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Frequently Asked Questions about the Asylum Clock Class Action Settlement

A.B.T., et al. v. USCIS, et al. is a nationwide class action that challenged the manner in which the United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) determine an asylum applicant's eligibility for an Employment Authorization Document (EAD). The suit was filed in the federal district court in Seattle, Washington in mid-December, 2011 by the Legal Action Center (LAC), Northwest Immigrant Rights Project (NWIRP), Gibbs Houston Pauw, and the Massachusetts Law Reform Institute.

The lawsuit challenged five specific EOIR and USCIS policies for administering the "asylum EAD clock"[1] in removal proceedings. The asylum EAD clock is the tool used by the agencies to calculate whether an asylum applicant has satisfied the 180-day waiting period for eligibility for work authorization. Asylum applicants are not automatically eligible to receive an EAD while their applications are pending. Instead, an applicant who is otherwise eligible can receive an EAD only after the asylum application has been pending for 180 days. The running of the 180-day waiting period is suspended for applicant-requested or caused delay of the adjudication of the asylum application.

The parties have reached a settlement of the issues in the case. Because the case is a class action, the settlement must be approved by the court before it will become final. This FAQ describes the terms of the Settlement Agreement and the process for its approval. The ABT Settlement Agreement is available at the LAC's website at http://legalactioncenter.org/sites/default/files/60-1_Settlement%20Agreement.pdf or the NWIRP's website at http://nwirp.org/documents/pressreleases/60-1.pdf.

1. When will the Settlement Agreement be final?

We anticipate that the Settlement Agreement will be implemented in early November 2013. It is unlikely that there will be any changes prior to that time.

The court will hold a fairness hearing on September 20, 2013, at which time it will consider any objections to the Settlement Agreement that class members have filed with the court prior to that

[1] Although EOIR and USCIS do not use the term "asylum EAD clock," we use it here because we believe it accurately captures the mechanism used by the agencies for determining if the asylum applicant has satisfied the waiting period for an EAD. EOIR and USCIS use a different but similar term, "asylum clock," to describe the asylum adjudications clock – the mechanism used to determine how long asylum cases have been pending since filing.

date. If the court determines that the Settlement Agreement is fair to the class members, it will issue an order approving the agreement. The date of the court's order approving the settlement will be the date that the Settlement Agreement becomes final. After the fairness hearing, the Court will dismiss the district court action with prejudice. However, the court will continue to retain jurisdiction over certain matters such as claims that a party has committed a violation of the Settlement Agreement.

2. What issues does the Settlement Agreement address and how does it resolve these issues?

There are five asylum EAD clock problems that the Settlement Agreement addresses. The following is a summary of these issues and the manner in which the Settlement Agreement resolves each problem. This FAQ has a more detailed discussion of the resolution of each problem in Questions 4 and 5 below.

- **Delay in starting the asylum EAD clock caused by an arbitrary rule that asylum applications can only be filed at a hearing before an immigration judge (IJ).**
    - The asylum EAD clock only starts when a complete application is filed. EOIR rules currently only allow an applicant to file an application at a hearing before an IJ, rather than with the court clerk, unlike other applications. Since court dockets are backlogged, applicants can often wait extended periods for immigration court hearings to file their applications and start their asylum EAD clocks.
    - **Resolution:** An applicant will be able to "lodge" an asylum application with an immigration court clerk at a time other than a hearing. A "lodged" application will be considered "filed" for purposes of the asylum EAD clock, and the "lodged" date will start the asylum EAD clock. The asylum application will still need to be "filed" in a hearing before an IJ. In the interim, however, the asylum EAD clock will be running and an individual with 180 days accumulated after the "lodged" date will be eligible to submit an application for employment authorization to USCIS.

- **Insufficient time allowed to prepare an expedited asylum case.**
    - Current immigration court policy permits an IJ to stop the asylum EAD clock if an asylum applicant cannot accept an expedited hearing date only 14 days away. Two weeks is usually too little time to properly prepare an asylum case. The alternative hearing date offered by the IJ is almost always months, if not years, in the future. So the applicant is left with the choice of a date that is within two weeks, or one that is months away during which time the applicant will be without an EAD.

- **Resolution:** An IJ must offer a non-detained applicant (whose case is on the expedited docket) a hearing date that is at least 45 days out. Because these cases are expedited, current policy requires the IJ to offer the first available date within the 180-day adjudications deadline. The settlement assures that the applicant will have a minimum of 45 days. If the applicant accepts that hearing date, the asylum EAD clock will continue to run.

- **EAD clock stopped after denial of asylum application by immigration judge and not restarted even after successful appeal and remand.**

  - Currently, the asylum EAD clock stops when an asylum application is denied by an IJ, and it does not restart if the decision is overturned and the case is remanded for a new asylum decision. As a result, the applicant is left without any opportunity for an EAD during the entire remand proceedings, a lengthy process.
  - **Resolution:** The asylum EAD clock will restart on the date that the BIA remands a case to the IJ for reconsideration of the asylum decision (including cases in which the remand originated in the court of appeals).
  - Additionally, on the date of the remand, the applicant's clock will be credited with the number of days that the case was pending on appeal, since the IJ denial.

- **Insufficient notice provided of the right to reschedule a missed asylum interview with USCIS, with the result that asylum EAD clock is often permanently stopped.**

  - Missing an asylum interview with USCIS permanently stops the asylum clock for work authorization, no matter the reason for missing the interview. Currently, an applicant has only a 15 day period in which to show good cause for missing the asylum interview.
  - **Resolution:** USCIS will mail a letter to asylum applicants who miss an asylum interview informing them of how missing an interview affects work authorization eligibility, and giving them 45 days to show good cause for having missed the interview.

- **Insufficient notice of asylum EAD clock decisions and procedures given to applicants, including insufficient notice regarding the impact of an adjournment on the EAD clock.**

  - Currently, many asylum applicants are not aware that decisions made at a preliminary hearing in Immigration Court may stop the asylum EAD clock. The reason given by an IJ for setting the next hearing – the "adjournment code" – determines whether the asylum EAD clock runs or stops. Currently, an IJ may or may not state the reason for the adjournment. EAD denial notices may also lack sufficient information about the reasons for asylum EAD clock decisions.

- **Resolution:** The Immigration Court will provide a written notice to asylum seekers and their counsel about the asylum EAD clock, including the impact of the different hearing adjournment codes on employment authorization. The IJ will be instructed to state clearly on the record the reason for adjournment. USCIS will consider ways to make its letters denying EAD applications clearer and will make changes to these letters.

3. How do I know if someone is a class member?

An asylum applicant is entitled to certain benefits under the terms of Settlement Agreement if he or she is a member of the Notice and Review class and one of the subclasses described below. The class and subclasses correspond with the five problems described above.

- **Notice and Review Class**
  - Noncitizens who have filed or lodged an asylum application,
  - Whose asylum applications are pending, ***and***
  - Who received insufficient notice under the terms of the Settlement Agreement (see question 4 below for changes to EOIR and USCIS policies and practices regarding notice).

- **Hearing Subclass**
  - Noncitizens in removal proceedings who have filed or lodged (see question 4 for a description of the process for "lodging" an asylum application) a complete asylum application with the immigration court *prior* to a hearing before an immigration judge, ***and***
  - Whose asylum EAD clocks started at the date of the next hearing instead of the date that the asylum application was lodged at the immigration court.

- **Prolonged Tolling Subclass**
  - Noncitizens who are not detained and who have filed an application for asylum, ***and***
  - Whose asylum EAD clocks stopped due to delay attributed to them for failing to accept the next expedited hearing date offered by the immigration court.

- **Missed Asylum Interview Subclass**
  - Noncitizens who failed to appear for an asylum interview with USCIS, ***and***
  - Whose asylum EAD clocks have not counted the time that has elapsed following the date of the missed asylum interview.

- **Remand Subclass**
  - Noncitizens whose asylum applications have been denied by the immigration court before 180 days accrued on their asylum EAD clocks,
  - Whose appeal to the BIA or a federal court of appeals was remanded for further adjudication of the asylum claim by an immigration judge, ***and***
  - Whose asylum EAD clocks have not counted the time from the date of the initial denial.

4. <u>What policy changes will take place under the ABT Settlement Agreement specific to each class? When will they take effect?</u>

- **Notice and Review Class**
  - **See Section III.A.1 of the ABT Settlement Agreement**
  - **By November 8, 2013, EOIR will amend its relevant policy memorandum, entitled Operating Policies and Procedures Memorandum 11-02: The Asylum Clock,** to state that the immigration judge must make the reason(s) for the case adjournment clear on the record.[2]
  - **By November 8, 2013, both EOIR and USCIS will create an interim notice regarding asylum adjudication and employment authorization.** EOIR will provide this notice to an asylum applicant when an asylum application is lodged or filed with an immigration court and also will make a copy of the notice available at each hearing. USCIS will make the information publicly available, including providing the notice to an asylum applicant upon referral to immigration court. Defendants also will provide contact information for inquiries regarding requests to correct the calculation of the asylum adjudications period before the Asylum Office, hearing adjournment codes before the Immigration Court, and asylum-related EAD denials before USCIS.
  - **Defendants will issue a final version of the interim notice no later than May 8, 2015.**
  - **USCIS will produce a new EAD denial letter with input from Plaintiffs as to the language and content no later than May 8, 2015**

- **Hearing Subclass**
  - ***See* Section III.A.2 of the ABT Settlement Agreement**
  - **By November 8, 2013, defendants will have implemented a process for stamping an application "lodged not filed" at the immigration court.** The 180-day waiting period for an EAD will begin when the application is stamped

[2] These changes may take place *prior* to November 8, 2013. Class counsel will provide notice on their websites as soon any policies changes stemming from the Settlement Agreement are implemented.

"lodged, not filed." Once the 180-day period has passed, an applicant can file a Form I-765, Application for Employment Authorization, with USCIS, with a copy of the asylum application that an EOIR immigration clerk stamped "lodged not filed." USCIS will consider the date that the application was stamped "lodged not filed" as the filing date for the purpose of calculating the time period for EAD eligibility.

- **By May 8, 2015, in addition to the above described changes, EOIR will have established a system for transmitting the "lodged not filed" date to USCIS.**

- **Prolonged Tolling Subclass**
  - **See Section III.A.3 of the ABT Settlement Agreement**
  - **By November 8, 2013, EOIR will amend section VI.E.2.c. of the OPPM 11-02: The Asylum Clock** to require, in setting individual hearing dates in expedited non-detained cases in which there are pending asylum applications, that an immigration judge set the individual hearing date at least 45 days from the date of the last hearing.

- **Missed Asylum Interview Subclass**
  - **See Section III.A.4 of the ABT Settlement Agreement**
  - **By November 8, 2013, defendants will implement a new system for starting and restarting the asylum clock after a missed asylum interview.**
  - First, USCIS will mail a "Failure to Appear" Warning letter as soon as possible after an asylum applicant misses an interview at the Asylum Office. The letter will describe the effect of the failure to appear on EAD eligibility and list procedural steps the applicant must take to establish "good cause" for failing to appear for the interview. It will also describe the effect of failing to respond to the warning letter within a 45 day period.
  - If the applicant responds within 45 days and demonstrates good cause for missing the interview, the interview will be rescheduled and the asylum EAD clock will restart as of the new interview date.
  - If 45 days pass with no action by the applicant, USCIS will mail a "Referral Notice for Failure to Appear" with charging documents to the applicant. This notice will describe the effect of the failure to appear on EAD eligibility and list procedural steps the applicant must take to establish "exceptional circumstances" for failing to appear at an asylum interview now that the case is before an immigration judge.
  - Upon determining whether exceptional circumstances exist, the Asylum Office will issue a determination letter to the applicant and his or her representative of record, and notify Immigration and Customs Enforcement's Office of the Principal Legal Advisor (ICE OPLA) of the determination. If the Asylum Office

determines that the applicant established "exceptional circumstances," the applicant may then request that ICE OPLA file a joint motion for dismissal of immigration proceedings. If the immigration judge then dismisses proceedings, and the asylum application is returned to the Asylum Office, the Asylum Office will reopen the asylum application and reschedule an interview with the asylum applicant.

- The asylum EAD clock, which stopped on the date of the applicant's failure to appear for the asylum interview, will restart on the date the applicant appears for the rescheduled interview at an Asylum Office.

- **Remand Subclass**
  - **See Section III.A.5 of the ABT Settlement Agreement**
  - **By November 8, 2013, defendants will implement a new system for starting and restarting the asylum EAD clock when an asylum case is remanded from the BIA.**
  - Following a BIA remand of a case to an IJ for adjudication of an asylum claim, including cases that the BIA is remanding to an IJ following a remand to the BIA from a court of appeals, the asylum EAD clock will be credited with the number of days that elapsed between the initial immigration judge denial and the date of the BIA remand order. Additionally, the asylum EAD clock will restart on the date of the BIA remand and will run and stop according to general EOIR policies thereafter.
  - To demonstrate eligibility for employment authorization, an asylum applicant must attach a copy of the complete BIA order remanding his or her case to the immigration court to his or her EAD application.

5. ***When and how may a person file a claim to seek relief under the ABT Settlement Agreement?***

An ABT claimant may file a claim under the ABT Settlement Agreement if he or she did not benefit from the policy changes in the Settlement Agreement in any one of the ways described below. The claim forms discussed below can be found at the LAC website at http://legalactioncenter.org/sites/default/files/ABT%20Claim%20Form.pdf and the NWIRP website at http://www.nwirp.org/news/viewmediarelease/60.

- **Filing a Notice and Review Claim: EOIR**
  - An ABT claimant may file a claim with EOIR if, after November 8, 2013, 1) EOIR does not provide notice to the claimant regarding the asylum EAD clock when the claimant lodges an asylum application with the immigration court or files an asylum application with the immigration judge, and/or 2) EOIR does not

provide notice regarding the asylum EAD clock at subsequent immigration court hearings.

- The claim form titled "SECTION I – CLAIMS BEFORE EOIR" should be completed and submitted for this claim.

- **Filing a Notice and Review Claim: USCIS**
  - An ABT claimant may file a claim with USCIS if, after November 8, 2013, USCIS refers the claimant's application to an immigration judge and does not provide a notice containing information about employment authorization to the ABT claimant at the time of referral.
  - The claim form titled "SECTION III – CLAIMS BEFORE USCIS; MISSED INTERVIEW AND NOTICE" should be completed and submitted for this claim.

- **Filing a Hearing Claim: EOIR**
  - An ABT claimant may file a claim with EOIR if, after November 8, 2013, EOIR does not stamp the ABT claimant's complete defensive asylum application at the immigration court clerk's window as "lodged not filed" and return the asylum application to the claimant, or prevents or otherwise deters the ABT claimant from "lodging" a complete asylum application.
  - The claim form titled "SECTION I – CLAIMS BEFORE EOIR" should be completed and submitted for this claim.

- **Filing a Hearing Claim: USCIS**
  - An ABT claimant may file a claim with USCIS if, after November 8, 2013, in adjudicating an application for employment authorization, USCIS did not use the date on which an ABT claimant "lodged" his or her asylum application at an immigration court clerk's window as the filing date for purposes of EAD eligibility.
  - The claim form titled "SECTION II – CLAIMS BEFORE USCIS; EAD DENIALS" is to be completed and submitted for this claim.

- **Filing a Missed Asylum Interview Claim: USCIS**
  - An ABT claimant may file a claim with USCIS in any of the following situations:
  - If, after November 8, 2013, USCIS does not mail a Failure to Appear Warning Letter to the ABT claimant at the last address provided to USCIS after the claimant failed to appear for an asylum interview with a USCIS Asylum Office, ***and/or***
  - USCIS does not wait 45 days after a missed interview before issuing a decision referring the asylum application to an immigration judge, ***and/or***

- USCIS does not include a Referral Notice for Failure to Appear when referring an ABT claimant's asylum application to an immigration judge, ***and/or***
- After his or her case is referred to an immigration judge by USCIS and an ABT claimant requests that USCIS make a determination that exceptional circumstances led to the missed asylum interview, USCIS fails to provide the ABT claimant and his or her representative with a determination letter, with a copy to ICE OPLA, ***and/or***
- After USCIS determines that exceptional circumstances existed for missing the asylum interview, the ABT claimant's proceedings are dismissed by the immigration judge and the USCIS Asylum Office reopens the claimant's asylum case, USCIS fails to start the asylum EAD clock on the rescheduled asylum interview date.
- The claim form titled "SECTION III – CLAIMS BEFORE USCIS; MISSED INTERVIEW AND NOTICE" is to be completed and submitted for this claim.

- **Filing a Remand Claim: USCIS**
  - After November 8, 2013, an ABT claimant may file a claim with USCIS if the BIA remanded the claimant's asylum case to an immigration judge and the claimant's EAD application was denied because USCIS did not credit the time from the initial immigration judge denial to the date of the BIA remand order in determining EAD eligibility.
  - The claim form titled "SECTION II – CLAIMS BEFORE USCIS; EAD DENIALS" is to be completed and submitted for this claim.

6. What happens after I file my claim form? If I disagree with the agency's decision, do I have a further appeal under the Settlement Agreement?

Within 45 days after receiving an ABT Claim Form, USCIS or EOIR will mail the asylum applicant who filed the claim either 1) a decision on the claim, called a Final Notice; or 2) a Notice of Preliminary Findings. *See* Section II.C.11.b.iv of the ABT Settlement Agreement.

The Final Notice will provide the agency's determination 1) about whether the claimant is a class or subclass member and if a violation of the Agreement occurred, 2) a description of any corrective action that the agency has taken or will take, if a violation was found, and 3) if the claimant is not determined to be a class or subclass member, instructions about seeking review of that determination.

The Notice of Preliminary Findings will explain the basis for USCIS or EOIR's belief that the claimant is not a class or subclass member or that there was no violation of the agreement, and request additional information and/or evidence from the ABT claimant. The claimant will have 30 days after the Notice of Preliminary Findings to submit additional written evidence or information. Within thirty days after timely receipt of the supplemental information from the

claimant, or within thirty days of the claimant's deadline if no additional information was submitted, USCIS or EOIR will send a Final Notice.

The parties may negotiate in good faith to resolve any remaining disputes within 30 days of the date that the agency mailed the Final Notice. For example, if a claim is granted, but the complaining party believes the corrective action taken by USCIS or EOIR is not sufficient to remedy the violation, he or she may attempt to negotiate a resolution of that dispute. *See* Section II.C.11.b.v of the ABT Settlement Agreement.

If the parties cannot resolve the dispute, ABT claimants may apply to the district court for enforcement of the Settlement Agreement. Before doing this, however, the asylum applicant must inform EOIR or USCIS that he or she intends to do so. *See* Section II.C.11.b.vi of the ABT Settlement Agreement.

7. ***May I challenge EOIR or USCIS' asylum EAD clock practices and procedures if they are not resolved by the Settlement Agreement?***

Yes. The Settlement Agreement does not affect or limit the ability of individuals to *independently* challenge, before the agency or in federal court, claims that are entirely outside of the Settlement Agreement or claims that cannot be considered under the Claims Review Process of the Settlement Agreement. Examples of issues in this latter category include: 1) a challenge to whether an immigration judge made the reason(s) for the case adjournment clear on the record, or 2) a challenge to whether the immigration judge offered a non-detained ABT claimant an expedited hearing date that was a minimum of 45 days from the last master calendar hearing. An applicant may use any available avenue to challenge one of these decisions. *See* Sections II.C.11 and II.C.11.b.ii of the ABT Settlement Agreement.

8. ***If my asylum EAD clock problem is not related to policies and practices covered by the Settlement Agreement, but merely an error on the part of EOIR or USCIS, what remedies exist?***

The *OPPM 11-02: The Asylum Clock* states that an asylum applicant who believes that an asylum clock decision is incorrect should address it in the following ways:

- If the issue arises during a hearing, the applicant or his or her attorney should raise the issue with the immigration judge; the judge should then respond on the record.
- If the issue arises after the hearing, the asylum applicant should contact the court administrator in writing with a detailed explanation of why the asylum EAD clock decision was incorrect. Contact information for court administrators is available at http://www.justice.gov/eoir/sibpages/ICadr.htm#AZ. The letter should also copy EOIR's Office of the General Counsel at 5107 Leesburg Pike Ste. 2600, Falls Church, VA 22041.
- If a party believes that the issue has not been addressed correctly at the immigration court level, the party may contact the Assistant Chief Immigration Judge in writing with a detailed explanation of why the asylum EAD clock decision was incorrect. Contact

information for Assistant Chief Immigration Judges is available at http://www.justice.gov/eoir/sibpages/ACIJAssignments.htm. The letter should also copy EOIR's Office of the General Counsel at 5107 Leesburg Pike Ste. 2600, Falls Church, VA 22041.

- If a case is pending before the Board of Immigration Appeals and the applicant believes an error has been made, he or she should contact EOIR's Office of the General Counsel directly by letter. The letter should provide a detailed explanation of why the clock appears to be incorrect. Questions about the appeal process at the Office of the General Counsel should be directed to 703-305-0470.

In addition, an asylum applicant who believes he or she is eligible for employment authorization may file an application for employment authorization with USCIS, together with evidence that he or she is eligible, and pursue any appropriate review of that application if denied.

9. If I requested and got a continuance and my individual hearing date now is set at a date that is months, even years in the future, what are my options?

Before requesting a continuance and accepting a future date that is far in the future, remember that, under the terms of the Settlement Agreement, in an expedited case, EOIR must not offer an individual hearing date that is sooner than 45 days after the master calendar hearing date. *See* Question 2, *supra*.

If you have an expedited case,[3] then the immigration judge must attempt to schedule the case within 180 days. When this happens, the asylum application may be decided before the 180-day waiting period for an EAD has run.[4] If the 45 days is insufficient and an applicant needs an additional continuance, then the case will be removed from the expedited calendar and the immigration judge does not have to schedule the next hearing within 180 days but may set it far in the future.

If you must request a continuance and the immigration judge offers you an individual hearing date far in the future, you may file a motion to advance the individual hearing date when you are ready to move forward. *OPPM 11-02: The Asylum Clock* states that a party may file a motion to cancel and reschedule a hearing for an earlier date. If the court grants the motion to advance, the asylum EAD clock will start or remain stopped depending on what happens at the advanced

[3] An expedited case is an asylum case subject to the 180-day adjudications deadline. A case is considered an expedited case if it was initially an affirmative asylum case filed with USCIS and then referred to an immigration court before 75 days had elapsed since filing. The case is also considered an expedited case if the case was filed at the immigration court and the applicant never requested a continuance. *See* OPPM 11-02: *The Asylum Clock* at 5, 9-10.

[4] If the applicant wins asylum, he or she will receive an EAD. If the asylum application is denied, and an appeal is taken, the asylum EAD clock could restart if there is a remand from the BIA for a new decision on the asylum application. *See* Question 4, Remand Subclass, *supra*.

hearing. Be sure to prepare your facts and arguments in support of your motion as thoroughly and persuasively as possible. Another alternative might be to request that the case be set to another Master Calendar Hearing.

10. When does the Settlement Agreement terminate?

The Settlement Agreement will end 4 years following the full implementation of all of the terms of the Agreement or 6 years after the effective date of the Agreement, whichever occurs first.

11. Should I contact class counsel if I think my client's case is not being handled correctly under the Settlment Agreement?

We are interested in hearing about problems with implementation of the Settlement Agreement. Do not contact us about implementation problems before November, 2013, because the Settlement Agreement will not be implemented until then. After that point, please carefully review these FAQs and the Settlement Agreement itself to make sure that your client is a class member entitled to relief under the Agreement before contacting us. If you believe that this is the case, and that relief has been denied, then contact the LAC at asylumclock@immcouncil.org or the NWIRP at Asylumclock@nwirp.org.