Frequently Asked Questions about *A.B.T. et al. v. USCIS, et al.*, A Nationwide Class Action Challenge to the Asylum EAD Clock

February 9, 2012

BACKGROUND

A.B.T., et al. v. USCIS, et al. is a nationwide class action challenging 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 complaint and motion for class certification (see http://www.legalactioncenter.org/litigation/asylum-clock) were filed in the federal district court in Seattle, Washington in mid-December, 2011 by the Legal Action Center (LAC), Northwest Immigrants Rights Project, Gibbs Houston Pauw, and the Massachusetts Law Reform Institute. The suit follows the LAC's extensive – yet ultimately unsuccessful – attempts to resolve these problems through administrative advocacy.

The lawsuit currently challenges three specific EOIR and USCIS policies for administering the "asylum EAD clock" in removal proceedings. Other asylum EAD clock policies and practices that affect significant numbers of asylum applicants may be challenged later (*see* Call for Plaintiffs). 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. 8 U.S.C. § 1158(d)(2); 8 C.F.R. §§ 208.7(a), 1208.7(a). The running of the 180-day waiting period is suspended for applicant-requested or caused delay of the adjudication of the asylum application. 8 C.F.R. §§ 208.7(a)(2); 1208.7(a)(2).

This FAQ provides an overview of the lawsuit. To monitor the continued progress of the lawsuit and for more information about the asylum clock in general, see our web page entitled Asylum Clock (http://www.legalactioncenter.org/litigation/asylum-clock).

What specific problems with the asylum EAD clock does the lawsuit address?

Plaintiffs and the proposed class and subclasses currently challenge three of defendants' policies and practices for administering the asylum EAD clock as violating the Constitution, the Immigration and Nationality Act (INA), the Administrative Procedure Act (APA), and governing regulations.

- ***"Notice and Review Policy and Practice***." First, the lawsuit challenges defendants'

policies and practices that preclude asylum applicants from receiving meaningful notice about the status of their asylum EAD clocks. Often, asylum applicants do not learn of defendants' decisions to stop or not start or restart the asylum EAD clock until their applications for work authorization have been denied. Defendants have no procedure to ensure that asylum applicants are informed when their EAD clocks are stopped or not started or restarted. Moreover, defendants do not provide asylum applicants with a meaningful opportunity to contest or remedy improper asylum EAD clock determinations.

- ***"Hearing Policy and Practice***." Second, the suit challenges defendants' policy and practice of considering an asylum application "filed" for purposes of the asylum EAD clock only at a *hearing* before an immigration judge. This is important because the 180-day waiting period for EAD eligibility begins upon the "filing" of a complete asylum application. In certain jurisdictions, crowded court dockets cause long delays before an asylum applicant's initial hearing. As a result, some applicants must file asylum applications with the court clerk before their hearings or they will miss the one year deadline for filing their applications. Due to defendants' Hearing Policy and Practice, applicants' EAD clocks are not credited with time between the court filing and the next hearing. This period of delay in starting the asylum EAD clock often lasts months to a year or more. Plaintiffs maintain that the 180-day waiting period for EAD eligibility should begin when a complete asylum application is filed with the "immigration court," as specified in the regulations. 8 C.F.R. § 1208.4(b)(3). This is true whether an applicant must file an application with the court to avoid missing the one-year deadline or is simply ready to file a complete application with the immigration court before the next scheduled hearing.

- ***"Remand Policy and Practice***." Finally, the suit challenges defendants' policy and practice of not starting or restarting the asylum EAD clock after an asylum case has been remanded by a federal court or the Board of Immigration Appeals (BIA) for further consideration of the asylum application. While the asylum EAD clock properly is stopped after an asylum application is denied by an immigration judge, a remand following an appeal necessarily vacates the denial. Because there is no longer a denial, there also no longer is a reason for the clock to remain stopped. Following a remand, the EAD clock should start or restart at the point it previously was stopped.

What relief are we requesting in this lawsuit?

Through this lawsuit, we hope to achieve a better system for determining asylum applicants' eligibility for work authorization. We are asking for declaratory and injunctive relief to force defendants to cease their unlawful asylum clock policies and to change the current system to bring it in line with the law. Specifically, we are asking the court to declare the asylum clock policies challenged here to be arbitrary and capricious, an abuse of discretion, and in violation of the statute, regulations and due process.

We are asking for the following injunctive relief:

- A permanent injunction ordering that if an asylum applicant is in removal proceedings, defendants must make any decision to stop the clock on the record, and only after the applicant has been notified of the consequences of requesting or causing a delay and given an opportunity to respond;
- A permanent injunction ordering defendants to establish an adequate process for an asylum applicant to contest an asylum EAD clock or EAD decision that is considered erroneous;
- A permanent injunction ordering defendants to start the asylum EAD clock when an asylum applicant files a complete asylum application with EOIR;
- A permanent injunction ordering defendants to start or restart the asylum EAD clock following a remand of an asylum case by either the BIA or a federal court of appeals; and
- A permanent injunction ordering defendants to readjudicate denied EAD applications for the proposed class and subclasses in accordance with the above-referenced guidelines.

What classes of asylum applicants does the lawsuit cover?

The proposed class definitions correspond to the three claims discussed above. There is an overall class consisting of those who have been harmed by defendants' Notice and Review Policy and Practice and two subclasses consisting of those who have been harmed by defendants' Hearing Policy and Practice and Remand Policy and Practice, respectively. The following are the requirements for membership in each of the classes:

Notice and Review Class – To be a member of the proposed class challenging defendants' Notice and Review Policy and Practice, a noncitizen must:

- Have filed a complete asylum application;
- Have been issued a Notice to Appear or Notice of Referral for removal proceedings;
- Have applied or will apply for an EAD and have had or will have the EAD application denied; and
- Have not received legally sufficient notice of an asylum EAD clock determination made in his or her case *and*/*or* have not been afforded a meaningful opportunity to challenge such determination.

Because the suit alleges that the defendants' current policies and practices do not provide sufficient notice of asylum EAD clock determinations or a meaningful opportunity to challenge such decisions, all asylum applicants who are in removal proceedings are likely to fall within this class.

Hearing subclass – To be a member of the proposed subclass challenging defendants' Hearing Policy and Practice, a noncitizen must satisfy the following:

- Have been issued a Notice to Appear or Notice of Referral for removal proceedings;
- Have filed or sought to file a complete asylum application with the immigration court; and
- Have had defendants' Hearing Policy and Practice applied with the result that the asylum EAD clock does not start immediately upon the filing of the asylum application but instead is delayed until the next hearing before

an immigration judge. This hearing may have already occurred or will occur in the future.

Remand subclass – To be a member of the proposed subclass challenging defendants' Remand Policy and Practice, a noncitizen must satisfy the following:

- Have had his or her asylum EAD clock stopped following the denial of an asylum application by the immigration court;
- Appealed the denial;
- Have had his or her case remanded by the BIA or a federal court for further adjudication of the asylum claim;
- Have not had his or her asylum EAD clock started or restarted following the remand.

Other subclasses may be added later if the lawsuit is expanded to include challenges to other policies and practices that affect large numbers of asylum applicants.

When will the motion for class certification be ready for a decision by the court?

The motion for class certification – which was filed in December 2011 – is scheduled to be fully briefed by the parties on February 24, 2012. At that point, the motion will be ready for a decision by the court. There is no way to predict when the court will decide. We will post information as soon as a decision is made.

What steps should I take if I think my client falls within one of the classes?

There are no steps that you need to take to ensure that your client is a member of the proposed class or subclasses. If the District Court grants the motion for class certification, its order will specify the class definitions. All asylum applicants who fall with these class definitions will automatically be included within the classes. We will issue additional guidance when this occurs.

In the meantime, we are interested in hearing from attorneys whose clients' asylum EAD clocks have stopped or not started as a result of the Hearing Policy and Practice or the Remand Policy and Practice. We may want to add plaintiffs to the suit in the future and will also want to demonstrate to the Court how widespread these problems are. If you represent an individual who has been subject to one of these policies, please follow the steps set forth in Call for Plaintiffs.

Did EOIR's recently issued Operating Policies and Procedures Memorandum (OPPM) resolve the asylum EAD clock problems challenged in this lawsuit?

No, the OPPM that EOIR issued on November 15, 2011 does not resolve the agencies' policies and practices challenged in this lawsuit. While OPPM 11-02, entitled "The Asylum Clock," does clarify a number of EOIR policies and practices with respect to the asylum clock,[1] it

[1] This OPPM purports to only measure compliance with the statutory "asylum adjudications goal;" that is, the 180-day period in which EOIR is required to adjudicate an asylum case. *See* OPPM 11-02 at 3-4; 8 U.S.C. § 1158(d)(5)(A)(iii). The adjudication codes that immigration

reaffirms the specific policies and practices that we challenge in our lawsuit. It also reaffirms other policies and practices that we may seek to challenge later.

Are there additional asylum EAD clock policies and practices that might be subject to a legal challenge in the future?

There are two other policies and practices that we are concerned may adversely affect large numbers of asylum applicants:

Under the **Prolonged Tolling Policy**, the asylum EAD clock will start or restart only at a hearing before an immigration judge. Thus, an asylum EAD clock that is properly stopped due to a delay caused by the applicant will not restart until the next hearing, even if the applicant resolves the delay sooner. The next hearing in the case may be scheduled months in the future. EOIR will not start or restart the clock even if the immigration court is on notice that the delay has been resolved and even if the applicant asks for the hearing date to be advanced and for the clock to be restarted.

DHS has stated that the asylum EAD clock will stop when a case is administratively closed under the current prosecutorial discretion initiative. Under this **Administrative Closure Policy**, if an applicant does not have 180 days on the clock at the time that the case is administratively closed, he or she will remain ineligible for an EAD throughout the entire time that the case remains administratively closed.

If you represent an individual who has been subject to the Prolonged Tolling Policy or the Administrative Closure Policy, please follow the steps set forth in Call for Plaintiffs.

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judges and immigration court clerks enter in asylum cases pursuant to this OPPM will be applied to determine whether a delay in the case was caused or requested by the applicant, which will stop the "adjudications clock." However, because EOIR's clock determinations are adopted by USCIS to calculate the 180-day waiting period for EAD eligibility, the OPPM also affects the asylum EAD clock.