

The Honorable Alejandro Mayorkas
Secretary
Department of Homeland Security
3801 Nebraska Ave. NW
Washington, D.C. 20016

The Honorable Merrick B. Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Director Ur Jaddou
United States Citizenship and Immigration Services
Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, MD 20746

Director David Neal
Executive Office for Immigration Review
Department of Justice
5107 Leesburg Pike, 18th floor
Falls Church, Virginia 22041

March 08, 2023

Dear Secretary Mayorkas, Attorney General Garland, Director Jaddou, and Director Neal:

The undersigned national legal service and advocacy organizations call on United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) to eliminate the “asylum clock” in adjudicating asylum-pending applications for employment authorization documents (EADs). Given the current asylum adjudication timelines—which are either extremely expedited or extremely backlogged—the clock does not serve its purported function of prohibiting asylum applicants with non-meritorious claims from delaying their cases solely to obtain work authorization. Moreover, the administration of the asylum clock is opaque to the public, arbitrarily enforced in different ways around the country, prevents asylum seekers from working to support themselves and their families, and is wasteful of both agency staff time for those must administer it, and advocate resources for those who must engage in ongoing advocacy to attempt to restart the clock when it is wrongfully stopped. While the 180 day waiting period is statutory and cannot be changed absent congressional action, DHS and DOJ can make immediate improvements to the asylum EAD system through regulatory change. We call on the agencies to engage in rulemaking and remove the language¹ from 8 CFR § 208.7(a)(2) that established the need to account for applicant-caused delays through an asylum clock.

Background

Prior to rulemaking in 1994, asylum seekers could file their EAD applications along with their applications for asylum, and the agency, then Immigration and Naturalization Services (INS) imposed a 90 day waiting period on issuing the EAD. *See* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 62284, 62290 (Dec. 5, 1994). However, the 1994 regulations imposed a 150-day waiting period for asylum seekers to file an EAD application, with a deadline of 30 days thereafter for the agency to issue the EAD; those deadlines remain in effect to this day. At the time the agencies finalized this rule, they emphasized their belief that asylum applications would be adjudicated

¹ “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. 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.” 8 CFR § 208.7(a)(2).

quickly. “When the system is fully operational, asylum officers are expected to grant or refer affirmative claims within about 60 days. Thus, persons with bona fide asylum claims would get work authorization in approximately the same time as the current 90-day period for adjudicating work authorization applications.” *Id.*

Congress then codified the 180-day waiting period in 1996 by amending section 208 of the INA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009, 3693 (1996); INA § 208(d)(2) (“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.”). IIRIRA also codified the requirement that asylum applications be adjudicated within 180 days absent exceptional circumstances. *Id.* at 110 Stat. 3009, 3694 (1996); INA § 208(d)(5)(A)(iii).²

Since the 1994 rule went into effect, the agencies—legacy INS, now USCIS, and EOIR—have had to coordinate a complicated clock system to determine when an applicant has caused delay, when that delay ceases to exist, and how to update the clock. This system requires input from USCIS asylum officers, immigration judges, EOIR administrative employees, and implementation in adjudicating EADs by USCIS officers.

Current State of Asylum Adjudications

As of November 15, 2022, there were over 607,651 cases pending before USCIS asylum offices.³ This number is roughly 50 percent higher than the number of affirmative applications pending in 1994 when the clock was implemented; through 1994 there was an affirmative backlog of over 424,000 cases.⁴ Thus, after nearly 30 years of administering the asylum clock, there is no evidence that its existence has succeeded in reducing the affirmative asylum backlog.⁵

Under the current USCIS “Last In, First Out” scheduling system, the first priority for case scheduling as asylum offices is rescheduled cases.⁶ As a result, there is no EAD-related incentive to postpone an asylum interview, because doing so only results in a postponement of approximately three weeks. Under current affirmative asylum scheduling practices, asylum cases are either heard very quickly, meaning that there will be a decision before the 180-day waiting

² The legislative history for IIRIRA does not appear to address or explain why these provisions were included in the Act. *See* Cong. Rsch. Serv., Immigration: U.S. Asylum Policy 14–15 (2019) (reviewing the history of IIRIRA and stating that IIRIRA codified some asylum regulations, including those discussed above).

³ *See* USCIS, Asylum Quarterly Engagement and Listening Session Script & Talking Points December 13, 2022, https://www.uscis.gov/sites/default/files/document/foia/Asylum_Quarterly_Engagement-FY23_Quarter_1_Script_and_Talking_Points.pdf.

⁴ INS Statistical Yearbook at 85, (Feb. 1996) https://cis.org/sites/default/files/2019-03/INS_Yearbook_1994.pdf.

⁵ There is similarly an enormous defensive asylum backlog which Syracuse University’s TRAC reported at over 671,000 asylum cases pending as of November 2021. *See* TRAC, Immigration Court Asylum Backlog, <https://trac.syr.edu/phptools/immigration/asylum/>.

⁶ USCIS, Affirmative Asylum Interview Scheduling, (Last reviewed/updated May 31, 2022) <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling>.

period, or they enter a yearslong backlog.⁷ Applicants do not know when they file their applications which path their case may take, but either way, applicant-caused delay is unlikely to benefit an asylum seeker in obtaining their EAD.⁸

Likewise, cases in immigration court may be heard very quickly, or may languish in a years-long backlog.⁹ Some cases for recently arrived noncitizens are placed on an expedited dedicated docket, on which immigration judges are directed to complete cases within 300 days, and it is often difficult for noncitizens to obtain continuances.¹⁰ Other cases will be docketed after an unsuccessful Asylum Merits Interview and will have to be decided within 180 days of their successful credible fear interview.¹¹ The average adjudication time for cases that are not fast-tracked in immigration court is just under five years.¹² Meanwhile, in efforts to address the immigration court backlog, some courts are advancing cases with little or no notice, sometimes necessitating continuances by counsel whose dockets are overbooked or who need time to update evidence.¹³ There is no longer a straightforward path to asylum adjudications in immigration court where an asylum seeker would be given a quick hearing date and a continuance (without penalty) would ensure that they would receive their EAD. Instead cases may be decided before the applicant accrues 180 days, or may languish for years. In neither scenario does stopping the clock for a continuance deter non-meritorious asylum applications. Instead, it punishes bona fide asylum seekers who often must pay counsel, before obtaining work authorization, to advocate with USCIS and EOIR to restart the clock when it has been stopped in error.

⁷ The agencies are also gradually implementing the Asylum Processing Rule for asylum seekers who have gone through expedited removal. Under this rule, the Credible Fear Interview notes become the asylum application, starting the 180-day period for EAD purposes. However, since the entire adjudication must generally be completed within 180 days, the vast majority of asylum seekers processed under this rule would never receive an asylum-pending EAD. See NIPNLG, Biden's Asylum Processing Rule—Three Months in, What Practitioners Need to Know at 8, (Sep. 2022) https://www.nationalimmigrationproject.org/PDFs/2022_7Sept-FAQs-asylum-processing-rule.pdf.

⁸ That is, the asylum seeker will either obtain a positive decision before the 180-day waiting period, or will enter a backlog that will take years, even absent any applicant caused delay.

⁹ See, Innovation Law Lab and Southern Poverty Law Center, The Attorney General's Judges How the U.S. Immigration Courts Became a Deportation Tool at 19-20, (June 2019) https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

¹⁰ UCLA Center for Immigration Law and Policy, The Biden Administration's Dedicated Docket, Inside Los Angeles' Accelerated Court Hearings for Families Seeking Asylum at 14, (May 2022) https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf. (“One judge appeared willing to provide only one continuance to find counsel and was reluctant to provide additional time. The other judge routinely granted up to two continuances without inquiring if the families needed more time. While the average length between the filing of the NTA to completion of the case for individuals has been about 50 days before one judge, it has been about 73 days before the other.”)

¹¹ See footnote X NIPNLG, Asylum Processing Rule.

¹² TRAC, Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases, <https://trac.syr.edu/immigration/reports/675/#:~:text=The%20backlog%20now%20is%20eight,or%20just%20under%2005%20years>. (“The backlog now is eight times larger at 1.6 million pending cases, and wait times for a hearing on an immigrant's asylum claims, for example, now average 58 months or just under 5 years.”)

¹³ Alissa Zhu, Push to clear massive immigration court backlog ends up causing chaos for some Maryland clients, attorneys say, THE BALTIMORE BANNER, Oct. 24, 2022, <https://www.thebaltimorebanner.com/community/local-news/push-to-clear-massive-immigration-court-backlog-ends-up-causing-chaos-for-some-maryland-clients-attorneys-say-4SPYBHGTFJB7LBOHYIVBHDNLSU/>.

2019 Asylum EAD Rulemaking Eliminated the EAD Clock

DHS proposed eliminating the asylum EAD clock in a proposed rule on November 14, 2019, Asylum Application, Interview, and Employment Authorization for Applicants, 84 Fed. Reg. 62374 (Nov. 14, 2019) and published a final rule on June 6, 2020, Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38532 (June 26, 2020) which, among other things, eliminated the asylum clock. DHS's rationale for the 2019 proposed rule, much like the INS's rationale for the 1994 rule, was to "reduce incentives for [noncitizens] to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization." 84 Fed. Reg. at 62375. While that rule was overall punitive towards asylum seekers, imposing a 365-day waiting period rather than the statutory 180-day waiting period, and arbitrarily requiring denial of the EAD if at the particular moment the EAD application was filed, there was an applicant caused delay, 85 Fed. Reg. at 38537–38538, the agencies did recognize in the preamble to the rule, the universal criticism of the asylum clock, noting that "applicants, practitioners, and USCIS itself have all cited difficulty with accurate clock calculations." 85 Fed. Reg. at 62387. It explained that "calculating the current Asylum EAD clock is one of the most complex and time-consuming aspects of EAD adjudications," because it requires "multipart calculations," "tracking of the start and stop dates for each individual applicant's case," and "coordination with DOJ-EOIR." *Id.* at 62389. The elimination of the clock would "significantly streamline the employment authorization process of the (c)(8) EAD." *Id.* While this rule was ultimately vacated in *Asylumworks v. Mayorkas*, No. 20-CV-3815, 2022 WL 355213 (D.D.C. Feb. 7, 2022), its critique of the asylum clock remains accurate and demonstrates the agencies' own concerns with administering the asylum clock.

The Agencies Should Eliminate the Asylum Clock

The USCIS Ombudsman's Office has called attention to problems with the management of the Asylum Clock, going back to 2011 when it issued a report specifically on this issue, acknowledging in the conclusion that the "asylum clock presents challenges for asylum applicants, advocates, USCIS, and EOIR."¹⁴ Likewise, in its 2022 report, the Ombudsman's Office highlighted ongoing problems, especially given the need in defensive cases, for two different agencies to collaborate in EAD adjudications:

For defensive asylum applicants, inserting USCIS in the process of obtaining an EAD compounds the challenges they already face when seeking to support themselves and their families. EAD Clock errors related to the sharing of information and parsing of jurisdiction between USCIS and EOIR increases the chances of an incorrect denial resulting in periods of financial uncertainty and unnecessary hardship. Unable to work, many applicants are left without access to financial resources to support themselves and their families.¹⁵

¹⁴ Citizenship and Immigration Services Ombudsman, Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination And Communication at 6, (Aug. 6, 2011) <https://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf>.

¹⁵ Citizenship and Immigration Services Ombudsman Annual Report 2022, at 59 (June 2022) https://www.dhs.gov/sites/default/files/2022-07/2022%20CIS%20Ombudsman%20Report_verified_medium_0.pdf

The Ombudsman’s Report notes that “USCIS has a working group with representatives from the Asylum Division, Service Center Operations Directorate, Office of Chief Counsel, and Office of Information Technology (OIT) that meets biweekly and troubleshoots clock data issues and EAD asylum concern.”¹⁶ The need for a cross-agency working group to discuss clock issues, and the recognition of the time it takes for these agencies to meet regularly to address asylum clock issues, underscores the inherent flaws and inefficiencies in the asylum clock system.

Time that USCIS and EOIR spend trying to keep up with the complex administration of the EAD clock, could be better spent on substantive adjudications. Likewise, advocates must expend substantial resources following up with Asylum Offices and EOIR staff when the clock has been wrongfully stopped or has not been properly restarted. Agency staff must then respond to those inquiries by advocates, further reducing their available time to engage in other backlog reduction tasks. Various immigration advocacy and legal services groups have called on the agencies to do away with the asylum clock.¹⁷ USCIS Director Ur Jaddou has also highlighted the importance of timely adjudications in all types of applications and the need for creative solutions.¹⁸

We call on the agencies to eliminate the Asylum Clock and put the resources devoted to administering the clock, to adjudicating EAD applications and backlog reductions. Please feel free to contact Victoria Neilson, Supervising Attorney at the National Immigration Project (NIPNLG) at victoria@nipnlg.org if you would like to follow up.

Sincerely,

National Immigration Project (NIPNLG)
American Immigration Lawyers Association (AILA)
Asylum Seeker Advocacy Project (ASAP)
Human Rights First (HRF)
Immigration Legal Resource Center (ILRC)
National Immigrant Justice Center (NIJC)

¹⁶*Id.* at 57.

¹⁷ In June 2022, a coalition of immigration groups issued a report card flagging the asylum clock as one area of inefficiency. *See* Ready to Stay, Administrative Advocacy Working Group, Report Card on the Biden Administration’s Efforts to Reduce Barriers to Accessing Benefits Through USCIS, at 12 (June 2022) https://www.nationalimmigrationproject.org/PDFs/practitioners/reports/2022_June-report-card.pdf. (“It is unfair to prevent asylum seekers from working legally for reasons such as a postponement to seek counsel, especially when there is a shortage of pro- and low-bono counsel for asylum seekers, or a change in address from one Asylum Office’s jurisdiction to another, especially when asylum seekers are forced to be transient out of economic necessity and yearslong agency delays. In addition to the harm caused to the asylum seeker by the “clock,” this system – in which USCIS officers need to count days, determine the cause of any delay, and troubleshoot the asylum clock when it is wrongly stopped or not restarted – is a poor use of limited USCIS resources, which should be expended on adjudicating applications.”)

¹⁸ Readout of Director Ur M. Jaddou’s Virtual Briefing with Stakeholders to Mark One-Year Anniversary of Executive Orders Aimed at Restoring Faith in Our Immigration System, (Feb. 3, 2022). <https://www.uscis.gov/newsroom/alerts/readout-of-director-ur-m-jaddous-virtual-briefing-with-stakeholders-to-mark-one-year-anniversary-of>. (“It doesn’t matter what benefit we are talking about or what you applied for, every single applicant who seeks a benefit from USCIS is entitled to a timely decision. USCIS is clear-eyed about this and we are taking important steps to ensure that we are addressing case processing times in a meaningful way and, although there is still much to do that will take time given our large backlog, we have made progress in key areas.”).