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EMPLOYMENT AUTHORIZATION AND ASYLUM: STRATEGIES TO AVOID STOPPING THE ASYLUM CLOCK

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I. INTRODUCTION

Applicants for asylum in the United States are not immediately or automatically granted employment authorization. Before receiving an employment authorization document (EAD),² an asylum applicant must wait for a final grant of asylum or for an application to remain pending for 180 days according to the “asylum clock.” The asylum clock tracks how many days are credited towards the time an asylum application has been pending, not counting any delay caused by the asylum applicant.

A general lack of transparency plagues the administration of the asylum clock. Immigration judges (IJs) and asylum officers (AOs) often fail to inform the noncitizen of the determination to stop the clock. Asylum applicants who are unaware that the IJ has stopped the clock may discover this fact weeks or sometimes months later when the DHS denies their application for employment authorization. Despite repeated requests by the American Immigration Lawyers Association (AILA) for IJs to make this determination on the record, the Executive Office for Immigration Review (EOIR) continues to maintain that it will not require IJs to make formal findings on the record when the clock is stopped.³

This practice advisory explains how the asylum clock works in theory and in practice. The advisory focuses on both EOIR's interpretations and implementation of the asylum EAD clock. It also explains where AILF disagrees with EOIR's interpretations and implementation.

A. EOIR Interpretation Problems

Interpretation problems occur when the IJ or AO follows EOIR policy, but where AILF believes the policy is contrary to the regulations. This usually happens when EOIR improperly determines that the applicant for asylum caused the delay. *See infra* Section V, EOIR Interpretations of the Asylum EAD Clock and AILF's Analysis. Another problem involves restarting the asylum clock. The regulations require that the IJ restart an asylum clock when a delay no longer exists, but in practice, the asylum clock is often improperly permanently stopped. For example, EOIR's interpretation implies that once there is a denial of asylum, the EAD clock is permanently stopped. However, the only time the asylum EAD clock is permanently stopped is when the applicant does not show

² “Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a)” to submit an application for EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). Sections 274a.12(c)(8) and 1274a.12(c)(8) include pending applications for asylum and withholding of removal. Applicants for deferral of removal under the Convention against Torture pursuant to 8 C.F.R. § 208.17 or 8 C.F.R. § 1208.17 are eligible to apply for an EAD once they receive a grant of deferral. 8 C.F.R. § 274a.12(c)(18); 8 C.F.R. § 1274a.12(c)(18); 8 C.F.R. § 241.5(c) (permitting the DHS, in its discretion, to grant work authorization to people with a final order of removal who are released on an order of supervision).

³ *See* Appendix, EOIR/AILA Liaison Agenda Question 2, March 7, 2002; EOIR/AILA Liaison Agenda Question 4, March 16, 2005.

exceptional circumstances for failing to attend an interview at the asylum office or the hearing at immigration court. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).

B. EOIR Implementation Problems

Implementation problems occur when the IJ stops the clock contrary to EOIR policy. A common problem occurs when testimony at the asylum hearing could not be completed in the allotted time.⁴ EOIR policy states that adjourning because the case could not be completed in the time allotted should not stop the clock.⁵ However, IJs are improperly stopping the clock, finding that the respondent is the cause for the delay. In response, in liaison meetings with AILA, 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.”⁶

This practice advisory suggests arguments attorneys representing asylum applicants before an AO or respondents in immigration court proceedings can use to: 1) prevent the AO or IJ from stopping the clock or 2) convince the IJ or AO to restart a stopped clock. EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the issue arises after the hearing, the respondent should file a written motion with the IJ.⁷ *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

II. THE TWO ASYLUM CLOCKS

- Asylum Adjudication clock: The asylum adjudication clock measures the number of days an asylum application has been pending adjudication: “[I]n 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.” INA § 208(d)(5)(A)(iii).
- Asylum EAD clock: The asylum EAD clock also measures the number of days after submission of an asylum application that must elapse before the applicant may be provided an EAD. “An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An 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.” INA § 208(d)(2).

⁴ *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁵ Under the current adjournment codes, continuing the hearing in this circumstance should be a code 13, which would not stop the clock. *See* EOIR Operating Policies and Procedures Memorandum (OPPM) OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁶ *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁷ *Id.*

Different events may stop either the asylum adjudications clock or both the asylum adjudications clock and asylum EAD clock.⁸ This advisory focuses on the asylum EAD clock.

III. HOW DID THE ASYLUM EAD CLOCK DEVELOP?

- Prior to 1994, applicants could file for asylum and an EAD concurrently, and asylum officers could authorize employment for up to one year. The Immigration and Naturalization Service (INS) could renew the EAD and even if an asylum application was denied, the district director could grant further employment authorization. 8 C.F.R. § 208.7 (1991).
- In 1994, the government amended the regulations to require asylum applicants to wait 150 days after submitting a completed asylum application before applying for an EAD. The INS then had 30 days to adjudicate the EAD application. 59 Fed. Reg. 62,289-90 (Dec. 5, 1994) *codified at* 8 C.F.R. § 208.7 (1994).
- In 1996, Congress amended the INA by adding the 180-day waiting period for EAD purposes and implemented the 180-day period to adjudicate asylum applications. *See* Sec. 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (amending INA § 208).

IV. HOW DOES THE ASYLUM EAD CLOCK AFFECT WORK AUTHORIZATION?

- The clock starts on the date that the applicant submits a complete asylum application in accordance with 8 C.F.R. §§ 208.3 and 208.4. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- Once the asylum EAD clock reaches 150 days, the asylum applicant may apply for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- An asylum officer may grant, deny, refer or dismiss an asylum application. 8 C.F.R. § 208.14(b) & (c); 8 C.F.R. § 1208.14(b) & (c). Only a *denial* of an asylum application makes the applicant ineligible for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).⁹ A *referral* to the immigration court by an asylum officer is not a denial.

⁸ EOIR outlines its interpretation of how different events stop either the asylum EAD clock or the asylum adjudications clock. *See* OPPM 05-07: Definitions and Use of Adjourment, Call-up and Case Identification Codes, *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁹ An asylum officer may deny asylum to a person who “is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status” or who was “paroled into the United States and

8 C.F.R. § 208.14(c); 8 C.F.R. § 1208.14(c). Therefore, while a denial will stop the clock, a referral to the immigration court will not. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).¹⁰

- After the applicant has filed an application for an EAD, the U.S. Citizenship and Immigration Services (CIS) has 30 days from the date of the filing to grant or deny the EAD application. CIS cannot grant the application before the asylum clock has reached 180 days after the initial filing of the asylum application. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- The regulations state that “(a)n applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization.” 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). In addition, the regulations say that if an asylum application is denied while an application for employment authorization is pending with the CIS, the employment authorization application will be denied. *Id.* However, respondents who have received an EAD and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.¹¹ If the IJ grants asylum and the DHS appeals, the respondent may be granted an EAD pursuant to 8 C.F.R. § 274a.12(c)(8)(ii). The EAD is renewable during the appeals process, including judicial review. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b). 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. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).
- The asylum clock does not apply to a person who filed an asylum application prior to January 4, 1995, or whose asylum application has been recommended for approval.¹² 8 C.F.R. § 208.7(a)(1) & (3); 8 C.F.R. § 1208.7(a)(1) & (3).

the parole has not expired or been terminated.” 8 C.F.R. § 208.14(c)(2) and (3); 8 C.F.R. § 1208.14(c)(2) and (3).

¹⁰ If charging documents may not be issued, an asylum officer shall dismiss an application instead of referring the case to immigration court. 8 C.F.R. § 208.14(c)(1), 8 C.F.R. § 1208.14(c)(1). With no pending asylum application, the asylum clock does not apply.

¹¹ If the respondent received the EAD while the 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. 8 C.F.R. § 208.7(b)(1); 8 C.F.R. § 1208.7(b)(1). If the application is denied by the IJ or BIA, the EAD terminates when the EAD expires. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).

¹² If the applicant receives a letter of recommendation for asylum from the asylum office, but has not received the approval notice, the applicant may apply for an EAD under 8 C.F.R. § 274a.12(c)(8)(ii).

V. HOW IS THE ASYLUM EAD CLOCK STOPPED?

- A delay in the adjudication “caused” by the asylum applicant will stop the clock only during the time the delay exists: “Any delay requested or caused by the applicant shall not be counted as part of these time periods.” 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).
- 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. *Id.* The time between the issuance of a request for evidence and the receipt of a response to that request also is excluded. *Id.* Additionally, the period during which the applicant fails to appear to receive the decision of the asylum officer will not be counted towards the 180 days. 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d). The asylum clock restarts when the applicant “does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(c) [or § 1208.14(c)].” 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d).
- The clock permanently stops if an asylum applicant fails to appear for an interview with an asylum officer or for a hearing before an IJ unless the applicant demonstrates that the failure to appear was due to exceptional circumstances. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).
- EOIR’s adjournment codes reflect the agency’s interpretation of what stops the clock.¹³ The chart of codes lists whether an adjournment is “alien-related” or “DHS-related” or “IJ-related” or “Operational.” An “alien-related” adjournment stops both the asylum EAD clock and the asylum adjudications clock.¹⁴
- IJs enter the adjournment code on a worksheet that is not part of the administrative record. The information on the worksheet is then recorded in the court’s computer system.

VI. EOIR INTERPRETATIONS OF THE ASYLUM EAD CLOCK AND AILF’S ANALYSIS

This section explains EOIR’s interpretations of what constitutes a “delay caused or requested by the applicant” and when the delay ends. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). This section also includes AILF’s analysis to the government’s interpretations. To resolve asylum EAD clock problems, a respondent may file a motion with the court. *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

¹³ *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

¹⁴ *Id.* at Adjournment Codes Appendix.

A. Respondent's Rejection of the "Next Available" Hearing Date

Many attorneys and unrepresented respondents, without realizing the consequences, reject the earliest available hearing date offered by the IJ. IJs stop the clock when respondents decline to take the next "open date" on the court's calendar, reasoning that the rejection of the proposed hearing date is an "alien caused delay."¹⁵

Even if an attorney accepts the date offered by the IJ, a clerk may later call the attorney and offer a hearing date in the very near future. If the attorney rejects this new date, EOIR takes the position that this refusal stops the clock.

When AILA suggested that rejecting the first available hearing date should not always be a delay caused by the respondent, EOIR stated: "We do not agree with your contention that attorney conflicts should not constitute 'alien caused delays.' An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered 'alien caused delays.'"¹⁶

EOIR has insisted that IJs must have flexibility to schedule asylum hearings in order to adjudicate cases within the 180 days mandated by the statute. In response to AILA's suggestion that there be a mandatory time period before a hearing date, EOIR stated: "[a] requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system."¹⁷

AILF's Analysis

Apart from the question whether an attorney's time conflict constitutes a delay caused by the applicant, AILF believes that if counsel does not accept a hearing date that would be within 14 days of an initial Master Calendar (MC) hearing, the resulting delay *should* not be charged to the respondent.¹⁸ EOIR policy states that the respondent should only be charged with the delay when the rejected date is "not less than 14 days from the date of the Master Calendar."¹⁹ EOIR written policy also states that a merits hearing should not be scheduled within 14 days of the MC unless failing to schedule the hearing in this time period would prevent adjudication of the

¹⁵ See Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000. However, accepting another hearing date within 24 hours of the hearing date that the IJ first offered will not stop the clock. See Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, page 9.

¹⁶ See Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000.

¹⁷ *Id.*

¹⁸ Instead, this should be coded as an adjournment from a master calendar to an individual calendar, current code 17, which would not stop the clock. See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

¹⁹ See Revised OPPM No. 00-01, Asylum Request Processing, Revised August 4, 2000, page 9 *available at* <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

asylum application within 180 days.²⁰ Therefore, an applicant may argue that scheduling a MC to an individual hearing does not stop the clock. Additionally, EOIR policy advises the IJs to be aware of due process concerns.²¹

Even if the court stops the clock because the applicant refuses the next available hearing date, the clock should be restarted at the next hearing, because the delay would no longer exist. 8 C.F.R. § 1208.7(a)(2).

B. Filing a Defensive Asylum Application

The asylum clock applies to defensive asylum applications, that is, applications filed with the immigration court in the first instance as a defense to removal. The EAD provisions contained in 8 C.F.R. § 1208.7(a)(1) refer to the filing procedures for asylum applications in 8 C.F.R. § 1208.4(b)(3) & (4), which include filing a complete asylum application with the immigration court or Board of Immigration Appeals (BIA).²² Although the Department of Homeland Security (DHS) allows for submission of the affirmative asylum application by mail, EOIR policy only permits a respondent to file a defensive application for asylum at a hearing.²³

Under this EOIR policy, respondents may not file the asylum application during the time between two master calendar hearings or between a master calendar and an individual hearing. Respondents must wait for the next scheduled hearing to file their applications.

AILF's Analysis

Because the asylum EAD clock does not start until the respondent files a completed application, this policy unnecessarily prolongs the time until the clock will start. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). AILF believes this policy is subject to challenge.

C. Disputes about Timely Production of Biometrics

Before adjudication of an asylum application, DHS must complete a biometrics check.²⁴ 8 C.F.R. § 1003.47(a). Section 208(d)(5)(A)(i) of the INA prohibits an AO or IJ from granting asylum until DHS completes a background check. Failure to comply with the fingerprinting

²⁰ *Id.* at Page 8.

²¹ See Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 4 available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

²² An asylum application filed with the BIA would only involve a motion to remand or a motion to reopen.

²³ See Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 15 available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

²⁴ As of January 2005, biometrics included “digital fingerprints, photographs and, signature, and in the future may include other digital technology that can assist in determining an individual's identity and conducting background investigations.” See 70 Fed. Reg. 4743, n.2 (Jan. 31, 2005).

requirements without good cause may lead to dismissal of the application. 8 C.F.R. § 208.10; 8 C.F.R. § 1208.10. For work authorization purposes, the regulations provide that a “delay requested or caused by the applicant” may include “delays caused by failure without good cause to follow the requirements for fingerprint processing.” 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). EOIR takes the position that if the IJ adjourns a case “to allow alien time to complete the required paperwork for a biometrics check or an overseas investigation,” the clock stops.²⁵ EOIR justified this position by citing the supplementary information to its January 2005 Background and Security Investigations Interim Rule.²⁶ This rule assigns the responsibility for providing biometrics or other biographical information to the respondent. EOIR has said that once the person has satisfied the biometrics requirements, the clock may be restarted. The respondent may notify the court that he or she did provide the requisite biometrics information and file a motion to restart the clock. *See infra* Section VIII.

AILF's Analysis

AILF believes that allowing time for a respondent to comply with the biometrics requirement is not a delay caused or requested by the respondent. 8 C.F.R. § 1208.7(a)(2). In fact, the regulations support an interpretation that the respondent should not be charged with the delay unless and until he or she is notified of the obligation to provide biometrics information and fails to comply in a timely manner. By regulation, DHS is required to provide the respondent with notice of the biometrics requirements and instructions for the procedures. 8 C.F.R. § 1003.47(d).²⁷ The applicant must comply with the biometrics requirements “before or as soon as practicable after the filing of the application for relief in the immigration proceedings.” *Id.* Also, 8 C.F.R. § 1208.7(a)(2) states that the clock stops during “delays caused by failure without good cause to follow the requirements for fingerprint processing.” Therefore, under the regulations, the time it takes to comply with the biometrics information does not result in a respondent-created delay. Rather, the respondent should be charged with the delay only if he or she does not comply in a timely manner.

²⁵ A delay by the respondent relating to biometrics data currently is code 36. If the IJ adjourns a case to allow DHS time to complete the biometrics check, it is code 37 and the respondent will not be charged with the delay. *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at*: <http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-07.pdf>.

²⁶ *See* Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005 (EOIR explained that in the supplement to the background check regulation, a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner). *See* 70 Fed Reg. 4743, 4745 (Jan. 31, 2005).

²⁷ Once a person files or indicates an intention to file an application for relief, DHS “shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures.” 8 C.F.R. § 1003.47(d).

If DHS seeks a continuance due to a pending background check, the delay should be charged to DHS and the EAD clock should continue to run.²⁸ If the respondent joins in the request for a continuance, the delay will be charged to the respondent and the clock will stop.²⁹ If the respondent opposes or takes no position on the request for a continuance, the DHS should be charged with the delay.

D. Request for Evidence

A request for evidence may be issued if “the evidence submitted either does not fully establish eligibility” or “raises underlying questions regarding eligibility” for asylum. 8 C.F.R. § 103.2(b)(8). The regulations 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.” 8 C.F.R. § 208.7(a)(2). In practice, this means that a request for evidence is an action that will cause the clock to stop.

AILF's Analysis

As soon as the applicant submits the requested evidence, the delay no longer exists and the AO or IJ should restart the clock immediately. 8 C.F.R. § 208.7(a)(2).

E. Delays for Additional Evidence or Amending Asylum Application

The clock starts when a completed application is filed. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).³⁰ A complete asylum application must: 1) have all the boxes checked, 2) be signed, and 3) include additional supporting evidence as required on the application instructions.³¹ 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). If the application has not been returned to the applicant within 30 days, it is deemed complete. 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). 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. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

In removal proceedings, after the respondent files an asylum application, the IJ may continue the case for a second MC hearing to receive evidence or an updated affidavit instead of scheduling an individual hearing. In this scenario, EOIR policy is to stop the clock even though

²⁸ Currently code 37. See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

²⁹ Currently code 45. *Id.*

³⁰ This includes defensive asylum applications. See 8 C.F.R. § 1208.7(a)(1) and 8 C.F.R. § 1208.4(b)(3) & (4).

³¹ The current version of the asylum application is dated 7/3/03. However, DHS still accepts the 10/18/01 version. Therefore, submitting the 10/18/01 version should not stop the clock.

the respondent did not request the second MC.³² EOIR has stated that in such a situation, the respondent has caused the delay “by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing.”³³ EOIR stated that “[i]t is the alien who is asking for a benefit here—that of amending or updating his or her application. Consequently, it is an alien caused delay.”³⁴

AILF's Analysis

AILF believes that if a respondent submits additional information to the immigration court in advance of a hearing and does not cause a delay, the clock should not stop. If the respondent requests additional time to submit supplemental materials, the clock should stop only during the delay and should restart as soon as the delay no longer exists. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

F. Contesting the Charges, Filing for Other Forms of Relief

EOIR policy states that the clock stops if a respondent contests the charges of removability contained in the Notice to Appear.³⁵

AILF's Analysis

AILF believes this interpretation may be subject to challenge based on arguments about DHS's burden of proof. *See* INA § 240(c), 8 C.F.R. § 1240.8. Even if the EAD clock does stop, it should stop only until the IJ makes a determination on the allegations and the charges, then the clock should restart. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).

Additionally, EOIR policy states that the clock is stopped when a respondent files for other forms of relief.³⁶ However, 8 C.F.R. § 208.7(a)(2) stops the asylum EAD clock only for any delay in the adjudication of the asylum application caused or requested by the respondent. Filing for another form of relief, on its own, does not delay the adjudication of the asylum application, as the asylum application may be adjudicated before the IJ addresses any other relief requested.

³² *See* Appendix 2, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.

³³ *Id.*

³⁴ *Id.*

³⁵ Currently code 51, *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

³⁶ Currently code 6, *Id.*

G. Reopening a Case

An EOIR policy memorandum gives IJs three “options” for setting the asylum clock after the IJ has granted a motion to reopen:

- 1) Restart the clock after granting the motion to reopen.

EOIR suggests IJs choose the first option of not restarting the clock when reopening is based on a document that “was previously unavailable.” EOIR notes that the IJ can restart the clock at the first master calendar.

- 2) “Roll back” the clock and restart it from the date the IJ issued the final order, as if the clock never stopped from the denial of asylum to the granting of the motion to reopen.

EOIR states that IJs should use this second option when the respondent did not cause the delay. 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 the motion to reopen is granted.³⁷

EOIR suggests IJs use the third option of restarting the clock when the motion was granted when proceedings are reopened based on changed country conditions.

AILF's Analysis

In response to the first option, AILF believes that if the document previously was unavailable to the respondent, the respondent has not caused the delay. Furthermore, EOIR's position is undermined by the fact that once the BIA or IJ reopens a case after the IJ denied asylum, there is no longer an order denying the asylum application. See *Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005) (the grant of a motion to reopen vacates the previous voluntary departure order and therefore INA § 240B(d) does not continue to operate); *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings.); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (the BIA's granting of the motion to reopen means there is no longer a final decision to review); *Excellent v. Ashcroft*, 359 F. Supp. 2d 333, 335 (S.D.N.Y. 2005) (same). Therefore, the IJ should treat the asylum EAD clock as never having stopped by restarting the clock from the date the final order was given. That is, the IJ should “credit” all the time that elapsed since the original order denying asylum because a valid order denying asylum no longer exists.

³⁷ See Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, pages 6-7, available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

AILF agrees with EOIR's interpretation of the second option, but disagrees that the scope is so narrow. AILF believes this interpretation is applicable to more scenarios than EOIR's example of the *in absentia* context.

Regarding the third option, AILF believes that while the adjudications asylum clock should not be reset, the IJ should credit all the time since the original order denying asylum on the asylum EAD clock, based on same arguments discussed above to counter the first option.

H. Remands from the BIA

EOIR takes the position that if the BIA remands a case to the IJ, the remand does not restart the clock.³⁸ In support of this position, EOIR cites INA § 208(d)(5)(A)(iii), which 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.

INA § 208(d)(5)(A)(iii).

AILF's Analysis

AILF does not believe this statutory provision provides support for EOIR's position on remanded cases. First, section 208(d)(5)(A)(iii) of the INA describes the timeline for adjudication of the asylum application, not work authorization. Work authorization is addressed separately in the statute. Section 208(d)(2) of the INA prohibits an asylum applicant from receiving work authorization within 180 days of filing the application. Although both sections of the statute have 180 day requirements, this does not link the two asylum clocks together. Additionally, EOIR policy treats the two clocks as separate by stating that different actions can stop just the asylum adjudications clock or both the asylum EAD clock and the asylum adjudications clock.³⁹

Further, once on remand, a case is no longer on appeal and there is no final order. Reversal of a denied asylum application means that no denial exists and the person is put in the status he or she was in before the order denying asylum was issued. *Cf. Matter of Lok*, 18 I&N Dec. 101 (BIA 1981); (reversal of deportation order nullifies the order and restores the alien's lawful permanent resident status); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987) (same); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996) (court reversal of a BIA order of deportation nullifies the order); *Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993) (same). Although the EAD clock stops upon the denial of an asylum application, 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1), with no order denying asylum in effect, there is no bar to applying for work authorization. In such a situation, the clock should not be *restarted*, but rather should be treated as never having stopped.

³⁸ See Appendix 2, AILA-EOIR Liaison Agenda Question 1, October 17, 2005.

³⁹ See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

The time should be recalculated from the date of the first order denying asylum. The IJ should “credit” all the time that elapsed since the original order denying asylum.

VII. WHAT HAS EOIR SAID ABOUT RESOLVING ASYLUM EAD CLOCK DISPUTES?

- Currently, EOIR has identified two tracks for a respondent to pursue to restart a stopped clock. A respondent or attorney may (1) contact the court administrator, and/or (2) file a motion with the immigration court.⁴⁰ EOIR says that “[w]hen a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay.”⁴¹
- EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the issue arises after the hearing, the respondent should file a written motion with the IJ.⁴² EOIR said that the Office of the Chief Immigration Judge has no authority to overrule an IJ’s decision.
- EOIR also has suggested that a respondent who thinks the clock has been improperly stopped due to a data entry error contact the court administrator by mail.⁴³ If the court administrator fails to timely respond or provides an unsatisfactory response, EOIR suggests contacting the assistant chief immigration judge at EOIR headquarters.⁴⁴ If a case is pending at the BIA, EOIR’s Office of General Counsel may be contacted.⁴⁵

VIII. ACTIONS AN ATTORNEY COULD TAKE TO RESTART THE ASYLUM EAD CLOCK OR PREVENT IT FROM STOPPING

- Once the clock reaches 150 days, immediately file the I-765, the EAD application. CIS then has 30 days to adjudicate the application. If the EAD is approved while the application is pending before the asylum office, the EAD may be renewed even if the case is later referred to the Immigration Court and while it is appealed to the BIA. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b).

⁴⁰ Contact information for the court administrator for each court is available at: <http://www.usdoj.gov/eoir/sibpages/ICadr.htm>.

⁴¹ See Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

⁴² See Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁴³ See Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005.

⁴⁴ See Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005. A list of the Assistant Chief Immigration Judges and their respective territory is *available at* <http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm>.

⁴⁵ See Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005; AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

- Be aware of the code. How an adjournment is coded likely will determine whether the clock is stopped. If there are a variety of possibilities as to how to code the adjournment, assert that the clock is stopped based on an event that will not charge the respondent with delay. During the hearing, ask the IJ to indicate on the record the code used for continuing the case. It may be helpful to bring the list of codes to the hearing.⁴⁶
- Where a respondent failed to attend an asylum interview or a hearing at the immigration court due to exceptional circumstances, the clock should not stop. If the case is before the IJ, the respondent may file a motion citing 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4) and demonstrate exceptional circumstances.
- Comply with the biometrics requirements. Promptly complete the biometrics requirements and submit proof to the court showing compliance. Even if there was a respondent caused delay (see discussion of biometrics above), as soon as the respondent has met the biometrics requirements, he or she may notify the IJ and request that the clock be restarted. EOIR says a respondent “may file a motion to inform the immigration judge that he or she has provided the requisite biometrics.”⁴⁷ EOIR says this will “allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.”⁴⁸ In addition, or in the alternative, EOIR has said that the respondent may send a letter to the court administrator.⁴⁹
- Monitor the status of the clock. Many people discover that the clock has been stopped after attempting to file for an EAD. Respondents may check the status of the clock at any time by calling EOIR’s Automated Status Query System at 1-800-898-7180. According to EOIR, the 800-number is updated within the next day whenever there is a change to the clock.⁵⁰
- Make a record: file a motion to restart the clock and argue your case. The clock stopping guidelines are confusing to IJs, court staff, attorneys, respondents, and the DHS. The case law, statutes and regulations are sparse; however, there are strong 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 to assert a code that properly reflects the cause of the delay.
- This motion, like any other motion, must be adjudicated. Since motions fall under the case completion goals for EOIR, the adjudication should be timely. Also, filing a

⁴⁶ See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁴⁷ See Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005.

⁴⁸ *Id.*

⁴⁹ See Appendix, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.

⁵⁰ See Appendix, AILA-EOIR Liaison Agenda Question 4, March 16, 2005.

motion and making an argument will ensure the issue is in the administrative record for possible review by the BIA and/or federal court.

- Appeal clock-related issues to the BIA. The BIA has not yet ruled on whether it will consider EAD clock issues on interlocutory or direct appeal. It could be argued that stopping the clock is a legal determination and an application of the regulations, so the BIA would be able to entertain such an appeal under 8 C.F.R. § 1003.1(b)(9) (relating to IJ decisions regarding asylum). The BIA has noted that the IJ has the authority to determine who caused a delay in processing an asylum case. *Matter of Hernandez*, 21 I&N Dec. 224, 228, n.2 (BIA 1996).

If you have questions or comments regarding this advisory, or current clients adversely affected by the asylum clock, contact Matt Downer at mdowner@aifl.org.

Appendix
Selected AILA-EOIR Liaison Notes on the Asylum Clock⁵¹

March 30, 2000, AILA-EOIR Liaison Meeting

11. *As you know, when an asylum case is proceeding before an immigration judge, the IJ stops the clock for purposes of employment authorization if the alien requests a continuance. Could EOIR issue instructions to IJs regarding the interpretation of this requirement? At present, some IJs stop the clock whenever alien's counsel is "unavailable" for the next "open date" on the court's calendar. Often the next "open date" is so soon that it is not realistic or just to expect that the alien or his or her advocate could be prepared to present the hearing on merits. We suggest the IJ offer a date that is no sooner than 30 days after the Master Calendar hearing.*

Also, if the attorney is "unavailable" because of a conflict with another EOIR hearing or interviews with the INS, this should not be considered an as alien-requested continuance.

Some IJs say that they are required to offer the soonest available date. Is there an instruction from EOIR to this effect? If so, could we obtain a copy of it?

RESPONSE

OPPM 97-6: Definitions and Use of Adjournment and Call-up Codes covers the use of adjournment codes in Immigration Court, as attached (for a list of OPPM's available on the agency's website, click [here](#)). There are no instructions which require an Immigration Judge to offer the earliest available date. One adjournment code which is considered an "alien-caused delay" is a rejection of the original hearing date. Immigration Judges must be given the flexibility to schedule asylum cases. Under section 208(d)(5)(A)(iii) of the Immigration and Nationality Act, in the absence of exceptional circumstances, final administrative adjudication of an asylum application shall be completed within 180 days after the application is filed. This statutory requirement may be an important consideration in scheduling asylum cases. Any policies cannot detract from the ability to meet this important statutory goal. A requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system.

We do not agree with your contention that attorney conflicts should not constitute "alien caused delays." An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered "alien caused delays."

⁵¹ Complete AILA-EOIR Liaison Agenda Questions available at <http://www.usdoj.gov/eoir/statspub.htm>.

March 7, 2002, AILA-EOIR Liaison Meeting

2. *Will EOIR request that Immigration Judges make formal findings on the record when the "clock" is stopped during the pendency of an asylum application through no fault of the alien? When there is no indication as to why the clock has stopped, who should we deal with at EOIR?*

RESPONSE

All continuances must be accurately assigned to the appropriate requesting party. The clock is tolled (stopped) for any alien caused delay. The clock remains stopped for the total number of days during which the delay continues. Immigration Judges must continue to give due consideration to requests from all parties for adequate time to prepare and to present their cases at the individual hearing. For further guidance on this issue, please see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

EOIR will not require Immigration Judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. If there is a question regarding the clock, please contact the Court Administrator. If the issue cannot be resolved at that level, then you may contact Loreto Geisse, Counsel to the Chief Immigration Judge, at: (703) 305-1247.

March 27, 2003, AILA-EOIR Liaison Meeting

8. *At the March 2002 EOIR liaison meeting, AILA inquired whether IJs would be required to state on the record the code for the "asylum clock" and to whom the continuance is attributable. There remain additional problems with the clock and the rights of asylum seekers to obtain an employment authorization document (EAD) which the OCIJ Operating Policy and Procedures Memoranda (OPPM) do not address.*

--There are times when an asylum hearing is not completed because the length of the testimony does not fit within the allotted time, even where the alien has requested a longer time slot. The clock remains stopped even when this is not the alien's fault.

--There are times when an IJ will continue the case for a second Master Calendar Hearing (MCH) after the filing of the I-589 to receive "evidence" or an updated affidavit at the second MCH when those items could be filed at a date prior to the Individual Hearing (IH). The clock remains stopped even though the alien did not request the second MCH.

(a) Will OCIJ issue further instructions on the clock to deal with these and other circumstances that keep arising?

RESPONSE

The OCIJ is constantly examining its policies and directives to the field in order to address issues that arise. This includes policies regarding the issue of asylum clocks. In the first example, the clock should not be stopped unless the reason why the hearing was protracted was due to the alien's actions. In the second example, the clock should be stopped, as the alien is causing the delay by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing. It is the alien who is asking for a benefit here—that of amending or updating his or her application. Consequently, it is an alien caused delay.

(b) What recourse do aliens have if they believe the clock has been improperly stopped? If the recourse is to file a motion to restart the clock, and it is denied, will OCIJ review that decision of the IJ?

RESPONSE

While cases are pending before the Immigration Court, an alien can contact the Court Administrator, by mail, if they believe that their asylum clock has been improperly stopped due to a data input error (e.g., the legal technician has entered into the system an incorrect code). If it cannot be corrected in a timely manner, please contact OCIJ headquarters. For concerns regarding the IJ's determination to whom the delay will be attributed, the parties should make their arguments at the hearing. If the issue arises after the hearing, please file a written motion with the Judge. Please note, however, that the OCIJ has no authority to overrule an IJ's decision.

(c) In its March 2002 response, EOIR advised AILA to contact the court administrator with regard to clock problems. Do you really want court administrators to deal with these matters on a case by case basis and, if not satisfied, to contact OCIJ?

RESPONSE

Yes.

March 16, 2005, AILA-EOIR Liaison Meeting

3. Members continue to have problems with the setting and resetting of the asylum clock for applicants in proceedings. On a case that is remanded or reopened, under what circumstances should the clock be restarted or reset where an asylum application has already been tendered and the clock "stopped" by some intervening event?

RESPONSE

If a motion to reopen is granted, and the decision on the asylum application was a grant, deny, or other, the ANSIR system displays the following three clock options: (1) restart the clock from the IJ completion date, (2) restart the clock from the motion to reopen completion date, (3)

do not restart the clock. For specific details, see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum (OPPM) 00-01, "Asylum Request Processing," available at <http://www.usdoj.gov/coir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>. Based on the immigration judge's selection, the clock will then be recalculated or will continue to be stopped. With respect to remands, OCIJ is currently reviewing clock issues and the ANSIR system and will provide further guidance at a later date.

If a practitioner disagrees with the clock setting, the first step is to try to resolve the concern locally with either the court administrator or the immigration judge and thereafter with the Assistant Chief Immigration Judge having jurisdiction over the particular court. However, if at any point the result is unsatisfactory and the case is on appeal to the Board, the request should instead be directed in writing to the Office of General Counsel. See <http://www.usdoj.gov/coir/sibpages/ICadr.htm> for contact information, a list of the Immigration Courts, and the link to the list of areas of responsibility and jurisdiction of the Assistant Chief Immigration Judges.

4. Members continue to report confusion by the bar and Respondents as to whether and when the clock has been stopped and on what basis, only finding out weeks or months later when an application for an EAD is denied due to a stopped clock. Will EOIR reconsider requiring Immigration Judges to inform Respondents when their actions have resulted in stopping the clock for asylum purposes? [A similar question was asked in the March 7, 2002 Agenda Questions (#2). See <http://www.usdoj.gov/coir/statspub/eoiraila0203.htm>. Asylum clock questions were also raised in the March 27, 2003 (#8) and March 30, 2000 (#11) Agenda Questions.]

RESPONSE

EOIR will not require immigration judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. For further guidance on which actions will stop the clock, see the Office of the Chief Immigration Judge's OPPM 03-03, titled "Definitions and Use of Adjournment, Call-up and Case Identification Codes," available at <http://www.usdoj.gov/coir/efoia/ocij/OPPMLG2.htm>.

Moreover, the status of the clock can be checked at any time by calling EOIR's Automated Status Query System at 1-800-898-7180. Whenever there is a change to the clock, the 800-number is updated within the next day.

October 17, 2005, AILA-EOIR Liaison Meeting

1. At the last liaison meeting held on March 16, 2005, OCIJ stated that it was reviewing the clock stopping provisions as they relate to asylum cases that are remanded or reopened and would provide guidance at a later date. Has this issue been resolved and if so, how? If OCIJ has not yet addressed the issue, when does it anticipate resolving this issue?

RESPONSE:

Since the March 16, 2005, liaison meeting, the Office of the Chief Immigration Judge (OCIJ) has reviewed the issue of the clock and remands. When the Board of Immigration Appeals (Board) remands an asylum case to an immigration judge, the immigration judge does not restart or reset the asylum clock. OCIJ has considered the propriety of restarting or resetting the asylum clock and concluded that the clock would not restart upon remand. In reaching that conclusion, OCIJ relied on section 208(d)(5)(A)(iii) of the Immigration and Nationality Act. That section provides that 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. When an immigration judge enters an order, the immigration judge stops the clock. Thus, if the immigration judge denied an asylum application on day 160, the clock would remain on day 160 while the case was on appeal and during any further proceedings.

2. *At the AILA Annual Conference in Salt Lake City, EOIR commented that the new biometrics regulation would result in stopping the clock in expedited asylum cases between an initial master calendar and the next. Given the time in receipting in applications before the court and obtaining biometrics appointments, such a policy could result in a delay of three to four months. Please comment on the exact policy and mechanism that EOIR anticipates an asylum seeker in proceedings to follow in order to comply with the biometrics requirements, and their impact on the clock.*

RESPONSE:

When adjourning a hearing and scheduling the next, immigration judges consider the reason for the delay and properly attribute the delay to the respondent or the Department of Homeland Security. As explained in the supplement to the background check regulation, **a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner.** See 70 Fed Reg. 4743, 4745 (Jan. 31, 2005). Therefore, when an immigration judge adjourns a case to allow the respondent time to complete the necessary paperwork or other requirements for the background investigations and security checks, the delay is attributed to the alien. Conversely, if DHS needs time to complete the background investigations and security checks, the delay is properly attributed to the government.

Because the Executive Office for Immigration Review (EOIR) has no role in the provision of biometrics or the processing of background checks, an immigration judge does not know whether a respondent has complied with the regulation. Therefore, an immigration judge generally learns that a respondent has complied during the next scheduled hearing. However, a respondent may file a motion to inform the immigration judge that he or she has provided the requisite biometrics. A motion reflecting the alien's compliance with the regulation would allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.

3. *Despite the recent instruction regarding procedures for restarting or correcting the asylum clock, many members report that the issues are not being resolved even when following*

the steps noted in prior liaison minutes. Court administrators and immigration judges alike are telling respondents that they have no power over the issue and inquiries to both OCIJ and the Board remain unanswered after up to two months. Will EOIR review its procedures or revise its liaison instructions for resolving such cases?

RESPONSE:

EOIR agrees that asylum clock questions generally should not require two months for review. Any specific information that AILA can provide about cases illustrating delay may assist EOIR in identifying the source of any delay. In the event a court administrator or immigration judge has declined to respond to an asylum clock inquiry, if AILA provides the A number, OCIJ is willing to look into the matter. Please contact the Assistant Chief Immigration Judge (ACIJ) with control over the relevant geographic location. A list of the ACIJ's and their respective territory is available at <http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm>.

When a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay. OCIJ recently reminded court administrators and immigration judges about the importance of addressing asylum clock issues. In particular, court administrators were reminded that they had the responsibility for reviewing and addressing such inquiries in consultation with the immigration judges.

When a case is pending at the Board, asylum clock questions should be directed to the attention of the Office of General Counsel (OGC), who works with OCIJ to respond appropriately to the clock inquiry. Practitioners interested in additional information about the asylum clock and asylum clock inquiries may consult question 3 of the AILA-EOIR liaison agenda questions dated March 16, 2005, available at <http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf>.



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Via Certified Mail/Return Receipt Requested

June 5, 2011

US Department of Homeland Security
 US Citizenship & Immigration Services
 P.O. Box 21281
 Phoenix, AZ 85036

SAMPLE

Re: **Initial Employment Authorization Application for Asylum**
Applicant: Margaret DOE, A# 012-345-678

Dear Sir or Madam:

On behalf of the above asylum applicant, I am enclosing an initial application for employment authorization. Attached to the Form I-765, please find the following:

- 1) Form G-1145, E-Notification of Application/Petition Acceptance
- 2) Two passport size photographs
- 3) Form G-28, Notice of Entry of Appearance as Attorney
- 4) Copy of Receipt of Asylum Application
- 5) Copy of Notice of Hearing in Los Angeles Immigration Court

I am not enclosing a filing fee, as this is Ms. Doe's initial employment authorization request.

If you need any additional information to process this application, please advise.

Very truly yours,

K. Werth

Katka Werth
 Staff Attorney
 Immigrants' Rights Project
 (213) 385-2977, ext. 126

Enclosures

Form G-1145, E-Notification of Application/Petition Acceptance

Department of Homeland Security
U.S. Citizenship and Immigration Services

Who Can Receive E-Mails and/or Text Messages?

When you file an immigration form at one of the three U.S. Citizenship and Immigration Services (USCIS) Lockbox facilities, you will have the option to receive an e-mail and/or text message informing you that USCIS has accepted your application or petition. If you provide an e-mail address and a mobile phone number, you will receive both types of electronic notification (e-Notification) messages.

The three USCIS Lockbox facilities are located in Chicago, IL, Phoenix, AZ, and Lewisville, TX.

You should verify where to file by reviewing the filing instructions related to your immigration form(s). Please note that some immigration forms will continue to be filed with USCIS Service Centers or Field Offices. USCIS Service Centers or Field Offices will not provide e-mail and text message notifications at this time. USCIS will continue to expand its e-Notification messaging capabilities to include these filings.

When Will I Be Notified?

USCIS will notify you within 24 hours of accepting your immigration form(s).

What Will the E-Mail or Text Message Include?

The message will provide a receipt number as information but will not constitute official notice of acceptance. The e-mail notice will also provide a brief statement on how to get additional information about the status of your case.

USCIS will then send the official receipt notice, Form I-797C, Notice of Action, to the person seeking the benefit or the person's representative, as appropriate, via the U.S. Postal Service. There will be no e-Notification for acceptance of Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. E-mail or text messages that cannot be delivered will not be retransmitted.

What If I Want to Submit Multiple Applications?

If you are submitting multiple immigration forms for one applicant, please clip this entire form with the e-mail address and/or mobile phone number (see below) to the front of the first immigration form of the package. You will receive a separate e-mail and/or text message for each accepted immigration form.

For representatives who file multiple unrelated immigration forms in one envelope, and who want their clients to receive e-Notification(s), this form, with the notification information provided below, must be clipped to the front of each related package of immigration forms. The e-Notification message will provide a receipt number for each immigration form but will not include the applicant's name because the message cannot be sent over a secure network. One e-mail and/or text message will be sent per accepted immigration form; e-Notification will only be sent to the person requesting the benefit(s).

Does the E-Notification Grant Any Type of Status or Benefit?

No. The e-mail or text message does not grant any immigration status or benefit. You may not present a copy of the e-mail or text message as evidence that USCIS has granted you any immigration status or benefit. Receipt of the transmission cannot be used as supporting evidence for other benefits.

Will USCIS Cover My Costs to Receive E-Mails and Text Messages?

No. USCIS assumes no legal responsibility for your costs to receive e-mail and/or text messages. USCIS will not reimburse you for any costs related to e-Notification.

How Can I Request E-Mails or Text Messages?

If you submit your immigration form(s) to a USCIS lockbox facility and include your e-mail and/or mobile phone number in the appropriate box below, USCIS will use this information as permission to send an e-Notification to you.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at three minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Products Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529-2210. OMB No. 1615-0109. Do not mail your application to this address.

Complete this form and clip it on top of the first page of your immigration form(s).

Applicant/Petitioner Full Last Name Doe	Applicant/Petitioner Full First Name Margaret	Applicant/Petitioner Full Middle Name Mary
E-Mail Address kwerth@publiccounsel.org	Mobile Phone Number (Text Message)	



**G-28, Notice of Entry of Appearance
as Attorney or Accredited Representative**

Department of Homeland Security

Part 1. Notice of Appearance as Attorney or Accredited Representative

A. This appearance is in regard to immigration matters before:

- USCIS - List the form number(s): I-765
 ICE - List the specific matter in which appearance is entered: _____

CBP - List the specific matter in which appearance is entered: _____

B. I hereby enter my appearance as attorney or accredited representative at the request of:

List Petitioner, Applicant, or Respondent. NOTE: Provide the mailing address of Petitioner, Applicant, or Respondent being represented, and not the address of the attorney or accredited representative, except when filed under VAWA.

Principal Petitioner, Applicant, or Respondent			A Number or Receipt Number, if any	<input type="checkbox"/> Petitioner	
Name: Last	First	Middle	012-345-679	<input checked="" type="checkbox"/> Applicant	
DOE	Mary	Margaret		<input type="checkbox"/> Respondent	
Address: Street Number and Street Name		Apt. No.	City	State	Zip Code
1234 Green Street,		#5	Los Angeles	CA	90000

Pursuant to the Privacy Act of 1974 and DHS policy, I hereby consent to the disclosure to the named Attorney or Accredited Representative of any record pertaining to me that appears in any system of records of USCIS, USCBP, or USICE.

Signature of Petitioner, Applicant, or Respondent: H. Doe Date: 06-06-2011

Part 2. Information about Attorney or Accredited Representative (Check applicable item(s) below)

- A. I am an attorney and a member in good standing of the bar of the highest court(s) of the following State(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia: Supreme Court of Arizona
 I am not or am subject to any order of any court or administrative agency disbarring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law (If you are subject to any order(s), explain fully on reverse side).
- B. I am an accredited representative of the following qualified non-profit religious, charitable, social service, or similar organization established in the United States, so recognized by the Department of Justice, Board of Immigration Appeals pursuant to 8 CFR 1292.2. Provide name of organization and expiration date of accreditation: _____
- C. I am associated with _____
 The attorney or accredited representative of record previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative is at his or her request (If you check this item, also complete item A or B above in Part 2, whichever is appropriate).

Part 3. Name and Signature of Attorney or Accredited Representative

I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before the Department of Homeland Security. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.

Name of Attorney or Accredited Representative	Attorney Bar Number(s), if any
Katka Werth	22314
Signature of Attorney or Accredited Representative	Date
<u>K. Werth</u>	06-06-2011
Complete Address of Attorney or Organization of Accredited Representative (Street Number and Street Name, Suite No., City, State, Zip Code)	
Public Counsel, 610 S. Ardmore Ave.	
Phone Number (Include area code)	Fax Number, if any (Include area code)
(213) 385-2977	(213) 385-9089
E-Mail Address, if any	
kwerth@publiccounsel.org	

Do not write in this block.

Remarks	Action Block	Fee Stamp
A#		
Applicant is filing under §274a.12 _____		(Date).
<input type="checkbox"/> Application Approved. Employment Authorized / Extended (Circle One) _____		until _____ (Date).
Subject to the following conditions: _____		
Application Denied.		
<input type="checkbox"/> Failed to establish eligibility under 8 CFR 274a.12 (a) or (c).		
<input type="checkbox"/> Failed to establish economic necessity as required in 8 CFR 274a.12(c)(14), (18) and 8 CFR 214.2(f)		

I am applying for: Permission to accept employment.
 Replacement (of lost employment authorization document).
 Renewal of my permission to accept employment (attach previous employment authorization document).

1. Name (Family Name in CAPS) (First) (Middle)	Which USCIS Office?	Date(s)
Doe Mary Margaret	N/A	
2. Other Names Used (include Maiden Name)	Results (Granted or Denied) - attach all documentation	
None	N/A	
3. Address in the United States (Number and Street) (Apt. Number)	12. Date of Last Entry into the U.S. (mm/dd/yyyy)	
1234 Green Street 5	09/15/2007	
(Town or City) (State/Country) (ZIP Code)	13. Place of Last Entry into the U.S.	
Los Angeles CA 90000	Los Angeles	
4. Country of Citizenship/Nationality	14. Manner of Last Entry (Visitor, Student, etc.)	
Eritrea	Visitor	
5. Place of Birth (Town or City) (State/Province) (Country)	15. Current Immigration Status (Visitor, Student, etc.)	
Asmara Eritrea	Asylum Applicant	
6. Date of Birth (mm/dd/yyyy) 7. Gender	16. Go to Part 2 of the Instructions, Eligibility Categories. In the space below, place the letter and number of the category you selected from the instructions (For example, (a)(3), (c)(17)(ii), etc.)	
01/01/1960 <input type="checkbox"/> Male <input checked="" type="checkbox"/> Female	Eligibility under 8 CFR 274a.12 (c) (8) ()	
8. Marital Status <input checked="" type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced	17. If you entered the Eligibility Category, (c)(3)(C), in item 16 above, list your degree, your employer's name as listed in E-Verify, and your employer's E-Verify Company Identification Number or a valid E-Verify Client Company Identification Number in the space below.	
9. Social Security Number (include all numbers you have ever used) (if any)	Degree: _____	
None	Employer's Name as listed in E-Verify: _____	
10. Alien Registration Number (A-Number) or I-94 Number (if any)	Employer's E-Verify Company Identification Number or a valid E-Verify Client Company Identification Number: _____	
012-345-678		
11. Have you ever before applied for employment authorization from USCIS?		
<input type="checkbox"/> Yes (If "Yes," complete below) <input checked="" type="checkbox"/> No		

Certification

Your Certification: I certify, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Furthermore, I authorize the release of any information that U.S. Citizenship and Immigration Services needs to determine eligibility for the benefit I am seeking. I have read the Instructions in Part 2 and have identified the appropriate eligibility category in Block 16.

Signature Margaret Doe Telephone Number (213) 123-4567 Date 06/06/2011

Signature of Person Preparing Form, If Other Than Above: I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

Print Name Katka Werth, Public Counsel Address 610 S. Ardmore Ave., Los Angeles Signature K. Werth Date 06/06/2011

Remarks	Initial Receipt	Resubmitted	Relocated			Completed	
			Rec'd	Sent	Approved	Denied	Returned



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M

U.S. DEPARTMENT OF JUSTICE
BUREAU OF CUSTOMS & IMMIGRATION
ALBUQUERQUE OFFICE
ALBUQUERQUE, N.M.

MARGARET DOE
012-345-678

MARGARET DOE
1234 GREEN STREET #5
LOS ANGELES CA 90000

DATE: 1-23-57
FORM: 1-57

I have received your application for admission to the United States and I am returning this card to you. Your application will be reviewed and you will be advised of the result.

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

RE: Margaret Doe
FILE: 012-345-678

DATE:

TO: Margaret Doe
1234 Green Street #5
Los Angeles, CA 90000

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Jul 1, 2011 at 08:30 A.M. at: 606 SOUTH OLIVE ST., 5TH FL., COURTROOM 2 LOS ANGELES, CA 90014.

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action; OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security establishes by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT LOS ANGELES, CA, THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 240-314-1500.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL PERSONAL SERVICE (P)
TO: ALIEN ALIEN c/o Custodial Offices ALIEN'S ATT/REP [] DHS
DATE: _____ BY: COURT STAFF KLama

Attachments: [] EOIR-33 [] EOIR-28 [] Legal Services List [] Other T1



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

November 15, 2011

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Attorney Advisors and Judicial Law Clerks
All Immigration Court Staff

FROM: Brian M. O'Leary *Brian M. O'Leary*
Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 11-02:
The Asylum Clock

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I. Introduction

The Executive Office for Immigration Review (“EOIR”) operates an “asylum clock,” which measures the length of time an asylum application has been pending for each asylum applicant in removal proceedings. As explained below, the asylum clock is an administrative function that tracks the number of days elapsed since the application was filed, not including any delays requested or caused by the applicant. This Operating Policies and Procedures Memorandum (“OPPM”) provides guidance on the asylum clock for proceedings before EOIR.

II. Authority

The Immigration and Nationality Act (“INA” or “Act”) contains two distinct provisions relating to 180-day time frames in the context of asylum applications.

INA § 208(d)(5)(A)(iii) sets a goal for adjudication of asylum applications:

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.

INA § 208(d)(2) addresses employment authorization in the context of asylum applications:

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An 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.

Both of these sections of the Act are interpreted at 8 C.F.R. § 1208.7(a)(2):

The time periods within which the alien may not apply for employment authorization and within which the [Department of Homeland Security] must respond to any such application and within which the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with [8 C.F.R.] §§ 1208.3 and 1208.4. Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing.

When an asylum application is pending before an Immigration Judge, EOIR tracks the time elapsed since the filing date to measure compliance with the asylum adjudications goal of INA § 208(d)(5)(A)(iii). This period does not include any delays requested or caused by the applicant,

and it ends with the final administrative adjudication of the application. This period also does not include administrative appeal or remand. *See* section VIII (Cases on Appeal or Remand), below.

The Department of Homeland Security (“DHS”), U.S. Citizenship and Immigration Services (“USCIS”), is responsible for adjudicating applications for employment authorization filed by asylum applicants. The USCIS Asylum Division manages the asylum clock while the asylum application is pending with USCIS. To facilitate USCIS’s adjudication of employment authorization applications, EOIR provides USCIS with access to its asylum adjudications clock for cases before EOIR.

III. Applicability

All asylum applications have an asylum clock, except as described below.

A. Applications Filed Prior to January 4, 1995

Asylum applications filed before January 4, 1995, do not have an asylum clock.

B. ABC Cases

Asylum applications filed pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), do not have an asylum clock.

IV. Starting the Asylum Clock

The asylum clock starts as follows, depending on whether the application was filed with USCIS or in immigration court.

A. Applications Filed With USCIS

An asylum application filed with USCIS is known as an “affirmative” application. For affirmative applications that have an asylum clock, USCIS commences the tracking of the asylum clock when a complete application is filed with USCIS. When an affirmative asylum application is referred from the USCIS Asylum Division, EOIR begins to track the clock calculating the days from the day when a complete application was filed with USCIS. The case is referred with the clock either running or stopped, as described below, depending on the status of the proceedings before USCIS.

1. Referred After Interview

If the application is referred after the applicant appeared at an interview with a USCIS asylum officer, the asylum clock is running when the case is referred to EOIR. For example, if USCIS’s clock is running at 48 days when the case is referred, then EOIR’s clock begins running at 48 days on the date of referral.

a. Fewer Than 75 Days at Referral

If a case is referred to EOIR with fewer than 75 days elapsed on the asylum clock, the case is treated as an “expedited asylum case” and is therefore subject to EOIR’s 180-day adjudications deadline. These cases should be completed within 180 days after the application was filed, not including any delays caused by the applicant. For more information on the handling of expedited asylum cases at the immigration court, see section VI(C)(1) (Expedited Cases), below.

b. 75 Days or More at Referral

If a case is referred to EOIR with 75 days or more elapsed on the asylum clock, the case is not treated as an “expedited asylum case” and is therefore not subject to EOIR’s 180-day adjudications deadline, although the clock will run and stop as usual. For more information on the handling of such cases at the immigration court, see section VI(C)(2) (Cases With 75 Days or More at Referral), below.

2. No-Show at Interview Before USCIS

If an applicant fails to appear at an interview before USCIS, the clock may be stopped by USCIS. If the case is then referred after the clock is stopped by USCIS, the clock is not restarted by EOIR. See 8 C.F.R. §§ 208.10, 1208.7(a)(2), 1208.7(a)(4). For more information on such cases, see section VI(C)(3) (Cases Where the Applicant Failed to Appear Before USCIS), below.

The applicant can request that USCIS reopen the case before USCIS. The applicant can make such a request before the case is referred to EOIR. If the case has been referred to EOIR, the applicant may consult USCIS’s procedures for such situations as explained in the USCIS *Affirmative Asylum Procedures Manual*, which is available online at http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf.

3. Failure to Pick Up Decision and NTA

If an applicant fails to appear at his or her appointment with USCIS to receive the asylum officer’s decision and the Notice to Appear (Form I-862), the clock is stopped on the date the applicant failed to appear. See 8 C.F.R. § 1208.9(d). The clock does not restart on the date the case is referred to EOIR. However, the clock can restart at the first master calendar hearing before the immigration court, as described in section VI (Proceedings Before the Immigration Court), below. Whether such a case is treated as an “expedited asylum case” depends on the number of days on the clock at referral. See section IV(A)(1) (Referred After Interview), above.

B. Applications Filed With the Immigration Court

An asylum application that is first filed in immigration court is known as a “defensive” application. For defensive applications, EOIR’s asylum clock begins to run when the applicant files a complete asylum application in accordance with 8 C.F.R. §§ 1208.3 and 1208.4. See 8 C.F.R. § 1208.7(a)(2).

A defensive asylum application is “filed” for asylum clock purposes when it is accepted by

the judge at a hearing. See Revised OPPM No. 00-01, *Asylum Request Processing*. A Form I-589 (Application for Asylum and for Withholding of Removal) that is submitted as part of a motion to reopen or other motion filed out of court is not “filed” for asylum clock purposes until: (1) the motion has been granted; and (2) the asylum application is accepted by the judge at a hearing.

In some cases, a Form I-589 is filed as an application for withholding of removal under INA § 241(b)(3) or protection under the Convention Against Torture, but not asylum. A Form I-589 filed for these purposes can be accepted by the immigration court at the court window, by mail, or by courier service. However, acceptance of a Form I-589 at the court window, by mail, or by courier service is not a “filing” for asylum clock purposes. See section V(B) (Applications for Withholding of Removal and Convention Against Torture), below.

Furthermore, an asylum application is not “filed” for asylum clock purposes if it does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials specified in 8 C.F.R. § 1208.3(a). See 8 C.F.R. § 1208.3(c)(3). For information on supplementing an asylum application that has already been filed, see section VI(G)(1) (Code 21 (*Supplement Asylum Application*)), below.

V. General Principles

EOIR applies the following general principles with respect to the asylum clock in all cases.

A. One-Year Filing Deadline

EOIR interprets the federal regulations to provide that the asylum clock runs, except during applicant-caused delays, until the judge has adjudicated whether the asylum application was filed within 1 year after the date of the applicant’s arrival in the United States and, if not, whether an exception to this filing deadline applies. See INA § 208(a)(2)(B); 8 C.F.R. §§ 1208.3, 1208.4, 1208.7.

Therefore, when an alien files a Form I-589 as an application for asylum, the clock runs, except during applicant-caused delays, until:

- The applicant concedes that the asylum application was not timely and that no exceptions to the deadline apply; or
- The judge has adjudicated that the asylum application was not timely and that no exceptions to the deadline apply; or
- The judge has otherwise adjudicated the asylum application.

B. Applications for Withholding of Removal and Convention Against Torture

If a Form I-589 is filed as an application for withholding of removal under INA § 241(b)(3) or protection under the Convention Against Torture, and not as an application for asylum, there is no asylum clock. See Revised OPPM No. 00-01, *Asylum Request Processing*.

VI. Proceedings Before the Immigration Court

This section describes the operation of the asylum adjudications clock in proceedings before the immigration court.

A. Stopping and Starting the Asylum Clock

The clock runs during the proceedings before EOIR, except during “[a]ny delay requested or caused by the applicant.” 8 C.F.R. § 1208.7(a)(2). Following each hearing, the clock runs or stops depending on the reason the hearing was adjourned. If the hearing was adjourned because of a DHS or EOIR-related delay, the clock runs until the next hearing. If the hearing was adjourned because of an applicant-caused delay, the clock stops until the next hearing.

Even if the clock stopped due to an applicant-caused delay, the clock will restart at the next hearing unless there is another applicant-caused delay.

B. Adjournment Codes

The clock is programmed to run or stop based on adjournment codes entered into EOIR’s electronic database. For a complete list of adjournment codes and corresponding instructions, see OPPM 05-07, *Definitions and Use of Adjournment, Call-up and Case Identification Codes*.

1. Codes that Stop and Run the Clock

The adjournment code reflects why the hearing was adjourned; certain codes are used for alien-related adjournments, certain codes for DHS-related adjournments, and certain codes for EOIR-related adjournments.

- When a code indicating an applicant-caused delay is entered, the clock is stopped until the next hearing.
- When a code indicating a DHS or EOIR-related delay is entered, the clock runs until the next hearing.

2. Codes Marked with a “+” Sign

Certain alien and DHS-related adjournment codes permanently exempt the case from the 180-day adjudications deadline, even if they permit the clock to run. These codes are marked with a “+” sign in OPPM 05-07.

3. Neutral Adjournment Codes

Neutral adjournment codes are codes that do not affect the clock. For example, see section VI(F)(2) (Advancing Future Hearings).

C. Expedited and Non-Expedited Asylum Cases

1. Expedited Cases

Asylum cases subject to the 180-day adjudications deadline are known as “expedited asylum cases.” These cases should be completed within 180 days after the application was filed, not including any delays requested or caused by the applicant. Accordingly, expedited asylum cases should be scheduled so the case is completed within the 180-day deadline.

Judges and staff should remember that two categories of asylum cases are not expedited, as explained below.

2. Cases With 75 Days or More at Referral

As noted in section IV(A)(1)(b) (75 Days or More at Referral), above, an affirmative asylum application referred to EOIR with 75 days or more on the asylum clock is not treated as an “expedited asylum case” and is therefore not tracked under EOIR’s 180-day adjudications deadline. However, even though EOIR does not track these cases under the 180-day adjudications deadline, the clock will run and stop as usual. In such cases, hearings do not need to be expedited, but the appropriate adjournment code should be used to accurately reflect the reason for the adjournment. For example, if the case is being set from a master calendar to an individual calendar hearing, then a code 17 (*MC to IC – Merits Hearing*) should be used unless the applicant causes a delay in scheduling the individual calendar hearing.

3. Cases Where the Applicant Failed to Appear Before USCIS

As noted in section IV(A)(2) (No-Show at Interview Before USCIS), above, if an asylum application is referred after an applicant fails to appear at an interview with a USCIS asylum officer, and the clock is stopped by USCIS, it is not restarted by EOIR. In such cases, hearings do not need to be expedited.

Please note that, in cases where the applicant failed to appear at his or her appointment with USCIS to receive the asylum officer’s decision and the Notice to Appear (Form I-862), the clock is *not* permanently stopped. See section IV(A)(3) (Failure to Pick Up Decision and NTA), above. Whether such a case is expedited depends on the number of days on the clock at referral.

D. Judge, Court Administrator, and Court Staff Responsibilities

When a case is before the immigration court, responsibilities related to adjournment codes and the asylum clock are divided as follows. The judge is responsible for deciding the reason for each adjournment. If at a hearing, the judge should state the reason for the adjournment on the record. In addition, the judge may inform the parties how many days are on the clock and whether the clock is running or stopped.

In all cases, the judge should annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code. When a judge specifies a code, or states how many days are on the clock and whether the clock is running, the judge is performing an

administrative function, not making an adjudication.

For example, the judge might state on the record: “This hearing is being continued to allow the respondent time to retain an attorney or representative.” The judge would annotate the case worksheet with “code 01,” and the court administrator or court staff would then ensure that the adjournment code 01 (*Alien to Seek Representation*) is entered into the Case Access System for EOIR (“CASE”).

The court administrator and court staff are responsible for ensuring that each adjournment code is accurately entered into CASE.

For responsibilities in responding to asylum clock inquiries, see section VII (Addressing Asylum Clock Requests), below.

E. Offering Future Hearing Dates

This section provides instructions for offering a future hearing date during a hearing in an asylum case. Because the asylum clock can restart after it was previously stopped, judges must follow the instructions below whenever resetting an asylum case for a future hearing.

The judge should begin by determining on the record whether the case is an expedited asylum case. See section VI(C) (Expedited and Non-Expedited Asylum Cases), above. After this determination has been made, the judge should proceed as follows.

1. Non-Expedited Cases

In a non-expedited asylum case, the judge should determine on the record the reason for the adjournment. The appropriate adjournment code should be used and the case need not be scheduled within the 180-day adjudications deadline.

2. Expedited Cases

In an expedited asylum case, the judge should first make an initial assessment on the record of why the case should be adjourned. For example, the judge might determine that the case should be adjourned to allow the applicant’s attorney time to prepare, or to allow DHS time to conduct an investigation.

Having made this assessment, the judge should proceed as follows.

a. Making an Initial Determination

The judge should then make an initial determination whether the next hearing should be scheduled within the 180-day adjudications deadline.

The next hearing need *not* be scheduled within the 180-day adjudications deadline if:

- The case is being adjourned for an alien-related reason; or

- The case is being adjourned using a code marked with a “+” sign (for an alien or DHS-related reason that permanently exempts the case from the 180-day adjudications deadline); or
- The case has *previously* been adjourned using a code marked with a “+” sign (for an alien or DHS-related reason that permanently exempts the case from the 180-day deadline).

For example:

- If the case is being adjourned to allow the applicant’s attorney additional time to prepare, then the next hearing need not be scheduled within the 180-day adjudications deadline. The adjournment code 02 (*Preparation – Alien / Attorney / Representative*) should be entered, and the clock will stop until the next hearing.
- If the case is being adjourned for DHS to conduct an investigation, then the next hearing need not be scheduled within the 180-day adjudications deadline. The adjournment code 37+ (*DHS Investigation*) should be entered, and the clock will run until the next hearing.
- If the *previous* hearing had been adjourned using code 43+ (*DHS Forensic Analysis*), then the next hearing need not be scheduled within the 180-day adjudications deadline. The appropriate adjournment code should be entered at the *current* hearing, based on the events at that hearing. The clock will run or stop depending on the code chosen.

In all other situations, the next hearing may need to be scheduled within the 180-day adjudications deadline, and the judge should proceed as described below.

b. Asking Whether the Applicant Wants an Expedited Hearing Date

If the judge determines that none of the three situations above apply, the judge should then specifically ask on the record whether the applicant wants an “expedited asylum hearing date.”

If the applicant does not want an expedited asylum hearing date, then adjournment code 22 (*Alien or Representative Rejected Earliest Possible Asylum Hearing*), or another appropriate code that also stops the clock until the next hearing, should be used. The case need not be scheduled within the 180-day adjudications deadline.

c. Offering an “Expedited Asylum Hearing Date”

If the applicant wants an expedited asylum hearing date, the judge should offer the first available date within the 180-day adjudications deadline. Generally, when setting a case from a master calendar hearing to an individual calendar hearing, a minimum of 14 days should be allowed, even if the 180-day adjudications deadline is imminent. This time period may be shortened if requested by the applicant. For example:

- If the applicant accepts that hearing date, then adjournment code 17 (*MC to IC – Merits Hearing*), or another appropriate code that also allows the clock to run until the next hearing, should be used.
- If the applicant declines or is unable to accept that hearing date, then adjournment code 22 (*Alien or Representative Rejected Earliest Possible Asylum Hearing*), or another appropriate code that also stops the clock until the next hearing, should be used. For example, if the applicant wants an expedited hearing date but is unable to accept the date offered because he or she will not be able to timely file supplementary documents prior to that date, the adjournment code 21 (*Supplement Asylum Application*) should be used. When the applicant declines or is unable to accept the hearing date offered, the case need not be scheduled within the 180-day adjudications deadline.

3. Judges Should Not Use Other Language

When scheduling a future hearing in an asylum case, judges should not use language other than that described above. For example, judges should not ask an asylum applicant if he or she wishes a hearing “on the expedited docket” or wishes to “waive the clock.” Phrases such as these can lead to confusion as to how the asylum clock works.

F. Between Hearings

1. The Status of the Clock Does Not Change Between Hearings

In general, the status of the clock does not change between hearings. If a hearing was adjourned because of an applicant-caused delay, the clock is stopped until the next hearing. If a hearing was adjourned because of a DHS or EOIR-related delay, the clock runs until the next hearing.

For example, if an applicant requests that a hearing be adjourned to retain an attorney, then the clock is stopped until the next hearing because it is deemed an applicant-caused delay. The clock will remain stopped until the next hearing even if the applicant then retains an attorney one month before the next hearing. However, a party may file a motion to advance a future hearing, as described below.

2. Advancing Future Hearings

In some cases, a future hearing may be cancelled and rescheduled for an *earlier* date. This may be done because a judge has granted a party’s motion to advance the hearing, or by the immigration court without a party’s request.

When a hearing date is advanced, the status of the clock will remain the same until the new hearing date. Following the new hearing date, the clock will run or stop, depending on the reason for the adjournment. For example, if the clock had been stopped and the judge grants the applicant’s motion to advance, the clock will remain stopped until the new hearing date. At that time, it will restart if the new hearing is adjourned for a DHS or EOIR-related delay.

When a future hearing is advanced, court staff should enter the adjournment code 55 (*Hearing Deliberately Advanced*) for the future hearing date that is being rescheduled. Code 55 is a neutral code that will not affect the clock.

3. Rescheduling Future Hearings

In some cases, a future hearing may be cancelled and rescheduled for a *later* date. This may be done at the request of one of the parties or by the immigration court without a party's request.

When rescheduling a future hearing for a later date, court staff should enter an adjournment code for the cancelled hearing that accurately reflects why the hearing is being rescheduled, following the instructions below. The adjournment code previously used should not be reentered unless that adjournment code accurately reflects why the future hearing is being rescheduled.

a. Case is Rescheduled by Court

If the future hearing is being rescheduled for court-related reasons, court staff should enter an EOIR-related ("IJ" or "Operational") adjournment code for that hearing, unless a party causes a delay in rescheduling the hearing, as discussed below. If an EOIR-related adjournment code is used, the clock will run starting on the date the hearing would have taken place.

For example, if the hearing is being rescheduled because the judge will be on detail at another immigration court and will be unavailable to hear the case, the code 35 (*Unplanned IJ Leave – Detail / Other Assignment*) is the appropriate adjournment code. In such a case, even if the clock was previously stopped, it will run starting on the date the hearing would have taken place. Since code 35 allows the asylum clock to run, court staff should be mindful of setting the new hearing within the 180-day adjudications deadline.

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.

For DHS delays, court staff should be mindful of setting the case within the 180-day adjudications deadline, unless the code used exempts the case from the deadline. *See* section VI(B) (Adjournment Codes), above.

Court staff should document in writing any delays caused by either party and place the documentation on the left side of the Record of Proceedings.

b. DHS-Caused Delay

If the future hearing is being rescheduled because the judge granted DHS's motion to continue, a code reflecting a DHS-related adjournment should be used. If such a DHS-related adjournment code is used, the clock will run starting on the date the hearing would have taken place. Unless the DHS code exempts the case from the 180-day adjudications deadline, court staff should be mindful of setting the case within the deadline. *See* section VI(B) (Adjournment Codes), above.

c. Applicant-Caused Delay

If the future hearing is being rescheduled because the judge granted the applicant's motion to continue, a code reflecting an alien-related adjournment should be used. If such an alien-related adjournment code is used, the clock will stop on the date the hearing would have taken place.

4. Changes of Venue and Transfers

When an asylum applicant files a motion to change venue from one immigration court to another immigration court, and the judge grants the motion, the asylum clock is stopped from the date the motion is granted until the next hearing. On the date of the next hearing, the clock may restart or remain stopped, depending on the reason for the adjournment.

When DHS files a motion to change venue from one immigration court to another immigration court, and the judge grants the motion, if the asylum clock was running, it continues to run until the next hearing. If the clock was stopped before the judge granted the motion, it starts to run from the date the motion is granted until the next hearing. On the date of the next hearing, the clock may continue to run or may be stopped, depending on the reason for the adjournment.

In addition, cases are sometimes transferred between two hearing locations that share administrative control of cases, without a motion to change venue. Typically, these hearing locations are located close to one another, and one of them is in a prison or other detention facility. When an asylum case is transferred between two hearing locations, the clock runs from the date of the transfer until the next hearing. On the date of the next hearing, the clock may stop or continue running, depending on the reason for the adjournment.

G. Additional Adjournment Code Guidance

This section provides additional guidance on the use of particular adjournment codes. This guidance is meant to be read in conjunction with OPPM 05-07, *Definitions and Use of Adjournment, Call-up and Case Identification Codes*. It does not supersede OPPM 05-07.

1. Code 21 (*Supplement Asylum Application*)

When the applicant has filed an asylum application pursuant to 8 C.F.R. §§ 1208.3 and 1208.4 and states that he or she wants an expedited asylum hearing date and will be supplementing the application, the judge should offer an expedited asylum hearing date. If the applicant accepts the initial hearing date offered and will be able to timely file any supplements to the application before that hearing, the clock should run until that hearing.¹ Code 21 (*Supplement Asylum Application*), which stops the clock, is the appropriate adjournment code *only if* the applicant requests a *delay* to supplement the application. For example:

- The applicant has filed an asylum application. At a master calendar hearing, the

¹ Timeliness is determined according to Chapter 3.1(b) (Timing of submissions) of the Immigration Court Practice Manual, unless otherwise specified by the judge on the record.

applicant accepts an expedited asylum hearing date, and states that he or she will be timely filing an additional affidavit and background documents. Adjournment code 17 (*MC to IC – Merits Hearing*) should be used, permitting the asylum clock to run until the next hearing.

- If, in the previous example, the applicant will not be able to timely file the supplementary documents prior to the expedited hearing date, then the applicant should not be provided the expedited hearing date and adjournment code 21 (*Supplement Asylum Application*), or another appropriate code that stops the clock, should be used.

2. Code 36+ (*Preparation of Records / Biometrics Check / Overseas Investigation by Alien*)

Code 36+ (*Preparation of Records / Biometrics Check / Overseas Investigation by Alien*), which stops the asylum clock, is the appropriate adjournment code only if the applicant causes a *delay* because of failure without good cause to follow the requirements for fingerprint or biometrics processing. 8 C.F.R. § 1208.7(a)(2).

H. Issuing a Decision at a Later Date

1. Adjourning for a Decision at a Later Hearing

When the judge adjourns a hearing to enter a decision at a later hearing, the first hearing should be adjourned using the adjournment code 13 (*Insufficient Time to Complete Hearing*), which allows the clock to run. However, if there is an independent reason for the case to be adjourned, the appropriate code should be used. For example, if all testimony has been taken but the applicant failed without good cause to follow the requirements for fingerprint or biometrics processing, the adjournment code 36+ (*Preparation of Records / Biometrics Check / Overseas Investigation by Alien*) would be appropriate.

2. Reserved Decision

When the judge adjourns a hearing to issue a written decision without scheduling a future hearing date, the hearing should be adjourned using the adjournment code RR (*Reserved Decision*), which allows the clock to run. The judge should be mindful of issuing the decision within the 180-day adjudications deadline.

I. Motions to Reopen

When an alien who has filed an asylum application submits a motion to reopen to the immigration court, the guidelines in Revised OPPM No. 00-01, *Asylum Request Processing*, should be followed.

VII. Addressing Asylum Clock Requests

This section describes the administrative procedures to follow in addressing concerns relating

to EOIR's asylum adjudications clock in particular cases.

A. Parties

Parties should not file motions related to the asylum clock. If an asylum applicant believes an asylum clock in a particular case is incorrect, this should be addressed as follows:

- During a hearing, the issue should be addressed to the judge, and the judge should address the issue on the record with the parties.
- After a hearing, the issue should be addressed to the court administrator in writing.
- If a party believes the issue has not been addressed correctly at the immigration court level, the party may then contact the Assistant Chief Immigration Judge in writing.
- For cases pending before the Board of Immigration Appeals, see section VIII (Cases on Appeal or Remand), below.
- When a party addresses an asylum clock issue in writing, the party should provide a detailed explanation of why they believe the clock is incorrect. Such an explanation assists EOIR in resolving the issue.

B. Judges and Court Administrators

When a concern has been raised out of court about a particular case, the court administrator is responsible for ensuring that each adjournment code accurately reflects the reason the hearing was adjourned, and that the asylum clock is accurate.

When a court administrator receives an inquiry relating to the asylum clock, the court administrator should review the Record of Proceedings, EOIR's electronic database, and the hearing recording. If necessary, the court administrator should discuss the purpose of any adjournments with the judge. The court administrator should take corrective measures needed to ensure that each adjournment code is correct and that the asylum clock is accurate.

After ensuring that each adjournment code is correct and that the clock is accurate, the court administrator should respond by letter or e-mail to an applicant's request to adjust the clock. Except for motions and judges' responses to any motions, which are discussed below, any correspondence, including e-mails, regarding the clock should be placed on the left side of the Record of Proceedings.

For additional information on judge and court administrator responsibilities with respect to the asylum clock, see section (VI)(D) (Judge, Court Administrator, and Court Staff Responsibilities), above.

C. Judges Should Not Issue Clock Orders

Because the asylum clock is an administrative function, and decisions regarding the asylum clock are not adjudications, judges should not issue orders regarding the asylum clock. If a court

receives a motion regarding the asylum clock, the judge should not issue an order in response, but rather should give a copy of the motion to the court administrator to be resolved as described above. In response to a clock motion, the judge may issue a standard response; for example, “The respondent’s motion to restart the clock is an administrative request. Accordingly, it has been referred to the court administrator for resolution.” The motion and the judge’s response to the motion should be placed on the right side of the Record of Proceedings. The judge’s response should be served on both parties.

VIII. Cases on Appeal or Remand

As discussed in section II (Authority), above, EOIR’s asylum clock is an adjudications clock that is maintained for the purpose of measuring compliance with the asylum adjudications goal of INA § 208(d)(5)(A)(iii). EOIR’s asylum adjudications clock permanently stops when the judge issues a decision granting or 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). Therefore, EOIR’s asylum clock does not run during any appeal of the decision to the Board of Immigration Appeals (“Board”), during judicial review before the Federal courts, or if a case has been remanded to the immigration court. However, if an applicant is applying for asylum for the first time during a remanded proceeding, then the clock starts and stops as usual.

Furthermore, as discussed in section II (Authority), USCIS is responsible for adjudicating applications for work authorization. Accordingly, if an applicant believes that he or she is eligible for work authorization while the case is on appeal or remand, the applicant should contact USCIS.

However, if a case is pending before the Board and the asylum applicant believes that more time should have accrued on the clock during the *initial* proceedings before the immigration court, the applicant may contact the Executive Office for Immigration Review, Office of the General Counsel, by letter. When a party addresses an asylum clock issue in writing, the party should provide a detailed explanation of why the clock appears to be incorrect. Such an explanation assists EOIR in resolving the issue.

IX. Conclusion

This OPPM provides guidance on the asylum clock for proceedings before EOIR. If you have any questions, please contact your Assistant Chief Immigration Judge or Mark Pasierb, Chief Clerk, Office of the Chief Immigration Judge.