

UP AGAINST THE ASYLUM CLOCK

Fixing the Broken Employment Authorization Asylum Clock



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II. Introduction

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

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

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

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

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

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

III. Executive Summary

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

In 1996, Congress amended the Immigration and Nationality Act by codifying the 180-day waiting period for EAD applications.⁵ Congress also implemented a 180-day case completion deadline for Immigration Judges (IJs) to adjudicate asylum applications.⁶ These changes created a 180-day timeframe in which USCIS and EOIR⁷ should endeavor to complete an asylum application.

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

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

³ 8 C.F.R. § 208.7 (1994).

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

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

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

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

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

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

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

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

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

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

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

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

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

http://www.americanimmigrationcouncil.org/sites/default/files/lac_pa_022806.pdf [hereinafter AILF Practice Advisory].

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

¹² 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

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

IV. Background and Legal Authority

A. Background of the Asylum Clock

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

The EAD asylum clock was created in response to increasing numbers of asylum applications in the late 1980s and early 1990s.¹⁹ In fiscal year (FY) 1991, INS received 56,310 asylum applications, but completed only 16,552.²⁰ By FY 1994, the number of asylum applications dramatically increased to 143,225, and INS decided less than a third of that number.²¹ This gap contributed to a backlog of over 400,000 asylum applications by the end of 1994.²² Critics charged that many of these applications were submitted by applicants in order to obtain EADs and not for obtaining asylum.²³ Prior to 1994, it was relatively easy for asylum applicants to obtain EADs. Applicants were not required to wait 150 days before applying for work authorization.²⁴ Asylum applicants could file for asylum and an EAD concurrently, and

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

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

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

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

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

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

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

²⁰ *Id.* at 731.

²¹ GORDON ET AL., *supra* note 15, at § 34.02.

²² *Id.*

²³ Martin, *supra* note 19 at 735.

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

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

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

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

1994 Changes

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

²⁵ 8 C.F.R. § 208.7 (1994).

²⁶ Affirmative Asylum Manual, *supra* note 11, at 121.

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

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

²⁹ Martin, *supra* note 19 at 734-35.

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

³¹ Martin, *supra* note 19 at 734.

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

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

³⁴ 59 Fed. Reg. at 62284, 62291 (Dec. 5, 1994).

³⁵ 59 Fed. Reg. at 62284.

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

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

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

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

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

³⁶ 59 Fed. Reg. at 14780.

³⁷ Martin, *supra* note 19 at 733.

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

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

⁴⁰ Affirmative Asylum Manual, *supra* note 11, at 122.

⁴¹ 59 Fed. Reg. at 62290.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 59 Fed. Reg. at 62290-91.

⁴⁷ 59 Fed. Reg. at 62291.

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

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

B. Legal Authority

Statute and Regulations

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

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

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

⁵⁰ *Id.*

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

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

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

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

⁵⁵ INA § 208, 8 U.S.C. § 1158 (2009).

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

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

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

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

⁵⁹ 8 C.F.R. § 208.3; 8 C.F.R. § 1208.3 (2009).

⁶⁰ 8 C.F.R. § 208.7; 8 C.F.R. § 1208.7 (2009).

⁶¹ 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2) (2009).

⁶² 8 C.F.R. § 208.14; 8 C.F.R. § 1208.14 (2009).

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

C. Policy and Guidelines

USCIS Asylum Division Policy and Guidelines

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

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

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

⁶⁴ Affirmative Asylum Manual, *supra* note 11, at 1.

⁶⁵ *Id.* at 90-91.

⁶⁶ *Id.* app. 20.

⁶⁷ *Id.* app. 1.

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

⁶⁹ Affirmative Asylum Manual, *supra* note 11, app. 20.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ REMC is an acronym for "remove case from schedule."

⁷⁴ Affirmative Asylum Manual, *supra* note 11, app. 20.

⁷⁵ *Id.* at 2-3.

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

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

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

EOIR Policy and Guidelines

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

⁷⁷ Affirmative Asylum Manual, *supra* note 11, at 91.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Affirmative Asylum Manual, *supra* note 11, at 92-93, 104.

⁸¹ *Id.* at 43.

⁸² *Id.*

⁸³ *See e.g.*, Affirmative Asylum Manual, *supra* note 11, app. 5.

⁸⁴ Affirmative Asylum Manual, *supra* note 11, at 3.

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

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

⁸⁷ Affirmative Asylum Manual, *supra* note 11, at 3.

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

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

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

ASQ contains a telephone menu in English and Spanish where the caller must enter the applicant registration number (A-number) of the applicant involved.⁹⁹ According to EOIR, ASQ is updated within 24 hours of a change to the EAD asylum clock¹⁰⁰ Also, for cases before the immigration court, ASQ contains information regarding the next hearing date, time, and location. In asylum cases, ASQ contains the elapsed time and status of the asylum clock, and IJ decisions.¹⁰¹

⁸⁹ See OPPM 05-07, *supra* note 85.

⁹⁰ See *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

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

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

⁹⁷ *Id.* at 1.

⁹⁸ *Id.* at 12-13.

⁹⁹ *Id.*

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

¹⁰¹ Immigration Court Practice Manual, *supra* note 96, at 13.

