clock, any "alien-related adjournment" stops both the adjudications and the asylum EAD clock.
[44] *Id.* at 9-10. EOIR maintains a list of adjournment codes that identify the reason for the adjournment; whether the adjournment is due to applicant, government or court-related reasons; and whether the adjournment permanently exempts a case from the 180-day adjudications period. *See* OPPM 13-03: *A.B.T. Settlement*, Attachment B, Adjournment Codes.
[45] *See* OPPM 13-02: *The Asylum Clock*, at 10-11; OPPM 13-03: *A.B.T. Settlement*, Attachment B, Adjournment Codes.
[46] *See* OPPM 13-02: *The Asylum Clock*, at 10.
[47] *Id.* at 10.
[48] *Id.*

If an attorney accepts the expedited date offered by the IJ, court staff may later call the attorney and offer a new expedited hearing date that may be even sooner. If the attorney rejects this new date, EOIR may take the position that this refusal stops the clock.[49] Applicants should argue that any hearing rescheduled for an earlier date by a court without a party's request should not impact the status of the asylum EAD clock. EOIR guidance states that when a court advances a hearing date without the party's request, the status of the clock "will remain the same until the new hearing date."[50]

10. How does "applicant-caused" delay affect the asylum clock?

Under the regulations, "[a]ny delay requested or caused by the applicant shall not be counted as part of" the 180-day waiting period for EAD eligibility, [51] and thus will stop the clock. Arguably, the regulation requires that the clock be stopped only during the time that the delay exists. Unfortunately, this is not how USCIS and EOIR interpret this regulation. Instead, in cases that are before the immigration court, EOIR mandates that the clock remain stopped from the date of the hearing at which the applicant-caused delay occurs until the next hearing date.[52] EOIR policy does not permit the IJ or the court administrator to restart the clock prior to the next hearing, even if the applicant cures the delay before the next hearing and notifies the court that the delay is cured. Further, the clock will remain stopped following the next hearing if, at the new hearing, the IJ determines there is a new applicant-caused delay.[53]

11. What is considered "applicant-caused" delay?

The regulations provide only a limited number of examples of what constitutes an applicant caused delay. By regulation, "delays caused by failure without good cause to follow the requirements for fingerprint processing" stop the clock.[54] Additionally, the time between the issuance of a request for evidence and the receipt of a response to that request,[55] and the period during which the applicant fails to appear to receive the decision of the asylum officer,[56] will not be counted towards the 180 days.

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[49] *Id.* at 12 ("When feasible, court staff may contact the parties when rescheduling a hearing to verify that they will accept the first available date for that hearing. If one of the parties causes a delay in rescheduling the hearing, the appropriate alien or DHS-related adjournment code should be used.").
[50] OPPM 13-02: *The Asylum Clock*, at 11.
[51] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[52] *See* OPPM 13-02: *The Asylum Clock*, at 11.
[53] *See id*. at 7, 11.
[54] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[55] *Id.*
[56] 8 C.F.R. §§ 208.9(d), 1208.9(d). The EAD clock restarts when the applicant "does appear to receive and acknowledge receipt of the decision or [when] the applicant appears before an immigration judge" after a case has been referred to removal proceedings. *Id.*

In addition to these regulatory examples, EOIR's adjournment codes reflect the agency's interpretation of what stops the clock.[57] This chart of codes lists whether an adjournment is "alien-related" or "DHS-related" or "IJ-related" or "Operational." An "alien-related" adjournment stops the asylum clock for purposes of both 180-day periods (the adjudications period and the EAD waiting period) until the next hearing.[58] Most of EOIR's twenty-six "alien-related" codes are not referenced in the regulations.[59]

Common actions considered "alien-related" delay by EOIR include:

- Grant of applicant's motion for continuance to seek representation
- Grant of applicant's motion for continuance to prepare an asylum application
- Applicant rejects earliest offered individual hearing date

Many immigration courts are facing overloaded dockets and thus hearings are scheduled for dates far in the future. Because the asylum clock, if stopped, will not be restarted between hearings, applicants' clocks are stopped for extended periods beyond the initial applicant-caused delay. Contrary to EOIR's expansive interpretation of the phrase "applicant caused or requested delay," the wording of the regulation, which specifically references "good cause" in connection with the failure to complete biometrics, arguably suggests that other types of delay also should not be charged against the applicant if he or she can show good cause for the delay.

For cases pending with an Asylum Office, common actions considered applicant-related delay include:

- A request to transfer a case to a new Asylum Office or interview location, including when the transfer is
- based on a new address;
- A request to reschedule an interview for a later date;
- Failure to appear at an interview or fingerprint appointment;
- Failure to provide a competent interpreter at an interview;
- A request to provide additional evidence after an interview; and
- Failure to receive and acknowledge an asylum decision in person (if required).

12. What is *not* considered "applicant-caused" delay?

EOIR has clarified that delay caused by the immigration court or by DHS should not be attributed to the asylum applicant and should not stop the asylum clock.[60] If a case is rescheduled for court-related reasons, EOIR directs court staff to enter an adjournment code indicating that EOIR caused the delay and the clock should then continue to run on the date the

[57] *See generally* OPPM 13-03: *A.B.T. Settlement*, Attachment B, Adjournment Codes.
[58] OPPM 13-02: *The Asylum Clock*, at 7.
[59] For example, Code 01, applied when an applicant requests time to seek representation, and Code 22, applied when an applicant is unable to take the earliest possible hearing date, are found nowhere in the regulations.
[60] *See* OPPM 13-02: *The Asylum Clock*, at 11-12.

hearing would have taken place.[61] For example, if the court reschedules a hearing because the judge will be on detail, the guidance states that code 35 (Unplanned IJ Leave – Detail/Other Assignment) is the appropriate adjournment code.[62]

If DHS causes the delay, the court should enter a DHS-related adjournment code. For example, if a judge grants DHS' motion to continue the hearing or motion to change venue from one immigration court to another, the delay should be attributed to DHS and the clock should continue to run.[63]

13. What notices are given to the applicant about asylum clock decisions?

Pursuant to the Settlement Agreement, an IJ "must make the reason(s) for the case adjournment clear on the record." The judge also "may inform the parties how many days are on the clock and whether the clock is running or stopped."[64] Thus, EOIR policy now *requires* IJs to state the reason for a case adjournment on the record. An IJ is not required to state the specific adjournment code on the record, only give the reason for the adjournment. However, with the reason given, applicants generally will be able to determine the adjudication code and thus will be able to determine whether the asylum EAD clock should be running.

Further, EOIR will provide the 180-day Asylum EAD Clock Notice when an applicant lodges an asylum application at immigration court or files an application at an immigration hearing. EOIR will also make the Notice available at each immigration hearing.[65]

USCIS provides information about the asylum EAD clock on its website and provides the Asylum EAD Clock Notice to an asylum applicant when his or her case is referred from the Asylum Office to immigration court.[66] The denial letter sent to an applicant when his or her case is referred by USCIS to an immigration court also will include information about the asylum EAD clock.[67]

14. Does an applicant remain eligible for an EAD and EAD renewals during an appeal of an adverse IJ decision on the asylum application?

When an asylum application is denied on or before the 150th day of the 180-day EAD waiting period, the applicant is not eligible to apply for an EAD In all other cases, an asylum applicant may apply for an EAD on the 151st day of the 180-day EAD waiting period. If the asylum application is denied before the expiration of the 180-day period but while an EAD application is pending, the EAD application also will be denied.[68] In addition, if the asylum application is

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] OPPM 13-02: *The Asylum Clock*, at 8-9.
[65] *See* OPPM 13-03: *A.B.T. Settlement* at Attachment A, "Revised Settlement Agreement."
[66] *See id.*; EAD Clock Notice.
[67] *See* OPPM 13-03: *A.B.T. Settlement* at Attachment A, "Revised Settlement Agreement."
[68] 8 C.F.R. §§ 208.7(a)(1); 1208.7(a)(1).

denied after the 180-day period has run, the applicant is no longer eligible to apply for an EAD and any pending EAD will be denied. In all of these scenarios, the asylum applicant will not be eligible for an EAD during any appeal of the denial of the asylum application. However, under the Settlement Agreement, if the BIA remands the case back to the IJ for further review of the asylum application, then the asylum EAD clock will restart and the applicant will be eligible to have all of the time that the case was pending on appeal added to the days on the asylum EAD clock.[69]

In cases in which the asylum application is denied after the 180-day waiting period has run and the EAD application has been approved, whether – and for how long – the applicant can continue to receive the EAD depends on the procedural posture of the case.

Affirmative cases: If the applicant received an EAD while the asylum application was pending at the Asylum Office and the AO denies (not refers) the application, the EAD will be valid until the expiration of the EAD or 60 days after the AO denial, whichever is later.[70] Because a referral by the AO is not a denial,[71] the applicant will continue to receive the EAD following a referral.

Defensive cases: Respondents who have received an EAD and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.[72] When all appeals and judicial review have been exhausted, if the asylum application has been denied, work authorization terminates on the expiration date of the EAD.[73]

III. COMMON ASYLUM CLOCK PROBLEMS AND POSSIBLE RESOLUTIONS

1. An applicant does not appear for an asylum interview.

The regulations prohibit an asylum applicant from receiving employment authorization if he or she fails to appear for "a scheduled interview before an asylum officer."[74] Problems arise when a person fails to appear at a USCIS interview and USCIS then stops the clock and refers the asylum case to immigration court. EOIR will not restart the asylum clock, stopped by USCIS, when the applicant appears in immigration court. USCIS policy grants the applicant two opportunities to correct the failure to appear and to restart the clock: 1) after the failure to appear and before the case is referred to the immigration court and 2) after the case has been referred to the immigration court. Steps an asylum applicant must take are outlined in two USCIS memorandum: 1) *Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests*[75] and 2) *Application of the "Exceptional Circumstances" standard in cases where an applicant has failed to appear for an asylum interview*.[76]

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[69] *See infra* Part III.10 for discussion of the effect of remand.
[70] 8 C.F.R. §§ 208.7(b)(1), 1208.7(b)(1).
[71] 8 C.F.R. § 208.14(c).
[72] 8 C.F.R. §§ 208.7(b); 1208.7(b)
[73] 8 C.F.R. §§ 208.7(b)(2), 1208.7(b)(2).
[74] 8 C.F.R. §§ 208.7(a)(4).).
[75] Memorandum from U.S. Citizenship and Immigration Services, Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests (October 17, 2013), *available*

After missing an asylum interview, USCIS now will mail a "Failure to Appear" Warning letter as soon as possible after an asylum applicant misses an interview at the Asylum Office. The letter describes the effect of the failure to appear on EAD eligibility and lists procedural steps the applicant must take to establish "good cause" for failing to appear for the interview. It also describes the effect of failing to respond to the warning letter within a 45 day period. If the applicant responds within 45 days and demonstrates good cause for missing the interview, the interview will be rescheduled and the asylum EAD clock will restart as of the new interview date.[77]

If 45 days pass with no action by the applicant, USCIS will refer the case to the immigration court. USCIS also will mail a "Referral Notice for Failure to Appear" with charging documents to the applicant. This notice will describe the effect of the failure to appear on EAD eligibility and list procedural steps the applicant must take to establish "exceptional circumstances" for failing to appear at an asylum interview now that the case is before an immigration judge. The first step is for the asylum applicant to explain the exceptional circumstances in writing to the asylum officer. Should the applicant successfully present a case of exceptional circumstances, the Asylum Office will issue a determination letter to the applicant and his or her representative of record, and notify Immigration and Customs Enforcement's Office of the Principal Legal Advisor (ICE OPLA) of the determination. If the Asylum Office determines that the applicant established "exceptional circumstances," the applicant may then request that ICE OPLA file a joint motion for dismissal of immigration proceedings. If the ICE attorney agrees and the IJ then dismisses proceedings, the case is returned to the Asylum Office, the Asylum Office will reopen the asylum application and reschedule an interview with the asylum applicant. The asylum EAD clock, which stopped on the date of the applicant's failure to appear for the asylum interview, will restart on the date the applicant appears for the rescheduled interview at an Asylum Office. However, as long as the case remains pending before the immigration judge and is not returned to the Asylum Office, the clock remains *permanently stopped*.

2. A party moves for a change of venue.

EOIR treats an asylum applicant's motion to change venue as a request that delays the proceedings. Thus, when an IJ grants such a motion, the request is considered applicant-caused delay and the clock is stopped from the date the motion is granted until the next hearing in the new jurisdiction.[78] In contrast, if a venue change is granted based on a DHS motion, the asylum

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at http://legalactioncenter.org/sites/default/files/USCIS%20failure%20to%20appear%2010-17-13.pdf.

[76] Memorandum from U.S. Citizenship and Immigration Services, Application of the "Exceptional Circumstances" standard in cases where an applicant has failed to appear for an asylum interview (October 17, 2013), *available at* http://legalactioncenter.org/sites/default/files/USCIS%20exceptional%20circumstances%20standard%2010-17-13.pdf.

[77] Memorandum from U.S. Citizenship and Immigration Services, Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests (October 17, 2013), at 4.

[78] OPPM 13-02: *The Asylum Clock*, at 13.

clock, if running, continues to run. If the clock was stopped before the judge granted DHS' motion, the clock runs from the date the motion was granted until the date of the next hearing.

Importantly, EOIR guidance states that cases can be transferred between two hearing locations that share administrative control of cases without a motion to change venue.[79] Such transfers often involve a hearing location in a detention facility. The clock does not stop when a case is transferred between two hearing locations.[80] Thus, if the clock stops in a case transferred between two hearing locations that share administrative control of cases, an applicant should be able to argue that the clock was improperly stopped under EOIR guidance.

In cases involving a change in venue requested by the asylum applicant, if there is no actual delay caused by the venue change, the applicant might be able to convince the IJ or the court administrator not to stop the clock.[81] Alternatively, the applicant could move to advance the hearing date to an earlier date.[82] If the motion is denied, however, it is unlikely that, without a change in agency policy or litigation, the applicant will be able to get his or her clock started due to EOIR's policy of refusing to restart the clock between hearings.

3. The applicant rejects the "next available" or "expedited" hearing date.

As discussed earlier, the asylum EAD clock will stop in an "expedited case" if the applicant does not accept an "expedited hearing date" (an individual hearing date that is no sooner than 45 days after a master calendar hearing). After determining that the case is an expedited case and deciding to offer an expedited hearing date,[83] the IJ should *ask on the record* whether the applicant wants an "expedited asylum hearing date."[84] If the applicant declines an "expedited asylum hearing date," then the adjournment code 22 (Alien or Representative Rejected Earliest Possible Asylum Hearing) "or another appropriate code that also stops the clock until the next hearing" will be entered."[85]

An applicant may challenge a stopped asylum clock if the judge does not follow EOIR guidance and fails to clearly state that the next offered hearing date is an "expedited asylum hearing date," or uses other language to describe the next offered hearing date.[86]

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[79] *Id.*
[80] *Id*.
[81] This could occur where the docket of the original court is more backlogged than that of the court to which the venue change is made. In such a situation, the actual hearing date that the applicant is given by the second court could be sooner than a hearing date given by the original court.
[82] *See* OPPM 13-02: *The Asylum Clock*, at 11-12.
[83] *See supra* Part II.9 describing the three situations where a judge offers an expedited hearing date.
[84] *See* OPPM 13-02: *The Asylum Clock*, at 10.
[85] *Id.*
[86] *See id*. at 11.The guidance explicitly states that phrases other than "expedited hearing date" can "lead to confusion as to how the asylum clock works," and that a judge should not ask, for

In addition, the IJ should ensure that the applicant has a minimum of 45 days before the individual hearing, *even if* the 180-day adjudications deadline is imminent, as stated under EOIR's guidance.[87] Arguably any delay resulting from the refusal to accept a hearing within 45 days of an initial master calendar hearing should not be charged to the applicant.

If the applicant does not accept the next available hearing date because there will not be enough time to prepare the case, the court may schedule the next hearing far in the future due to overcrowded court dockets. In such a situation, the applicant could file a motion to advance the hearing date.[88] If the motion is denied, it is unlikely that the applicant will be able to get the clock started because EOIR policy prohibits the starting of the clock between hearings.

4. Biometrics are not completed.

The INA prohibits an asylum officer or IJ from granting asylum until DHS completes a background check.[89] Pursuant to the regulations, DHS must complete a biometrics check before adjudicating an asylum application.[90] Failure to comply with the fingerprinting requirements without "good cause" may lead to dismissal of the application.[91] Additionally, "delays caused by failure without good cause to follow the requirements for fingerprint processing" may constitute an applicant-caused delay that will stop the asylum clock.[92]

Previously, EOIR took the position that if an IJ adjourns a case to allow an applicant "time to complete the required paperwork for a biometrics check or an overseas investigation," the clock stopped. EOIR has since clarified that the clock should not stop unless the applicant causes a *delay* in proceedings due to the failure without good cause to follow the biometrics requirements.[93] EOIR guidance does not specifically define a "delay" in proceedings; however, logically, only an action which causes a hearing to be adjourned for the applicant to comply with biometrics requirements would constitute "delay." In contrast, if the case is not postponed specifically for this reason, the clock should not stop. For example, if at a master calendar hearing the IJ sets the case for an individual hearing in three months during which time the applicant must complete biometrics, he or she could argue that there was no applicant-caused delay. In such a case, the IJ would have had to set the case over for an individual hearing regardless of whether the biometrics had been obtained.

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example, if an applicant wants the hearing "on the expedited docket" or wants to "waive the clock."

[87] *Id*.

[88] *See* OPPM 13-02: *The Asylum Clock*, at 11-12.

[89] INA§ 208(d)(5)(A)(i).

[90] 8 C.F.R. § 1003.47(a).

[91] 8 C.F.R. §§ 208.10, 1208.10.

[92] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).

[93] *See* OPPM 13-02: *The Asylum Clock*, at 14 (stating that Code 36 only should be applied to stop the clock if the applicant causes a delay).

Even if the hearing was adjourned to allow time for the applicant to comply with the biometrics requirement, the applicant can argue that it is not applicant-caused delay unless he or she failed to comply in a timely manner. By regulation, DHS is required to provide the applicant with notice of the biometrics requirements and procedures, and the applicant must comply with these procedures "before or as soon as practicable after the filing of the application for relief in the immigration proceedings."[94] Also, the regulations state that the clock stops only during "delays caused by failure *without good cause* to follow the requirements for fingerprint processing."[95] Thus, the applicant should not be charged with the delay for the time it takes to comply with the biometrics requirements unless he or she does not comply in a timely manner or otherwise fails to demonstrate "good cause" for not following fingerprint processing requirements.

5. USCIS or an immigration judge requests additional evidence from the applicant.

The regulations relating to the asylum clock state that the period of time the clock runs "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."[96] Section 103.2(b)(8) permits USCIS to issue a request for evidence when it determines that "all required initial evidence has been submitted but the evidence submitted does not establish eligibility."[97] In practice, this means that a request for evidence by an asylum officer is an action that will cause the clock to stop. In general, an asylum officer will not continue to adjudicate an application until the additional evidence is received, and thus such a request would delay the adjudication.

Note, however, that 8 C.F.R. § 103.2(b)(8) does not apply to EOIR and thus, technically, this restriction on the clock does not apply to an applicant in removal proceedings. Instead, EOIR rules anticipate that additional evidence often will be submitted prior to a final hearing. As such, the general rule is to allow submission of such evidence up to 15 days prior to the merits hearing.[98] When evidence is submitted within this time frame, it is not considered late and does not delay the proceedings. Consequently, where an IJ requests additional evidence to be submitted in accord with this general rule, the asylum clock should not stop as there would be no delay.

There may be situations in which the IJ asks for additional evidence and sets a new master calendar hearing specifically for receipt of this evidence. In such a case, an applicant could argue that the IJ's request does not constitute applicant-caused delay if a "complete" asylum application had been filed and all additional evidence could have been submitted prior to any individual hearing – whether scheduled yet or not – in accordance with EOIR rules.[99]

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[94] 8 C.F.R. § 1003.47(d).
[95] 8 C.F.R. § 1208.7(a)(2) (emphasis added).
[96] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[97] 8 C.F.R. § 103.2(b)(8).
[98] *See* OPPM 13-02: *The Asylum Clock*, at 13-14 (citing the Immigration Court Practice Manual (ICPM) at 3.1(b) (Timing of Submissions)).
[99] *Id*.

6. An applicant asks to supplement the record with additional evidence.

As discussed, the asylum clock starts when a complete asylum application is filed. An asylum officer or IJ may permit an applicant to amend or supplement the application, and the clock will stop for any period of delay caused by such a request.[100]

EOIR policy is to stop the clock only if an applicant causes a *delay* due to the request to supplement the application.[101] The guidance provides that a delay occurs only when an applicant will not be able to "timely" file supplementary documents prior to the expedited hearing date.[102] Unless otherwise specified by a judge, documents are timely filed when they are filed 15 days in advance of a master calendar or individual hearing.[103]

Consequently, the clock should not stop in a non-detained case in which the applicant accepted the initial hearing date offered and indicated that he or she will be able to file supplemental information 15 days before the master calendar or individual hearing date. EOIR guidance does not require more than the applicant's statement that he or she will be able to timely file supplements to the application.[104]

7. The applicant contests the charges of removal or applies for another form of relief in addition to asylum.

EOIR's list of codes that, if entered by an IJ, will stop the clock includes a code for a respondent contesting the charges of removability contained in the Notice to Appear[105] and for a respondent filing for other forms of relief from removal.[106] If faced with this situation, an applicant may argue that contesting removal should not be considered "delay." Instead, the respondent is simply stating his or her position with respect to the removal charges. In a criminal proceeding, for example, a defendant who pleads "not guilty" would not be considered to be delaying the case. Further support for this argument may be found in the provisions regarding DHS's burden of proof.[107] Moreover, even if the EAD clock does stop, it should stop only until the IJ makes a determination on the allegations and the charges. Once this occurs, the clock should restart**.**

An applicant also may argue that filing for another form of relief is not "applicant-caused" delay. Filing for another form of relief does not actually delay the adjudication of the asylum

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[100] 8 C.F.R. §§ 208.4(c), 1208.4(c).
[101] OPPM 13-02: *The Asylum Clock*, at 13-14.
[102] *Id.*
[103] *Id.* at 13 n.1 (indicating that "timeliness" is defined by ICPM Chapter 3.1(b)). The ICPM states that non-detained applicants may submit filings 15 days in advance of a master calendar hearing or an individual hearing. ICPM § 3.1(b)(i)(A).
[104] *See* OPPM 13-02: *The Asylum Clock*, at 13.
[105] Code 51. *See* EAD Clock Notice; OPPM 13-03: *A.B.T. Settlement*, Attachment B, Adjournment Codes.
[106] Code 6. *Id*.
[107] *See* INA § 240(c), 8 C.F.R § 1240.8.

application because the asylum application may be adjudicated before the IJ addresses any other relief requested.

However, because both of these policies are stated EOIR policies, objections will not succeed in most cases and litigation will be needed to change the policy.

8. The denial of an asylum application is on appeal.

EOIR policy states that the *180-day adjudication period* is tolled permanently when the judge issues a decision denying the asylum application, as the decision constitutes "final administrative adjudication of the asylum application, not including administrative appeal" under INA § 208(d)(5)(A)(iii)."[108] As a result, EOIR maintains that the asylum adjudications clock should not run during an applicant's appeal of a denied asylum application to the BIA or a federal court. With one exception, the asylum EAD clock also will not run during an appeal from a denial of the asylum application. Pursuant to the Settlement Agreement, the exception occurs when a case that was denied and is on appeal is remanded by the BIA back to an IJ for further review of the asylum application.[109]

Where an EAD was granted *prior* to the denial of the asylum application, the asylum applicant remains eligible for the EAD and renewal EADs during the pendency of any BIA or federal court appeal.[110] Consequently, in any case in which the asylum clock was improperly stopped before it reached 180 days, and where, but for the improper decision stopping it, the clock would have reached 180-days by the time the case was denied by an IJ, the applicant should be eligible for an EAD during any appeal. EOIR guidance provides that an applicant before the BIA who believes that his or her 180-day waiting period was improperly calculated during the initial proceedings before the immigration court may contact EOIR's Office of General Counsel with a detailed explanation of the incorrect asylum clock calculation.[111] The argument in such a case would be that, but for the agency's miscalculation of the asylum EAD clock, the applicant would have had an EAD when the IJ denied the asylum application and would have been entitled to continue to receive EAD renewals throughout the pendency of an appeal.

9. A motion to *reopen* is granted by an IJ or the BIA.

An EOIR policy memorandum gives IJs three "options" with respect to the asylum clock after an IJ has granted a motion to reopen. [112] In determining which option to select, the memorandum states that judges "should be guided by the principle that only alien-caused delays prevent the

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[108] *See* OPPM 131-02: *The Asylum Clock* at 16.
[109] *See* OPPM 13-03: *A.B.T. Settlement* at Attachment A, "Revised Settlement Agreement"; EAD Clock Notice. *See also infra* Part III.10 for discussion of effects of remand.
[110] *See* 8 C.F.R. §§ 208.7(b); 1208.7(b).
[111] *See* OPPM 13-02: *The Asylum Clock*, at 16.
[112] *See id.* at 14 (referring to the guidelines set forth in Revised OPPM 00-01); Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, at 6-7, *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

asylum clock from running. See 8 C.F.R. 208.7(a)(2)." A judge must select one of the three following options:

> 1) Not restart the clock when the motion to reopen is granted. EOIR suggests IJs choose this option "when granting a motion to reopen to consider a document which was previously unavailable." EOIR notes that the IJ may restart the clock at the next master calendar hearing.
>
> 2) Restart the clock back to the date of the IJ's final order denying the asylum application so that it will run from that date through the date that the motion to reopen is granted. EOIR states that the judge can use this method to calculate the clock after determining that the period of delay was not applicant-caused. An example of this is a motion to reopen an *in absentia* order where the respondent did not receive notice of the hearing.
>
> 3) Restart the clock from the date that the motion to reopen is granted. EOIR suggests IJs use this third option when proceedings are reopened based on changed country conditions.

Significantly, under this policy, the clock should never be "permanently" stopped. Thus, if the clock is permanently stopped following an IJ's decision to reopen a case, the IJ has erred by not properly applying the reopening policy.

EOIR's reopening policy provides *suggestions* only as to when the three options are to be applied, leaving the asylum clock decision to the discretion of the IJ. This allows an applicant to convince the IJ to choose the most favorable option. For example, an applicant could argue that, in a case which is reopened for submission of a previously unavailable document or for changed country conditions, option 2 should be chosen rather than options 1 or 3. Contrary to EOIR's suggestion, these situations do not involve applicant-caused delay and thus are not materially different from the example in option 2 where an *in absentia* order is reopened because the respondent was not provided notice of the hearing.

This EOIR policy applies only to reopening by an IJ and not to cases reopened by the BIA. However, if the case is reopened and *remanded* to the immigration judge for further review of the asylum claim, the case should fall under the remand provisions of the Settlement Agreement and all of the time that elapsed since the initial immigration judge denial of the asylum case should be counted toward the 180-day asylum EAD clock as described in the next section.

10. The BIA or a federal court of appeals *remands* an asylum case for additional review of the asylum application.

Pursuant to the Settlement Agreement, the asylum EAD clock now will start or restart when the BIA remands the asylum case to the IJ.[113] In addition, the asylum EAD clock will be credited

[113] *See* OPPM 13-03: *A.B.T. Settlement* at Attachment A, "Revised Settlement Agreement"; EAD Clock Notice.

with the number of days that elapsed between the initial IJ denial and the date of the BIA remand order.[114] In essence, EOIR policy now treats the asylum EAD clock as though it had never stopped when the case is remanded from the BIA to the IJ for further review of the asylum application. The time is calculated from the IJ decision denying asylum until the date of the BIA remand order, and all the time that elapsed between those dates is credited to the asylum applicant.

After the asylum EAD clock starts or restarts on the date of the BIA remand, it will run or stop according to general EOIR policies.[115] Once 150 days have accumulated on the asylum EAD clock and the asylum applicant submits an application for employment authorization, he or she must attach a copy of the complete BIA order (remanding his or her case to the immigration court) to the application.[116]

11. The applicant does not receive notice of an asylum clock decision.

Pursuant to the Settlement Agreement, IJs now must make the *reason* for each hearing adjournment clear on the record, although they do not have to state the adjournment code that they are applying.[117] IJs also will provide the 180-Day Asylum EAD Clock Notice to an asylum applicant when he or she lodges the application at immigration court or files an application at an immigration hearing. The notice also will be available at each immigration hearing.[118] USCIS has made the information contained in the Notice publicly available on its website and according to the terms of the settlement agreement, will make the Notice available when an asylum case is referred from the Asylum Office to immigration court.[119]

If the notices required by the Settlement Agreement are not provided, an applicant may bring a claim under the Settlement Agreement.[120]

12. An applicant is granted prosecutorial discretion and the asylum case is administratively closed.

In 2011, DHS announced a prosecutorial discretion initiative under which certain removal cases that are deemed low priority will be administratively closed.[121] At this point in time, DHS has

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[114] *Id*.
[115] *Id*.
[116] *See* USCIS Website, "How the Agreement Affects Adjudication of Asylum and EAD Applications," *at* http://www.uscis.gov/humanitarian/refugees-asylum/asylum/how-agreement-affects-adjudication-asylum-and-ead-applications.
[117] *See* OPPM 13-03: *A.B.T. Settlement* at Attachment A, "Revised Settlement Agreement."
[118] *See A.B.T.* Settlement Agreement, at 15, *available at* http://legalactioncenter.org/sites/default/files/KLOK-Revised%20Settlement%20Agreement.pdf.
[119] *See* USCIS Website, "How the Agreement Affects Adjudication of Asylum and EAD Applications," *at* http://www.uscis.gov/humanitarian/refugees-asylum/asylum/how-agreement-affects-adjudication-asylum-and-ead-applications
[120] *See A.B.T.* Settlement FAQs for information about bringing a claim under the Agreement.

made clear that the asylum clock will stop when a case is administratively closed. Attorneys have reported that when an applicant has less than 180 days on his or her asylum EAD clock, the applicant's clock will remain stopped throughout the time that the case is administratively closed and the applicant will be ineligible for an EAD. An applicant with more than 180 days on his or her clock at the time of the administrative closure should continue to be eligible for an EAD, including renewals of previously-issued EADs. This was confirmed in a recent non-precedential decision from USCIS's Administrative Appeals Office (AAO).[122] In that case, an applicant had already received employment authorization and after the case was administratively closed, USCIS refused to renew employment authorization. Relying on case law from several circuits, the AAO found that the fact that a case was administratively closed should not impact the applicant's eligibility for employment authorization.[123]

Applicants may argue that, according to the reasoning of the AAO decision, an applicant who accumulates 180 days on the asylum clock *after* the case is administratively closed also should be eligible for employment authorization. If the administrative closure of the case is merely a "docket management tool that has no jurisdictional effect" and the case otherwise remains pending and "undecided," then the asylum EAD clock should continue to run after the case is administratively closed. [124]

In some cases, DHS will grant an individual "deferred action" as an exercise of prosecutorial discretion. Unlike administrative closure, deferred action itself provides an independent basis for an EAD and thus reliance on the pending asylum application for an EAD usually would not be necessary.[125]

HOW TO ADDRESS ASYLUM EAD CLOCK PROBLEMS

1. Problems Regarding Calculation of the Asylum EAD Clock

All questions regarding the calculation of days on the asylum EAD clock should be directed to points of contact (POCs) at the Asylum Office with jurisdiction over the case.[126] Contact

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[121] For more information about prosecutorial discretion and administrative closure, *see* LAC's Practice Advisories, *at* http://www.legalactioncenter.org/sites/default/files/docs/DHS%20Review%20of%20Low%20Priority%20Cases%209-1-11.pdf.

[122] *See* Application for Employment Authorization (Form I-765) pursuant to 8 C.F.R. § 274a.12(c)(8) from the Administrative Appeals Office (Dep't of Homeland Security Sept. 6, 2013) (non-precedent decision), *available at* http://www.aila.org/content/default.aspx?bc=9418|10567|45915.

[123] *Id*.

[124] *Id*. at 4 (citing Dees v. Billy, 394 F.3d 1290, 1294 (9th Cir. 2005)).

[125] 8 C.F.R. § 274.12(c)(14). To receive an EAD based on a grant of deferred action, an individual must demonstrate economic necessity.

[126] *See* EAD Clock Notice.

information for POCs is available on the Asylum Division Web page under "Asylum Employment Authorization and Clock Contacts."[127]

EOIR instructs all asylum applicants who believe the asylum EAD clock was erroneously calculated to direct questions to the immigration judge during the immigration hearing or to the court administrator after the hearing.[128] If the applicant believes the immigration judge has not adequately addressed the clock issue, EOIR directs the applicant to contact the Assistant Chief Immigration Judge for the appropriate immigration court in writing. For cases on appeal, applicants should contact EOIR's Office of General Counsel in writing. By directing applicants to OPPM 13-02: The Asylum Clock for additional instructions regarding review of the asylum EAD clock, EOIR has indicated that applicants should use the same process for review of asylum EAD clock errors as adjudications clock errors.

In OPPM 13-02: The Asylum Clock, EOIR describes in more detail steps applicants can take to resolve asylum EAD clock problems at different stages of proceedings:[129]

- During a hearing, applicants should address the issue to the judge, and the judge should address the issue *on the record* with the parties;

- After a hearing, the applicant should address the issue to the court administrator in writing;[130]

- If unsuccessful in addressing the asylum clock problem at the immigration court level, the applicant may contact the Assistant Chief Immigration Judge in writing;[131]

- For cases pending before the BIA, applicants who believe that more time should have accrued on the clock during initial proceedings before the immigration court may contact the EOIR Office of General Counsel by letter with a detailed explanation of why the clock appears to be incorrect.[132]

The following are additional suggestions for monitoring the asylum clock, and starting or restarting the asylum clock:

- **Determine the status of the asylum clock**. Many people discover that the clock has been stopped after attempting to apply for an EAD. Remember to check the status of a

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[127] See USCIS Webpage, "Employment Authorization Asylum Clock Contacts," *at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Employment_Authorization_and_Clock_Contacts_6_13_11_4.pdf

[128] *See* EAD Clock Notice.

[129] *See* OPPM 13-02: *The Asylum Clock*, at 15.

[130] Contact information for the court administrator for each court is available at http://www.usdoj.gov/eoir/sibpages/ICadr.htm.

[131] A list of the Assistant Chief Immigration Judges and their respective courts is available at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.

[132] *See* OPPM 13-02: *The Asylum Clock*, at 16.

client's clock according to the steps outlined above in Part II.8. Once the clock reaches 150 days, an attorney may immediately file Form I-765, the EAD application. USCIS then has 30 days to adjudicate the application.[133]

- **Review applicable adjournment codes**. If a clock has not reached 180 days, be aware of adjournment codes that may stop the clock at the next scheduled hearing. How an adjournment is coded likely will determine whether the clock is stopped. If there is more than one code to apply to the adjournment and at least one of these would allow the clock to run, argue that this is the code that should be applied. If the IJ does not offer to explain whether the asylum EAD clock will stop or continue to run at the conclusion of the hearing, ask the IJ to clarify the status of the EAD clock. It will be helpful to have the list of Adjournment Codes handy.[134]

- **Promptly complete the biometrics requirements and submit proof to the court showing compliance**. Where biometrics have not been completed before the first master calendar hearing, assure the court at the hearing that they will be completed before the next scheduled hearing. EOIR policy is that a failure to have completed biometrics will stop the clock only if it delays the scheduling of a hearing. Thus, where biometrics can be completed before the next regularly scheduled hearing – whether a master or individual merits hearing – the failure to have completed them at the first master calendar hearing should not be considered applicant-caused delay and should not stop the clock.[135]

- **Make arguments to the judge during the hearing.** In general, in cases where you do not believe there is applicant-caused or requested delay, you should argue your case. The case law, statutes and regulations are sparse; however, there are several arguments based on the regulations, as this Practice Advisory illustrates. Cite the applicable regulations and argue why there is no applicant-caused delay or why the applicant-caused delay no longer exists. Review the different actions that EOIR believes stop the clock, contest the adjournment code used to stop the clock and assert a different code that properly reflects the cause of the delay. Where an IJ or court administrator has failed to properly apply the current EOIR policies, explain how the policy should be applied.

  As EOIR advises in its own guidance, be sure to raise any clock issues during your client's hearing and ask the judge to address the issue *on the record* with the parties.[136] Although EOIR guidance advises parties against filing motions and advises IJs not to issue orders on motions, it does allow for judges to "respond" to motions.[137] The guidance states that if a judge receives a motion regarding the asylum clock, the judge should give a copy to the court administrator to resolve. In response to the motion, the guidance states that the judge "may issue a standard response" such as "The respondent's motion to restart the clock is an administrative request. Accordingly, it has been referred

[133] 8 C.F.R. §§ 208.7(b), 1208.7(b).
[134] *See* OPPM 13-03: *A.B.T. Settlement*, at Attachment B.
[135] *See* OPPM 13-02: *The Asylum Clock*, at 14.
[136] *Id*. at 8.
[137] *Id*. at 15-16.

to the court administrator for resolution."[138] The guidance directs the applicant's motion and the judge's response to be placed on the right side of the Record of Proceedings and directs the judge to serve the response on both parties.[139] Thus, by raising the clock issue at the hearing, you will ensure that there is a record of your complaint and that it is forwarded to the court administrator.

- **If you become aware of an asylum clock problem outside of a hearing, direct written arguments for why the clock should start to the court administrator**. EOIR guidance provides that after receiving an inquiry relating to the asylum clock, the court administrator should review the Record of Proceedings, EOIR's electronic database, and the hearing recording in order to resolve the asylum clock problem.[140] If necessary, the guidance directs the court administrator to discuss the purpose of any adjournments with the judge and to take corrective measures to ensure that the proper adjournment code was applied and that the asylum clock is accurate. In addition to submitting written guidance to the court administrator, it may be advisable to submit a motion to the immigration judge, especially if you do not receive a timely response from the court administrator.

- **File a motion to advance the hearing date**. Because EOIR's current policy is not to start or restart the clock between hearings, in cases where you concede the delay is applicant-caused or requested, you should file a motion to advance the next hearing date as soon as the delay has been cured.[141] If the motion is granted, the applicant's clock may be started or restarted at the earlier hearing date.

- **Review the *A.B.T. v. USCIS* proposed class definitions and the *A.B.T.* Settlement FAQs.**[142] If you are unable to resolve the clock-related issues through the steps described above please review the class definitions in *A.B.T.* Your client may be a member of one of the classes of asylum applicants that benefit from the Settlement Agreement. If you have questions please contact the LAC at Asylumclock@immcouncil.org or the NWIRP at Asylumclock@nwirp.org.

If you have questions or comments regarding this advisory, contact the Legal Action Center at asylumclock@immcouncil.org.

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[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *See* OPPM 13-02: *The Asylum Clock*, at 11.
[142] *See A.B.T.* Settlement FAQs, *available at* http://www.legalactioncenter.org/sites/default/files/FAQ%202-5-14%20FIN.pdf.