LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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EMPLOYMENT AUTHORIZATION AND ASYLUM: STRATEGIES TO AVOID STOPPING THE ASYLUM CLOCK

By the Legal Action Center

I. INTRODUCTION

Applicants for asylum in the United States are not immediately or automatically granted employment authorization.[2] In order to receive an employment authorization document (EAD), an asylum application must remain pending for 180 days without a decision. This 180-day waiting period is calculated according to an "asylum clock," which tracks how many days are credited towards it. Exempted from this count are periods of delay "requested or caused" by the asylum applicant.[3] The asylum clock "starts" when a complete asylum application is filed. Once started, the asylum clock will be "stopped" during periods of applicant-caused delay. Once the delay has been resolved, the asylum clock should start again. The clock tracks the 180-day waiting period for all asylum applicants, whether they applied for asylum affirmatively with USCIS' Asylum Office; applied defensively while in removal proceedings before the Executive Office for Immigration Review (EOIR); or were referred by the asylum office to EOIR for removal proceedings.

Problems with the asylum clock arise from: 1) implementation – when EOIR and USCIS do not follow their own guidance regarding the clock; and 2) interpretation – when EOIR and USCIS develop and implement policies that wrongly interpret the regulations and adversely impact the asylum clock. Both types of problems with the asylum clock prevent asylum applicants from lawfully securing work authorization. While implementation errors should be corrected easily upon demonstrating that the clock decision is contrary to agency policy, the absence of an

[1] This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.

[2] An asylee is automatically eligible for an EAD only after his or her asylum application is granted.

[3] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).

adequate review mechanism often hinders correction of even simple errors. Resolution of an erroneous interpretation of the law by USCIS or EOIR may require a change in nationwide policy and thus is even more difficult to achieve. The nationwide class action *A.B.T. v. USCIS*,[4] filed in 2011 by the Legal Action Center (LAC) and partners, challenges several agency interpretations that cause the most widespread harm to asylum applicants.

This practice advisory discusses the employment authorization process for asylum applicants and the problems asylum applicants in immigration court proceedings encounter when applying for an EAD or attempting to fix erroneous asylum clock determinations. It describes EOIR's interpretation of the asylum clock, most recently set forth in a November 11, 2011 Memorandum.[5] It also suggests arguments attorneys representing asylum applicants in removal proceedings can use to: 1) prevent the immigration judge (IJ) from erroneously stopping the clock or 2) convince the IJ or court administrator (CA) to restart an erroneously stopped clock.

II. THE TWO 180-DAY PERIODS RELATED TO ASYLUM APPLICATIONS

There are two 180-day periods that must be measured in asylum cases pursuant to statute. The first, referred to as an "adjudications" period, is a 180-day period in which an IJ is to decide an asylum case.[6] The second is the 180-day waiting period for an asylum applicant to become eligible for an EAD.[7] EOIR contends that its asylum clock measures only the adjudications period and that it is solely USCIS' responsibility to measure the EAD waiting period.[8] In reality, however, USCIS relies on EOIR's "asylum clock" to make determinations about employment authorization.[9] Thus, as a practical matter, the "asylum clock" tracks both periods.

In many respects, tracking of the two periods overlaps. For example, both 180-day periods will be suspended for applicant-requested or caused delay.[10] However, there are times when measurement of the two periods diverges. For example, if DHS requests an adjournment to

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[4] *A.B.T. et al. v. U.S. Citizenship and Immigration Services*, No. 11-02108 (W.D. Wash. *filed* December 15, 2011). *See* the LAC's Q&A describing the case, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/FAQ%27s.pdf; *see also* http://www.legalactioncenter.org/litigation/asylum-clock. Other counsel in the case are Northwest Immigrant Rights Project; Massachusetts Law Reform Project; and Gibbs, Houston and Pauw.

[5] *See generally* Operating Policies and Procedures Memorandum ("OPPM") 11-02: The Asylum Clock at 7, *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm [hereinafter OPPM 11-02: The Asylum Clock].

[6] INA § 208(d)(5)(A)(iii).

[7] INA § 208(d)(2).

[8] *See* OPPM 11-02: The Asylum Clock at 16 (". . . USCIS is responsible for adjudicating applications for work authorization. Accordingly, if an applicant believes that he or she is eligible for work authorization . . . the applicant should contact USCIS.").

[9] *See* OPPM 11-02: The Asylum Clock at 4 ("To facilitate USCIS's adjudication of employment authorization applications, EOIR provides USCIS with access to its asylum adjudications clock for cases before EOIR.").

[10] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2); *accord* OPPM 11-02: The Asylum Clock at 3.

complete a fingerprint or database check, the case is permanently exempted from the 180-day adjudications deadline (i.e., this 180-day period is permanently tolled); however, the 180-day EAD waiting period continues to run.[11] The asylum clock also will continue to run in this circumstance.[12] Because of the divergence of the two 180-day periods in certain circumstances, the agencies' failure to track the two periods independently has led to problems in the administration of the asylum clock for EAD purposes.

III. HOW THE ASYLUM CLOCK FUNCTIONS

1. Are all asylum applicants eligible to apply for an EAD?

In addition to the 180-day waiting period, the regulatory eligibility requirements for an EAD are 1) that the asylum applicant is not an aggravated felon; 2) that the applicant has filed a complete asylum application; 3) that the asylum application has not been denied at the time the EAD application is decided; and 4) that, absent exceptional circumstances, the asylum applicant has not failed to appear for an interview or hearing.[13]

2. Are there any exceptions to the 180-day waiting period for EAD eligibility?

There are three categories of applicants who are exempt from the 180-day waiting period. They are individuals: 1) who filed an asylum application prior to January 4, 1995; 2) who filed an asylum application pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) ("ABC" cases);[14] and 3) whose asylum application has been recommended for approval.[15] In these three situations, the asylum applicant is eligible to apply for an EAD without having to wait 180 days.

3. When can a person file an EAD application?

Once the asylum clock reaches 150 days in affirmative or defensive cases, the asylum applicant may apply for an EAD with USCIS.[16] After the applicant has filed an application for an EAD, USCIS has 30 days from the date of the filing to grant or deny the EAD application. However, USCIS cannot grant the application before the asylum clock has reached 180 days after the initial filing of the asylum application.[17]

4. When does the 180-day waiting period begin?

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[11] *See* OPPM 11-02: The Asylum Clock at 7; OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes at 5, *available at* http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm (providing a complete list of adjudication codes) [hereinafter OPPM 05-07].
[12] *Id.*
[13] 8 C.F.R. §§ 208.7(a), 1208.7(a).
[14] *See* OPPM 11-02: The Asylum Clock at 4.
[15] 8 C.F.R. §§ 208.7(a)(1), (3),1208.7(a)(1), (3).
[16] 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1).
[17] *Id.*

The 180-day waiting period begins when a "complete asylum application" has been "filed" affirmatively with USCIS or defensively with the immigration court.[18] The meaning of the terms "complete asylum application" and "filed" are discussed below.

5. What is a complete asylum application?

A "complete" asylum application must: 1) have all the questions answered; 2) be signed by the applicant; and 3) include additional supporting evidence as required on the application instructions.[19] An incomplete application will be returned to the applicant. If the application has not been returned to the applicant within 30 days, it is deemed complete. [20]

The requirement that a "complete" application must be filed to start the asylum clock for EAD purposes does not mean that the application can never be supplemented at a later date. To the contrary, the instructions for the application specifically state that amendments or supplemental information can be submitted at the asylum interview or the IJ hearing.[21]

6. What does it mean to "file" an asylum application?

Affirmative filing: An applicant who is not in removal proceedings files the asylum application with USCIS. An affirmative applicant attends an interview with a USCIS asylum officer, who then grants, denies or dismisses the application, or refers the case to EOIR for removal proceedings.[22] When a case is referred for removal proceedings, the asylum application is then considered a "defensive" asylum application. A referral to an IJ is not a final decision in the case and does not constitute a denial of the asylum application.[23] Instead, an IJ reviews the previously filed asylum application *de novo* without the applicant having to file a new asylum application. Generally, in referred cases, the asylum clock will continue to run following the referral.[24]

Defensive filing: When an individual is placed in removal proceedings prior to filing an asylum application, he or she will file the asylum application directly with EOIR in the first instance. The regulations require only that the application be filed with the "immigration court."[25]

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[18] *Id.*
[19] 8 C.F.R. §§ 208.3, 1208.3
[20] 8 C.F.R. §§ 208.3(c)(3), 1208.3(c)(3).
[21] "I-589, Application for Asylum and Withholding of Removal" at 5, *available at* http://www.uscis.gov/files/form/i-589instr.pdf.
[22] 8 C.F.R. §§ 208.9(b), 208.14(c), 1208.9(b), and 1208.14(c).
[23] 8 C.F.R. §§ 208.14(c), 1208.14(c).
[24] 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1). In cases in which USCIS does not issue charging documents, the asylum officer shall dismiss an application instead of referring the case to immigration court. 8 C.F.R. §§ 208.14(c)(1), 1208.14(c)(1). With no pending asylum application, the asylum clock does not apply.
[25] 8 C.F.R. § 1208.4(b)(3).

Through a non-regulatory EOIR policy, a respondent in removal proceedings is permitted to file an asylum application *only* at a hearing before an IJ.[26] This effectively means that asylum applicants cannot "file" their applications with the immigration court clerk prior to a hearing, regardless of how long the wait is until the hearing, and also cannot file an application between two hearings.

At least one immigration court — the Seattle Immigration Court — allows asylum applicants to file an asylum application with the court clerk outside of a hearing. The court refers to this as "lodging" or "submitting" the application rather than "filing" it. This policy is intended to accommodate asylum applicants who otherwise would miss their one-year filing deadline if they were required to wait until the next hearing to file their asylum applications. In these cases, the application is considered "filed" for purposes of the one year filing deadline, but is not considered "filed" for purposes of starting the asylum clock.[27]

7. What is an "expedited" asylum case versus a "non-expedited" asylum case and what are the implications for the asylum clock?

EOIR considers asylum cases subject to the 180-day adjudications deadline to be "expedited cases," while those exempt from this deadline are "non-expedited cases."[28] An asylum case is treated as an "expedited" case if it is referred to EOIR with fewer than 75 days on the asylum clock; it is not considered "expedited" if it was referred to EOIR after 75 days or more had elapsed since the filing of the application.[29] A case that is not expedited is not subject to EOIR's 180-day adjudications deadline; despite this, the asylum clock will run and stop as usual.[30] Thus, for example, the asylum clock can be stopped for purposes of the 180-day EAD waiting period for applicant-caused delay.

EOIR states that the clock will stop in an "expedited case" if the applicant does not accept an "expedited hearing date" or a date that is within the 180-day adjudications period. EOIR policy is specific about procedures an IJ is to follow before stopping the clock on this basis. After determining that the case is an expedited case, EOIR guidance states that the judge should then evaluate whether to offer an expedited hearing date. In the following three types of cases, the judge need not offer an expedited hearing date: when 1) the case is being adjourned for an applicant-related reason; 2) the case is being adjourned for an applicant or DHS-related reason that permanently exempts the case from the 180-day adjudications deadline; or 3) the case *previously* was adjourned due to applicant-caused or DHS-caused delay that permanently

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[26] *See* OPPM 11-02: The Asylum Clock at 5-6 ("A defensive asylum application is "filed" for asylum clock purposes when it is accepted by the judge at a hearing."); Immigration Court Practice Manual § 3.1(b)(iii)(A) [hereinafter ICPM] ("Defensive applications are filed in open court at a master calendar hearing.").

[27] In *A.B.T. v. USCIS*, the LAC and its co-counsel contend that EOIR's policy of starting the clock only when an applicant files an asylum application with the IJ at a hearing violates the regulations and unlawfully prolongs the 180-day waiting period.

[28] *See* OPPM 11-02: The Asylum Clock at 5, 8.

[29] *Id.*

[30] *See* OPPM 11-02: The Asylum Clock at 5, 8.

exempts the case from the 180-day adjudications deadline.[31] If none of these three situations applies, the IJ should ask on the record whether the applicant wants an "expedited asylum hearing date." If the applicant declines an "expedited asylum hearing date," then the adjournment code 22 (Alien or Representative Rejected Earliest Possible Asylum Hearing)," will be entered, "or another appropriate code that also stops the clock until the next hearing . . ."[32]

If the applicant wants an expedited hearing date, the IJ should offer the first available date within the 180-day adjudications deadline. EOIR has stated that "[g]enerally, when setting a case from a master calendar hearing to an individual calendar hearing, a minimum of 14 days should be allowed before the next hearing, even if the 180-day adjudications deadline is imminent."[33] EOIR policy implies that this 14-day period should be shortened only "if requested by the applicant."[34] If the applicant rejects or is unable to make the expedited hearing date that the IJ offers, then the IJ is to enter an adjournment code reflecting applicant-caused delay.

Even if an attorney accepts the expedited date offered by the IJ, court staff may later call the attorney and offer a new expedited hearing date that may be even sooner. If the attorney rejects this new date, EOIR takes the position that this refusal stops the clock.[35]

8. How does "applicant-caused" delay affect the asylum clock?

Under the regulations, "[a]ny delay requested or caused by the applicant shall not be counted as part of" the 180-day waiting period for EAD eligibility, [36] and thus will stop the clock. Arguably, the regulation requires that the clock be stopped only during the time that the delay exists. Unfortunately, this is not how USCIS and EOIR interpret this regulation. Instead, in cases that are before the immigration court, EOIR's policy memorandum mandates that the clock remain stopped from the date of the hearing at which the applicant-caused delay occurs until the next hearing date.[37] The policy memorandum does not permit the IJ or the court administrator to restart the clock prior to the next hearing, even if the applicant cures the delay before the next hearing and notifies the court that the delay is cured. Further, the clock will remain stopped

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[31] *Id.* at 9-10. EOIR maintains a list of adjournment codes that identify the reason for the adjournment; whether the adjournment is due to applicant, government or court-related reasons; and whether the adjournment permanently exempts a case from the 180-day adjudications period. For example, where a case is marked with adjournment code +37, the case has been adjourned for DHS to complete an investigation and it is permanently exempted from the expedited docket. *See* OPPM 05-07.

[32] *See* OPPM 11-02: The Asylum Clock at 10.

[33] *Id*. Note, however, that EOIR also insists that IJs must have flexibility to schedule asylum hearings in order to adjudicate cases within 180 days and has refused to mandate a minimum number of days before the next hearing should be scheduled. *See* AILA-EOIR Liaison Agenda Questions, Question 11, March 30, 2000, *available at* http://www.justice.gov/eoir/statspub/qaeoiraila.htm.

[34] *Id.*

[35] *Id.* at 12.

[36] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).

[37] *See* OPPM 11-02: The Asylum Clock at 11.

following the next hearing if, at the new hearing, the IJ determines there is a *new* applicant-caused delay.[38]

9. What is considered "applicant-caused" delay?

The regulations provide only a limited number of examples of what constitutes an applicant caused delay. By regulation, "delays caused by failure without good cause to follow the requirements for fingerprint processing" stop the clock.[39] Additionally, the time between the issuance of a request for evidence and the receipt of a response to that request,[40] and the period during which the applicant fails to appear to receive the decision of the asylum officer,[41] will not be counted towards the 180 days.

In addition to these regulatory examples, EOIR's adjournment codes reflect the agency's interpretation of what stops the clock.[42] This chart of codes lists whether an adjournment is "alien-related" or "DHS-related" or "IJ-related" or "Operational." An "alien-related" adjournment stops the asylum clock for purposes of both 180-day periods (the adjudications period and the EAD waiting period) until the next hearing.[43] Most of EOIR's twenty-six "alien-related" codes are not referenced in the regulations.[44]

Many immigration courts are facing overloaded dockets and thus hearings are scheduled for dates far in the future. Because the asylum clock, if stopped, will not be restarted between hearings, applicants' clocks are stopped for extended periods beyond the initial applicant-caused delay. Contrary to EOIR's expansive interpretation of the phrase "applicant caused or requested delay," the wording of the regulation, which specifically references "good cause" in connection with the failure to complete biometrics, arguably suggests that other types of delay also should not be charged against the applicant if he or she can show good cause for the delay.

10. What is *not* considered "applicant-caused" delay?

EOIR has clarified that delay caused by the immigration court or by DHS should not be attributed to the asylum applicant and should not stop the asylum clock.[45] If a case is rescheduled for court-related reasons, EOIR directs court staff to enter an adjournment code indicating that EOIR caused the delay and the clock should then start or restart on the date the

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[38] *See* OPPM 11-02 : The Asylum Clock at 7, 11.
[39] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[40] *Id.*
[41] 8 C.F.R. §§ 208.9(d), 1208.9(d). The EAD clock restarts when the applicant "does appear to receive and acknowledge receipt of the decision or [when] the applicant appears before an immigration judge" after a case has been referred to removal proceedings. *Id.*
[42] *See generally* OPPM 05-07.
[43] *Id. at* Adjournment Codes Appendix; OPPM 11-02: The Asylum Clock at 7.
[44] For example, Code 01, applied when an applicant requests time to seek representation, and Code 22, applied when an applicant is unable to take the earliest possible hearing date, are found nowhere in the regulations. *See* OPPM 05-07 at Appendix, "Adjournment Codes".
[45] *See* OPPM 11-02: The Asylum Clock at 12.

hearing would have taken place.[46] For example, if the court reschedules a hearing because the judge will be on detail, the guidance states that code 35 (Unplanned IJ Leave – Detail/Other Assignment) is the appropriate adjournment code.[47]

If DHS causes the delay, the court should enter a DHS-related adjournment code. For example, if a judge grants DHS' motion to continue the hearing or motion to change venue from one immigration court to another, the delay should be attributed to DHS and the clock should continue to run.[48]

11. What notices are given to the applicant about asylum clock decisions?

EOIR policy mentions two notices related to the asylum clock. First, an IJ "should" state on the record the reason for a case adjournment.[49] Second, an IJ "may" inform the asylum applicant of the number of days on the clock and whether it is running.

Thus, EOIR policy does not *require* IJs or court administrators (CAs) to state the reason for a case adjournment, nor to inform applicants when or why their asylum clocks are stopped, not started, or not restarted. Further, when an IJ adjourns a case at a time other than a hearing, there is no requirement of notice to the applicant at all.[50] Similarly, when a CA makes a decision affecting the asylum clock, there is no requirement that the applicant be notified of the impact on the clock. As a result, there may be long periods in which the asylum applicant is unaware of the fact that his or her asylum clock stopped.

12. Does an applicant remain eligible for an EAD and EAD renewals during an appeal of an adverse IJ decision on the asylum application?

When an asylum application is denied on or before the 150th day of the 180-day EAD waiting period, the applicant is not eligible to apply for an EAD. In all other cases, an asylum applicant may apply for an EAD on the 151st day of the 180-day EAD waiting period. If the asylum application is denied before the expiration of the 180-day period but while an EAD application is pending, the EAD application also will be denied.[51] In addition, if the asylum application is denied after the 180-day period has run, the applicant is no longer eligible to apply for an EAD and any pending EAD will be denied. In all of these scenarios, the asylum applicant will not be eligible for an EAD during any appeal of the denial of the asylum application.

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[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] OPPM 11-02: The Asylum Clock at 8.
[50] *See generally* OPPM 11-02: The Asylum Clock. EOIR has also granted court administrators the authority to make decisions about the asylum clock, as EOIR has determined that they are "responsible for ensuring that . . . the asylum clock is accurate" and for taking "corrective measures" when necessary. OPPM 11-02: The Asylum Clock at 15.
[51] 8 C.F.R. §§ 208.7(a)(1); 1208.7(a)(1).

In cases in which the asylum application is denied after the 180-day waiting period has run and the EAD application has been approved, whether – and for how long – the applicant can continue to receive the EAD depends on the procedural posture of the case.

Affirmative cases: If the applicant received an EAD while the asylum application was pending at the asylum office and the AO denies (not refers) the application, the EAD will be valid until the expiration of the EAD or 60 days after the AO denial, whichever is later.[52] Because a referral by the AO is not a denial,[53] the applicant will continue to receive the EAD following a referral.

Defensive cases: Respondents who have received an EAD and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.[54] When all appeals and judicial review have been exhausted, if the asylum application has been denied, work authorization terminates on the expiration date of the EAD.[55]

IV. COMMON ASYLUM CLOCK PROBLEMS AND POSSIBLE RESOLUTIONS

1. An applicant does not appear for an asylum interview or an immigration hearing.

The regulations prohibit an asylum applicant from receiving employment authorization if he or she fails to appear for "a scheduled interview before an asylum officer or a hearing before an immigration judge."[56] The one exception to this is if the applicant can demonstrate that the failure to appear was the result of "exceptional circumstances."[57] Problems arise when a person fails to appear at a USCIS interview and USCIS then stops the clock and refers the asylum case to immigration court. EOIR will not restart the asylum clock, stopped by USCIS, when the applicant appears in immigration court. In order for the clock to start, EOIR has stated that the applicant must move to terminate removal proceedings and have the asylum application remanded and reopened by USCIS.[58] As long as the removal case remains pending, the clock remains *permanently stopped* during immigration proceedings.

Short of a change in agency policy or litigation, it is unlikely that an asylum applicant will be able to get the clock restarted while the case remains pending at EOIR. This policy has been challenged in *A.B.T. v. USCIS.* To succeed with a motion to terminate and remand to USCIS, the applicant most likely will need to demonstrate either that the failure to appear was not his or her fault (for instance, notice of the interview was mailed to an incorrect address) or that there were

[52] 8 C.F.R. §§ 208.7(b)(1), 1208.7(b)(1).
[53] 8 C.F.R. § 208.14(c).
[54] 8 C.F.R. §§ 208.7(b); 1208.7(b)
[55] 8 C.F.R. §§ 208.7(b)(2), 1208.7(b)(2).
[56] 8 C.F.R. §§ 208.7(a)(4), 1208.7(a)(4).
[57] *Id.*
[58] *See* OPPM 11-02: The Asylum Clock at 5 (referring the applicant to the USCIS Affirmative Asylum Procedures Manual for steps to restart the clock).

exceptional circumstances involved.[59] An applicant who can make such a demonstration will have a better chance of convincing the trial attorney to join in a motion to terminate and remand, which in turn will increase the chance of an IJ granting the motion.

2. An applicant files an asylum application with the immigration court prior to a hearing.

As discussed earlier, EOIR only allows an asylum applicant to file a defensive asylum application at a hearing before an IJ. Thus, applicants cannot "file" their applications prior to a hearing, regardless of how long the wait is until the hearing, and also cannot file an application between two hearings.

Some immigration courts will allow an applicant to file the application with the court clerk outside of a hearing in order to meet the one-year filing deadline for asylum applications. However, under EOIR policy, an application that is filed in this way is not considered "filed" for purposes of the EAD clock, but instead must be "filed" at the next hearing before the IJ. This policy has been challenged in *A.B.T. v. USCIS.*

3. A party moves for a change of venue.

EOIR treats an asylum applicant's motion to change venue as a request that delays the proceedings. Thus, when an IJ grants such a motion, the request is considered applicant-caused delay and the clock is stopped from the date the motion is granted until the next hearing in the new jurisdiction.[60] In contrast, if a venue change is granted based on a DHS motion, the asylum clock, if running, continues to run. If the clock was stopped before the judge granted DHS' motion, the clock runs from the date the motion was granted until the date of the next hearing.

Importantly, EOIR guidance states that cases can be transferred between two hearing locations that share administrative control of cases without a motion to change venue.[61] Such transfers often involve a hearing location in a detention facility. The clock does not stop when a case is transferred between two hearing locations.[62] Thus, if the clock is stopped in a case that was transferred between two hearing locations that share administrative control of cases, an applicant should be able to get it restarted by arguing that it was improperly stopped under EOIR guidance.

In cases involving a change in venue requested by the asylum applicant, if there is no actual delay caused by the venue change, the applicant might be able to convince the IJ or the court

[59] The USCIS Affirmative Asylum Procedures Manual defines "exceptional circumstances" as circumstances "beyond the control" of the applicant such as "serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances." *See* Affirmative Asylum Procedures Manual at 92 (revised July 2010) (quoting INA § 240(e)(1)).
[60] *Id.* at 13.
[61] *Id.*
[62] *Id*.

administrator not to stop the clock.[63] Alternatively, the applicant could move to advance the hearing date to an earlier date.[64] If the motion is denied, however, it is unlikely that, without a change in agency policy or litigation, the applicant will be able to get his or her clock started due to EOIR's policy of refusing to restart the clock between hearings. The EOIR policy that prohibits the clock from restarting between hearings has been challenged in *A.B.T. v. USCIS.*

4. The applicant rejects the "next available" or "expedited" hearing date.

As discussed earlier, EOIR guidance states that the clock will stop in an "expedited case" if the applicant does not accept an "expedited hearing date" (a date that is within the 180-day adjudications period). After determining that the case is an expedited case and deciding to offer an expedited hearing date,[65] the IJ should *ask on the record* whether the applicant wants an "expedited asylum hearing date."[66] If the applicant declines an "expedited asylum hearing date," then the adjournment code 22 (Alien or Representative Rejected Earliest Possible Asylum Hearing) "or another appropriate code that also stops the clock until the next hearing" will be entered."[67]

An applicant may challenge a stopped asylum clock if the judge does not follow EOIR guidance and fails to clearly state that the next offered hearing date is an "expedited asylum hearing date," or uses other language to describe the next offered hearing date.[68]

In addition, the IJ should ensure that the applicant has a minimum of 14 days before the individual hearing, *even if* the 180-day adjudications deadline is imminent, as stated under EOIR's guidance.[69] Arguably any delay resulting from the refusal to accept a hearing within 14 days of an initial master calendar hearing should not be charged to the applicant.

If the applicant does not accept the next available hearing date because there will not be enough time to prepare the case and the new hearing date scheduled by the court is far in the future, he or she could file a motion to advance the hearing date.[70] If the motion is denied, it is unlikely that

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[63] This could occur where the docket of the original court is more backlogged than that of the court to which the venue change is made. In such a situation, the actual hearing date that the applicant is given by the second court could be sooner than a hearing date given by the original court.
[64] *See* OPPM 11-02: The Asylum Clock at 11-12.
[65] *See supra* Part III.7 describing the three situations where a judge offers an expedited hearing date.
[66] *See* OPPM 11-02: The Asylum Clock at 10.
[67] *Id.*
[68] *See id*. at 11.The guidance explicitly states that phrases other than "expedited hearing date" can "lead to confusion as to how the asylum clock works," and that a judge should not ask, for example, if an applicant wants the hearing "on the expedited docket" or wants to "waive the clock."
[69] *Id*.
[70] *See* OPPM 11-02: The Asylum Clock at 11-12.

the applicant will be able to get the clock started because EOIR policy forbids the starting of the clock between hearings. This is a policy that has been challenged in the *A.B.T.* class action.

5. Biometrics have not been completed.

The INA prohibits an Asylum Officer or IJ from granting asylum until DHS completes a background check.[71] Pursuant to the regulations, DHS must complete a biometrics check before adjudicating an asylum application.[72] Failure to comply with the fingerprinting requirements without "good cause" may lead to dismissal of the application.[73] Additionally, "delays caused by failure without good cause to follow the requirements for fingerprint processing" may constitute an applicant-caused delay that will stop the asylum clock.[74]

Previously, EOIR took the position that if an IJ adjourns a case to allow an applicant "time to complete the required paperwork for a biometrics check or an overseas investigation," the clock stopped. In 2011, EOIR clarified that the clock should not stop unless the applicant causes a *delay* in proceedings due to the failure without good cause to follow the biometrics requirements.[75] EOIR guidance does not specifically define a "delay" in proceedings; however, logically, only an action which causes a hearing to be adjourned for the applicant to comply with biometrics requirements would constitute "delay." In contrast, if the case is not postponed specifically for this reason, the clock should not stop. For example, if at a master calendar hearing the IJ sets the case for an individual hearing in three months during which time the applicant must complete biometrics, he or she could argue that there was no applicant-caused delay. In such a case, the IJ would have had to set the case over for an individual hearing regardless of whether the biometrics had been obtained.

Even if the hearing was adjourned to allow time for the applicant to comply with the biometrics requirement, the applicant can argue that it is not applicant-caused delay unless he or she failed to comply in a timely manner. By regulation, DHS is required to provide the applicant with notice of the biometrics requirements and procedures, and the applicant must comply with these procedures "before or as soon as practicable after the filing of the application for relief in the immigration proceedings."[76] Also, the regulations state that the clock stops only during "delays caused by failure *without good cause* to follow the requirements for fingerprint processing."[77] Thus, the applicant should not be charged with the delay for the time it takes to comply with the

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[71] INA§ 208(d)(5)(A)(i).
[72] 8 C.F.R. § 1003.47(a).
[73] 8 C.F.R. §§ 208.10, 1208.10.
[74] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[75] *See* OPPM 11-02: The Asylum Clock at 14 (stating that Code +36 only should be applied to stop the clock if the applicant causes a delay). A delay by the respondent relating to biometrics data currently is code +*36. If the IJ adjourns a case to allow DHS time to complete the biometrics check, it is code +37 and the respondent will not be charged with the delay. *See* OPPM 05-07.
[76] 8 C.F.R. § 1003.47(d).
[77] 8 C.F.R. § 1208.7(a)(2) (emphasis added).

biometrics requirements unless he or she does not comply in a timely manner or otherwise fails to demonstrate "good cause" for not following fingerprint processing requirements.

6. USCIS or an immigration judge requests additional evidence from the applicant.

The regulations relating to the asylum clock state that the period of time the clock runs "shall also be extended by the equivalent of the time between issuance of a request for evidence pursuant to § 103.2(b)(8) of this chapter and the receipt of the applicant's response to such request."[78] Section 103.2(b)(8) permits USCIS to issue a request for evidence when it determines that "all required initial evidence has been submitted but the evidence submitted does not establish eligibility."[79] In practice, this means that a request for evidence by an Asylum Officer is an action that will cause the clock to stop. In general, an Asylum Officer will not continue to adjudicate an application until the additional evidence is received, and thus such a request would delay the adjudication.

Note, however, that 8 C.F.R. § 103.2(b)(8) does not apply to EOIR and thus, technically, this restriction on the clock does not apply to an applicant in removal proceedings. Instead, EOIR rules anticipate that additional evidence often will be submitted prior to a final hearing. As such, the general rule is to allow submission of such evidence up to fifteen days prior to the merits hearing.[80] When evidence is submitted within this time frame, it is not considered late and does not delay the proceedings. Consequently, where an IJ requests additional evidence to be submitted in accord with this general rule, the asylum clock should not stop as there would be no delay.

There may be situations in which the IJ asks for additional evidence and sets a new master calendar hearing specifically for receipt of this evidence. In such a case, an applicant could argue that the IJ's request does not constitute applicant-caused delay if a "complete" asylum application had been filed and all additional evidence could have been submitted prior to any individual hearing – whether scheduled yet or not – in accordance with EOIR rules.[81]

7. An applicant asks to supplement the record with additional evidence.

As discussed, the asylum clock starts when a complete asylum application is filed. An asylum officer or IJ may permit an applicant to amend or supplement the application, and the clock will stop for any period of delay caused by such a request.[82]

EOIR policy is to stop the clock only if an applicant causes a *delay* due to the request to supplement the application.[83] The guidance provides that a delay occurs only when an applicant

[78] 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).
[79] 8 C.F.R. § 103.2(b)(8).
[80] *See* OPPM 11-01: The Asylum Clock, at 13-14 (citing ICPR at 3.1(b)).
[81] *Id*.
[82] 8 C.F.R. §§ 208.4(c), 1208.4(c).
[83] OPPM 11-02: The Asylum Clock at 13-14

will not be able to "timely" file supplementary documents prior to the expedited hearing date.[84] Unless otherwise specified by a judge, documents are timely filed when they are filed 15 days in advance of a master calendar or individual hearing.[85]

Consequently, the clock should not stop in a non-detained case in which the applicant accepted the initial hearing date offered and indicated that he or she will be able to file supplemental information 15 days before the master calendar or individual hearing date. EOIR guidance does not require more than the applicant's statement that he or she will be able to timely file supplements to the application.[86]

8. The applicant contests the charges of removal or applies for another form of relief in addition to asylum.

EOIR's list of codes that, if entered by an IJ, will stop the clock includes a code for a respondent contesting the charges of removability contained in the Notice to Appear[87] and for a respondent filing for other forms of relief from removal.[88] If faced with this situation, an applicant may argue that contesting removal should not be considered "delay." Instead, the respondent is simply stating his or her position with respect to the removal charges. In a criminal proceeding, for example, a defendant who pleads "not guilty" would not be considered to be delaying the case. Further support for this argument may be found in the provisions regarding DHS's burden of proof.[89] Moreover, even if the EAD clock does stop, it should stop only until the IJ makes a determination on the allegations and the charges. Once this occurs, the clock should restart**.**

An applicant may also argue that filing for another form of relief is not "applicant-caused" delay. Filing for another form of relief does not actually delay the adjudication of the asylum application because the asylum application may be adjudicated before the IJ addresses any other relief requested.

However, because both of these policies are stated EOIR policies, objections will not succeed in most cases and litigation will be needed to change the policy.

9. The denial of an asylum application is on appeal.

The regulations state that an applicant whose asylum application is denied by an asylum officer or by an IJ within the 150-day period or prior to a decision being issued on an EAD application shall not be eligible to apply for employment authorization."[90] EOIR policy further states that

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[84] *Id.*
[85] *Id.* at 13 n.1 (indicating that "timeliness" is defined by ICPM Chapter 3.1(b)). The ICPM states that non-detained applicants may submit filings 15 days in advance of a master calendar hearing or an individual hearing. ICPM § 3.1(b)(i)(A).
[86] *See* OPPM 11-02: The Asylum Clock at 13-14.
[87] Code 51. *See* OPPM 05-07.
[88] Code 6. *Id.*
[89] *See* INA § 240(c), 8 C.F.R § 1240.8.
[90] 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1).

the 180-day adjudication period is tolled permanently when the judge issues a decision denying the asylum application, as the decision constitutes "final administrative adjudication of the asylum application, not including administrative appeal" under INA § 208(d)(5)(A)(iii)."[91] As a result, EOIR maintains that the asylum clock should not run during an applicant's appeal of a denied asylum application to the BIA or a federal court.

In contrast, where an EAD was granted prior to the asylum application being denied, the asylum applicant remains eligible for the EAD and renewal EADs during the pendency of any BIA or federal court appeal.[92] Consequently, in any case in which the asylum clock was improperly stopped before it reached 180 days, and where, but for the improper decision stopping it, the clock would have reached 180-days by the time the case was denied by an IJ, the applicant should be eligible for an EAD during any appeal. EOIR guidance provides that an applicant before the BIA who believes that his or her 180-day waiting period was improperly calculated during the initial proceedings before the immigration court may contact EOIR's Office of General Counsel with a detailed explanation of the incorrect asylum clock calculation.[93]

10. A motion to *reopen* is granted by an IJ.

An EOIR policy memorandum gives IJs three "options" with respect to the asylum clock after an IJ has granted a motion to reopen. [94] In determining which option to select, the memorandum states that judges "should be guided by the principle that only alien-caused delays prevent the asylum clock from running. See 8 C.F.R. 208.7(a)(2)." A judge must select one of the three following options:

> 1) Not restart the clock when the motion to reopen is granted. EOIR suggests IJs choose this option "when granting a motion to reopen to consider a document which was previously unavailable." EOIR notes that the IJ may restart the clock at the next master calendar hearing.
>
> 2) Restart the clock back to the date of the IJ's final order denying the asylum application so that it will run from that date through the date that the motion to reopen is granted. EOIR states that the judge can use this method to calculate the clock after determining that the period of delay was not applicant-caused. An example of this is a motion to reopen an *in absentia* order where the respondent did not receive notice of the hearing.
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> 3) Restart the clock from the date that the motion to reopen is granted. EOIR suggests IJs use this third option when proceedings are reopened based on changed country conditions.

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[91] *See* OPPM 11-02: The Asylum Clock at 16.
[92] *See* 8 C.F.R. §§ 208.7(b); 1208.7(b).
[93] *See* OPPM 11-02: The Asylum Clock at 16.
[94] *See id.* at 14 (referring to the guidelines set forth in Revised OPPM 00-01); Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000,at 6-7, *available at* http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

Significantly, under this policy, the clock should never be "permanently" stopped. Thus, if the clock is permanently stopped following an IJ's decision to reopen a case, the IJ has erred by not properly applying the reopening policy. This EOIR policy applies only to reopening by an IJ and not to cases reopened by the BIA.[95]

EOIR's reopening policy provides *suggestions* only as to when the three options are to be applied, leaving the asylum clock decision to the discretion of the IJ. This allows an applicant to convince the IJ to choose the most favorable option. For example, an applicant could argue that, in a case which is reopened for submission of a previously unavailable document or for changed country conditions, option 2 should be chosen rather than options 1 or 3. Contrary to EOIR policy, these situations do not involve applicant-caused delay and thus are not materially different from the example in option 2 where an *in absentia* order is reopened because the respondent was not provided notice of the hearing.

11. The BIA or a federal court of appeals *remands* an asylum case for additional review of the asylum application.

EOIR takes the position that if the BIA or a federal court remands a case to the IJ, the remand does not restart the clock.[96] In support of this position, EOIR cites INA § 208(d)(5)(A)(iii). This provision, which pertains to the 180-day adjudication period and not the 180-day EAD waiting period, 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.

EOIR interprets this provision to mean that the asylum clock permanently stops when the judge issues a decision granting or denying the asylum application, because this decision is a "final administrative adjudication of the asylum application, not including administrative appeal." As a result, the asylum clock does not run "during any appeal of the decision" to the BIA, "during judicial review before the Federal courts, *or if a case has been remanded to the immigration court*."[97] With respect to the asylum clock, EOIR refers an asylum applicant to USCIS, suggesting that any claim that the asylum clock should run while a case is on appeal or during a remand can be handled only by USCIS.[98] For individuals in removal proceedings, however, USCIS relies on the codes entered by IJs to calculate an applicant's 180-day waiting period. As a result, EOIR's remand policy is applied to determine the 180-day waiting period for EAD applicants, just as it is used to determine the 180-day adjudications period. The LAC has not heard of any case in which a request that USCIS not apply the remand policy has been successful.

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[95] *See infra* Part IV.11 (explaining how the BIA handles remands).
[96] OPPM 11-02: The Asylum Clock at 16.
[97] *Id*. (Emphasis added.)
[98] EOIR guidance notes that the clock will start and stop "as usual" if the application is filed for the first time during a remanded proceeding. *Id.*

In *A.B.T. v. USCIS*, the LAC and its co-counsel challenge this policy as applied to the asylum clock. The only justification for stopping the asylum clock – as opposed to the adjudications clock – during a respondent's appeal is the fact that the asylum application was denied. This justification disappears when a remand order is entered that directs reconsideration of the asylum application. At that time, there is no longer a decision denying the asylum application and the person is put in the status he or she was in before the order denying asylum was issued.[99] In such a situation, counsel in the *A.B.T.* suit argue that the clock should not be *restarted*, but rather should be treated as never having stopped. The time should be calculated from the date of the first order denying asylum and the IJ should "credit" all the time that elapsed since the original order denying asylum. Alternatively, and at the very least, the clock should be restarted as of the date of the remand order.

An applicant also may make the more practical argument, if true in the case, that the asylum clock reached 180 days before the asylum application was denied. If the180-day waiting period was improperly calculated during the initial proceedings before the immigration court, EOIR guidance provides that an applicant before the BIA may contact EOIR's Office of General Counsel with a detailed written explanation of the incorrect asylum clock calculation.[100] The argument in such a case would be that, but for the agency's miscalculation of the asylum clock as not having reached 180, the applicant would have had an EAD when the IJ denied the asylum application and would have been entitled to continue to receive EAD renewals throughout the pendency of an appeal.

12. The applicant does not receive notice of an asylum clock decision.

EOIR policy only requires that an IJ state on the record the reason for a case adjournment.[101] Any additional notice regarding the number of days on the asylum clock and whether the clock is running is entirely optional.[102]

If the IJ does not state on the record the reason for the case adjournment, as required by EOIR guidance, the applicant could challenge any decision to stop the clock. However, because EOIR does not require IJs or CAs to inform applicants about the status of the asylum clock, objections to lack of notice likely will not succeed in most cases. EOIR's policy of providing insufficient notice to asylum applicants has been challenged in the *A.B.T.* class action.

13. An applicant is granted prosecutorial discretion and the asylum case is administratively closed.

[99] *Cf. Matter of Lok*, 18 I&N Dec. 101 (BIA 1981) (reversal of deportation order nullifies the order and restores the alien's lawful permanent resident status); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996) (court reversal of a BIA order of deportation nullifies the order).
[100] *See* OPPM 11-02: The Asylum Clock at 16.
[101] *Id*. at 8.
[102] *Id*.

In 2011, DHS announced a prosecutorial discretion initiative under which certain removal cases that are deemed low priority will be administratively closed.[103] At this point in time, DHS has made clear that the asylum clock will stop when a case is administratively closed. Apparently, DHS is considering administrative closure to be applicant-caused delay even in cases in which ICE offers administrative closure to the respondent as an exercise of prosecutorial discretion. Consequently, when an applicant has less than 180 days on his or her asylum clock, the clock will remain stopped throughout the time that the case is administratively closed and the applicant will be ineligible for an EAD for this entire time. An applicant with more than 180 days on his or her clock at the time of the administrative closure should continue to be eligible for an EAD, including renewals of previously-issued EADs.

In some cases, DHS will grant an individual "deferred action" as an exercise of prosecutorial discretion. Unlike administrative closure, deferred action itself provides an independent basis for an EAD and thus reliance on the pending asylum application for an EAD usually would not be necessary.[104]

V. ACTIONS AN ATTORNEY COULD TAKE TO ADDRESS ASYLUM CLOCK PROBLEMS OF APPLICANTS IN REMOVAL PROCEEDINGS

EOIR has emphasized that asylum clock problems should be resolved quickly, stating that "[w]hen a case is pending before the immigration courts, court administrators and immigration judges should review inquiries about the accuracy of the asylum clock and address errors without undue delay."[105] EOIR guidance describes steps applicants can take to resolve asylum clock problems at different stages of proceedings:[106]

- During a hearing, applicants should address the issue to the judge, and the judge should address the issue *on the record* with the parties;

- After a hearing, the applicant should address the issue to the court administrator in writing;[107]

- If unsuccessful in addressing the asylum clock problem at the immigration court level, the applicant may contact the Assistant Chief Immigration Judge in writing;[108]

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[103] For more information about prosecutorial discretion and administrative closure, *see* LAC's Practice Advisories at http://www.legalactioncenter.org/sites/default/files/docs/DHS%20Review%20of%20Low%20Priority%20Cases%209-1-11.pdf.

[104] 8 C.F.R. § 274.12(c)(14). To receive an EAD based on a grant of deferred action, an individual must demonstrate economic necessity.

[105] *See* AILA-EOIR Liaison Agenda Question 3, October 17, 2005, *available at* http://www.justice.gov/eoir/statspub/eoiraila101705.pdf.

[106] OPPM 11-02 at 15.

[107] Contact information for the court administrator for each court is available at http://www.usdoj.gov/eoir/sibpages/ICadr.htm.

- For cases pending before the BIA, applicants who believe that more time should have accrued on the clock during initial proceedings before the immigration court may contact the EOIR Office of General Counsel by letter with a detailed explanation of why the clock appears to be incorrect.[109]

The following are additional suggestions for monitoring the asylum clock, and starting or restarting the asylum clock:

- **Determine the status of the asylum clock**. Many people discover that the clock has been stopped after attempting to apply for an EAD. An attorney may check the status of a client's clock at any time by calling EOIR's Automated Status Query System at 1-800-898-7180.[110] According to EOIR, the 800-number is updated by the next day whenever there is a change to the clock.[111] Once the clock reaches 150 days, an attorney may immediately file Form I-765, the EAD application. USCIS then has 30 days to adjudicate the application.[112]

- **Review applicable adjournment codes**. If a clock has not reached 180 days, be aware of adjournment codes that may stop the clock at the next scheduled hearing. How an adjournment is coded likely will determine whether the clock is stopped. If there is more than one code to apply to the adjournment and at least one of these would allow the clock to run, argue that this is the code that should be applied. Ask the IJ to indicate on the record the code used for continuing the case and whether it will stop the asylum clock. It may be helpful to bring the list of codes to the hearing.[113]

- **Promptly complete the biometrics requirements and submit proof to the court showing compliance**. Where biometrics have not been completed before the first master calendar hearing, assure the court at the hearing that they will be completed before the next scheduled hearing. EOIR policy is that a failure to have completed biometrics will stop the clock only if it delays the scheduling of a hearing. Thus, where biometrics can be completed before the next regularly scheduled hearing – whether a master or individual merits hearing – the failure to have completed them at the first master calendar hearing should not be considered applicant-caused delay and should not stop the clock.[114]

- **Make arguments to the judge during the hearing.** In general, in cases where you do not believe there is applicant-caused or requested delay, you should argue your case. The

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[108] A list of the Assistant Chief Immigration Judges and their respective courts is available at http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm.
[109] OPPM 11-02 at 16.
[110] http://www.justice.gov/eoir/npr.htm.
[111] *See* AILA-EOIR Liaison Agenda Question 4, March 16, 2005, *available at* http://www.justice.gov/eoir/statspub/eoiraila031605.pdf.
[112] 8 C.F.R. §§ 208.7(b), 1208.7(b).
[113] *See* OPPM 05-07.
[114] *See* OPPM 11-02, The Asylum Clock at 14.

case law, statutes and regulations are sparse; however, there are several arguments based on the regulations, as this Practice Advisory illustrates. Cite the applicable regulations and argue why there is no applicant-caused delay or why the applicant-caused delay no longer exists. Review the different actions that EOIR believes stop the clock, contest the adjournment code used to stop the clock and assert a different code that properly reflects the cause of the delay. Where an IJ or court administrator has failed to properly apply the current EOIR policies, explain how the policy should be applied.

As EOIR advises in its own guidance, be sure to raise any clock issues during your client's hearing and ask the judge to address the issue *on the record* with the parties.[115] Although EOIR guidance advises parties against filing motions and advises IJs not to issue orders on motions, it does allow for judges to "respond" to motions.[116] The guidance states that if a judge receives a motion regarding the asylum clock, the judge should give a copy to the court administrator to resolve. In response to the motion, the guidance states that the judge "may issue a standard response" such as "The respondent's motion to restart the clock is an administrative request. Accordingly, it has been referred to the court administrator for resolution."[117] The guidance directs the applicant's motion and the judge's response to be placed on the right side of the Record of Proceedings and directs the judge to serve the response on both parties.[118] Thus, by raising the clock issue at the hearing, you will ensure that there is a record of your complaint and that it is forwarded to the court administrator.

- **If you become aware of an asylum clock problem outside of a hearing, direct written arguments for why the clock should start to the court administrator**. EOIR guidance provides that after receiving an inquiry relating to the asylum clock, the court administrator should review the Record of Proceedings, EOIR's electronic database, and the hearing recording in order to resolve the asylum clock problem.[119] If necessary, the guidance directs the court administrator to discuss the purpose of any adjournments with the judge and to take corrective measures to ensure that the proper adjournment code was applied and that the asylum clock is accurate. In addition to submitting written guidance to the court administrator, it may be advisable to submit a motion to the immigration judge, especially if you do not receive a timely response from the court administrator.

- **File a motion to advance the hearing date**. Because EOIR's current policy is not to start or restart the clock between hearings, in cases where you concede the delay is applicant-caused or requested, you should file a motion to advance the next hearing date as soon as the delay has been cured. If the motion is granted, the applicant's clock may be started or restarted at the earlier hearing date.

[115] *Id*. at 8.
[116] *Id*. at 15-16.
[117] *Id*.
[118] *Id*.
[119] *Id*.

- **Review the *A.B.T. v. USCIS* proposed class definitions.** If you are unable to resolve the clock-related issues through the steps described above or believe that your client will not prevail because the clock stopped due to clearly described EOIR policies, please review the class definitions in *A.B.T.*, a pending class action lawsuit challenging implementation of the asylum clock. Your client may be a member of the proposed class and may be able to benefit if the class is certified and there is a favorable resolution.

If you have questions or comments regarding this advisory, contact the Legal Action Center at asylumclock@immcouncil.org.