

Citizenship and Immigration Services Ombudsman

EMPLOYMENT AUTHORIZATION FOR ASYLUM APPLICANTS: RECOMMENDATIONS TO IMPROVE COORDINATION AND COMMUNICATION

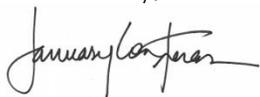
August 26, 2011

Administration of U.S. immigration laws is a shared responsibility divided among different departments and agencies. There is no doubt that this division sometimes creates challenges for both applicants and immigration officials. The recommendations in this report address such a challenge: employment authorization for asylum applicants involving what is commonly referred to as the asylum clock. Difficulties with the asylum clock can unnecessarily delay an applicant's ability to work and add to the hardships experienced by asylum applicants.

Asylum applicants rely on not only the U.S. Citizenship and Immigration Services (USCIS) at the Department of Homeland Security but also on the Executive Office for Immigration Review (EOIR) at the Department of Justice to work effectively both as individual departments and together as one Federal Government. Currently, there is no easily accessible process for applicants and their representatives to resolve asylum clock issues seamlessly within and between departments. Increased information sharing and dialogue may help prevent these issues and provide a means for timely resolution, when they do occur.

The asylum clock is widely described as a problem that is complex, but solvable. USCIS and EOIR have increasingly shown a readiness to tackle the problem, including an upcoming joint national meeting with stakeholders about how to advance asylum clock policies and procedures. In addition, the USCIS Asylum Division has now publicly provided direct contacts to address asylum clock issues on a case-by-case basis. These are important steps, and the Ombudsman's Office encourages USCIS and EOIR to prioritize collaboration on asylum clock issues until the right solutions are in place. The recommendations included here are intended to assist USCIS in reaching this goal.

Most sincerely,



January Contreras
Citizenship and Immigration Services
Ombudsman

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

1. Engage in ongoing interagency dialogue to clearly define the roles of USCIS and EOIR regarding the asylum clock.
2. Establish more effective internal communication channels to improve coordination on asylum clock issues:
 - (a) Increase communication between USCIS components regarding asylum clock-related issues; and
 - (b) Provide updated asylum clock training to appropriate USCIS personnel.
3. Make asylum clock information easily available to asylum applicants:
 - (a) Provide direct public access to USCIS service centers on asylum clock issues;
 - (b) Allow customers to view their asylum clock online; and
 - (c) Give clear, written notice when a clock has been stopped.

REASONS FOR THE RECOMMENDATIONS

- Problems with asylum clock calculations may prevent asylum applicants from obtaining employment authorization leading to periods of financial uncertainty and unnecessary delay.
- Issues arise because of difficulties in communication between USCIS and EOIR. Both agencies play important roles in making asylum clock determinations but fail to engage in regular, meaningful dialogue.
- Information about time accrued on the asylum clock is not easily accessible to applicants. Lack of information leads to confusion about employment eligibility.
- Customers lack a standardized means to correct errors relating to asylum clock calculations creating more work for USCIS through varied, informal approaches.



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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

This study by the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) reviews U.S. Citizenship and Immigration Services' (USCIS) handling of employment authorization for asylum applicants. An individual may qualify for asylum when he or she suffered past persecution or fears future persecution on account of race, religion, nationality, political opinion, and/or membership in a particular social group.¹

An asylum applicant becomes eligible for employment authorization when USCIS or the Executive Office for Immigration Review (EOIR) does not timely adjudicate an asylum application within 180 days, and the delay is not the fault of the asylum applicant.² The calculation of this 180 day period is referred to as the asylum clock.

Over the past year, the Ombudsman's Office has received reports that many asylum applicants are experiencing difficulties related to the asylum clock. Stakeholders and USCIS personnel attribute many of these difficulties to a lack of interagency information sharing and other communication problems involving USCIS and the Immigration Courts.³ Stakeholders also report an apparent lack of internal communication between the USCIS Asylum Division and USCIS service centers. The problem is compounded by the fact that USCIS does not solely control the asylum clock when an asylum case is pending before EOIR. In addition, asylum applicants and their representatives have expressed frustration at the scarcity of public information about how the asylum clock functions and the lack of options available to promptly and effectively resolve asylum clock problems. Many asylum applicants are unable to support themselves and their families without employment authorization.

The Ombudsman's Office makes the following recommendations to USCIS in order to improve the transparency, timeliness, and effectiveness of asylum-based employment authorization adjudication and processing:

- 1. Engage in ongoing interagency dialogue to clearly define the roles of USCIS and EOIR regarding the asylum clock.**
- 2. Establish more effective internal communication channels to improve coordination on asylum clock issues:**
 - (a) Increase communication between USCIS components regarding asylum clock-related issues; and**
 - (b) Provide updated asylum clock training to appropriate USCIS personnel.**
- 3. Make asylum clock information easily available to asylum applicants:**

- (a) **Provide direct public access to USCIS service centers on asylum clock issues;**
- (b) **Allow customers to view their asylum clock online; and**
- (c) **Give clear, written notice when a clock has been stopped.**

BACKGROUND

To be eligible for asylum, an applicant must have suffered past persecution or fear future persecution on account of race, religion, nationality, political opinion, and/or membership in a particular social group.⁴ Generally, asylum applications are statutorily required to be adjudicated within 180 days of filing.⁵ If an application is not adjudicated within that timeframe, an asylum applicant may seek employment authorization. USCIS will accept an application for employment authorization 150 days after receipt of the asylum application. However, consistent with the statute, USCIS will not grant employment authorization prior to 180 days from the date an asylum application was filed.⁶ The running calculation of this 180 day period is referred to as the asylum clock.

In addition to providing a clear timeframe for the adjudication of asylum applications, the governing statute also requires that delays by the Federal Government do not penalize the asylum applicant who is seeking employment authorization. Ensuring that a delay is correctly identified as attributable either to the applicant or to the Federal Government is critical.⁷ Problems occur when delays are incorrectly attributed to the asylum applicant in circumstances that are actually caused by EOIR or USCIS. Additionally, when a delay that was caused by or requested by the applicant comes to an end, there is no easy way for the applicant to work with the Federal Government to restart the clock.

Methodology. In conducting this study, the Ombudsman's Office met with USCIS and EOIR officials within headquarters and in the field to discuss process, responsibilities, and current data sharing arrangements and technologies. The Ombudsman's Office also considered stakeholder feedback and the issues they most often identified as concerning. In addition, the Ombudsman's Office reviewed case assistance requests relating to asylum clock matters and worked with USCIS to resolve these cases.

Legal Framework. By statute and regulation, USCIS is authorized to receive and adjudicate employment authorization applications.⁸ Currently, control of the asylum clock depends on who has jurisdiction over the asylum application. While a case is being adjudicated by the Asylum Division, USCIS controls the asylum clock. If an Asylum Officer refers a case to EOIR, jurisdiction transfers from the Asylum Division to EOIR. EOIR then assumes responsibility for the asylum clock.⁹

Regulations state that when USCIS or EOIR fails to adjudicate an asylum application within 180 days, an individual may receive employment authorization.¹⁰ Applicant-caused delay stops the asylum clock and does not count towards the accrual of the 180 days.¹¹

To apply for permission to work, an asylum applicant files Form I-765, Application for Employment Authorization.¹² Immigration Services Officers (ISOs) at USCIS service centers adjudicate employment authorization requests by reviewing asylum clock information located in various USCIS and EOIR databases. USCIS and EOIR maintain separate calculations of an individual's asylum clock accrual time, which can lead to difficulty in Employment Authorization Document (EAD) adjudications when there are discrepancies.

Stakeholder Concerns and Impact on Asylum Applicants. Stakeholders report that difficulties with the asylum clock occur throughout the process of seeking asylum – when an application is before USCIS and when an application is before EOIR. For example, a stakeholder reported to the Ombudsman’s Office that an applicant filed for asylum. After 129 days accrued on the asylum clock, the Asylum Division referred the case to EOIR. Once 150 days had accrued, the applicant filed an EAD application. USCIS denied the EAD application stating that EOIR had stopped the asylum clock at 129 days. A review of EOIR’s public case tracking system revealed that the asylum clock had never been stopped by EOIR, and USCIS’ determination was in error.

In other instances, stakeholders note that an asylum clock may be erroneously stopped by EOIR for reasons other than applicant-caused delay. For example, one stakeholder reported that the asylum clock was stopped when U.S. Immigration and Customs Enforcement counsel requested a continuance of the case. In another example, the asylum clock was permanently stopped due to EOIR’s clerical error. Frequently, these errors are discovered only when asylum applicants submit their employment authorization applications to USCIS and receive a denial.

Asylum clock errors often prohibit asylum applicants from obtaining employment authorization, leading to periods of financial uncertainty and unnecessary hardship.¹³ Unable to work, many applicants are left without access to the financial resources necessary to support themselves in the United States.

Process for Correcting Errors. Asylum applicants are often unable to acquire current, accurate information from USCIS about the amount of time accrued on their asylum clock. Generally, asylum applicants are directed to contact the USCIS National Customer Service Center toll free number to access information about their case, including information regarding the asylum clock. However, customer service personnel do not always have the training required to access and analyze information relating to the asylum clock.

Recently, the Asylum Division moved to improve customer service by providing direct customer access to Asylum Division personnel for individual case assistance relating to asylum clock matters.¹⁴ In response to a customer inquiry regarding an asylum clock issue, asylum office personnel will review the A-file and asylum clock information to determine how long the clock has been running, why the asylum clock was stopped, and the earliest possible date the applicant may apply for work authorization.¹⁵ If an error in the asylum clock calculation is detected, asylum office personnel may elevate matters to Asylum Division Headquarters where the error can be corrected in the Asylum Division’s case management system.¹⁶ This direct access to Asylum Division personnel is an important resource for applicants. Yet while USCIS and stakeholders report that Asylum Division Headquarters works to address most clock-related issues, no standard procedure exists, and resolution in a timely manner is not guaranteed.

EOIR also provides various avenues to resolve an asylum clock issue, but the process differs from court to court. EOIR provides a phone number where individuals with a pending asylum application before the Immigration Court may access general case information, including how many days have accrued. An applicant may submit a request to the court administrator or file a motion to restart the asylum clock. However, there is no single, standardized EOIR process for restarting the asylum clock. Stakeholders often lack the information necessary to correct clock errors or restart the clock following an applicant requested/caused delay.

RECOMMENDATIONS & ANALYSIS

The Ombudsman's Office makes the following recommendations:

1. Engage in ongoing interagency dialogue to clearly define the roles of USCIS and EOIR regarding the asylum clock.

Regular meetings would provide an opportunity for USCIS and EOIR to: clearly define their respective roles; discuss information access; formulate solutions to problems that are encountered by USCIS personnel adjudicating employment requests; and identify deficiencies in the current methods for collecting, verifying, and transmitting asylum clock information. Furthermore, any local operational concerns that affect asylum clock calculations can be identified and evaluated efficiently through direct discussions between USCIS and EOIR.

Joint operational and policy meetings should include appropriate representation from USCIS and EOIR including the Service Center Operations Directorate, service center points of contact, Asylum Division Headquarters, asylum office points of contact, and equivalent EOIR Headquarters and operational personnel. Since USCIS adjudicates all employment authorization applications, it may be best situated to take the lead in managing these meetings and tracking milestones to ensure that outcomes are achieved.

Additionally, as joint operational meetings occur between USCIS and EOIR, the two agencies need to engage in continued dialogue with stakeholders and frontline staff who can provide valuable information on the effectiveness of changes implemented through these meetings.

Below, the Ombudsman's Office highlights potential areas of discussion to develop long-term solutions.

a. Memorandum of Agreement

A Memorandum of Agreement to establish a workable operational framework would enable the agencies to meet their obligations under the regulations, and fulfill the needs of asylum applicants. In the memorandum, the two agencies could address issues such as data sharing, standard procedures, and interagency communication.

b. Regulatory Review and Policy Guidance

USCIS and EOIR should ascertain whether current regulations adequately address public concerns and support agency requirements. When reviewing the regulations, USCIS and EOIR should consider whether they should more fully articulate the boundaries of USCIS' role in the adjudication of asylum-based employment authorization and the extent of USCIS' authority to make asylum clock determinations for cases before EOIR. Since the current regulatory scheme provides little guidance, regulations could provide a more expansive and meaningful definition of applicant-caused delay. In addition, a regulatory presumption that an applicant is eligible for employment authorization once: 1) 180 days have elapsed since the time of filing; and, 2) EOIR has not affirmatively indicated that there was applicant-caused delay would eliminate many of the problems caused by discrepancies between asylum clock information contained in USCIS and EOIR systems.

Alternatively, while reviewing the pertinent regulations and drafting proposed updates, USCIS could issue revised policy guidance to officers in the field that: 1) includes EOIR input regarding the handling of employment authorization applications filed by individuals with asylum cases pending before the Immigration Courts; and, 2) provides clarification to ISOs on the asylum clock, such as what constitutes applicant-caused delay.

c. Data Sharing

A joint effort focused on how to maximize the potential for automated, interoperable data sharing is important to resolving asylum clock issues. USCIS and EOIR should examine the information shared between the two agencies and decide whether enough data is transmitted from EOIR to USCIS to enable ISOs to determine whether the asylum clock has accrued 180 days; and, if it has not, to determine when and why it stopped. Although certain data is made available by EOIR at this time, it would benefit both agencies to explore expanding data sharing. USCIS and EOIR should also: 1) review the accuracy of shared data; and, 2) resolve any connectivity and electronic information systems issues that may inhibit the rapid exchange of accurate, up-to-date information.

Through the type of discussions outlined above, USCIS and EOIR could determine the best solutions for providing asylum applicants with meaningful guidance and additional clarity on how asylum-based employment authorization applications are adjudicated.

2. Establish more effective internal communication channels to improve coordination on asylum clock issues:

(a) Increase communication between USCIS components regarding asylum clock-related issues; and

Regular communication among all of the asylum offices, Asylum Division Headquarters, the Service Center Operations Directorate, and each service center is a key factor in identifying and effectively resolving asylum clock issues. The Ombudsman's Office recommends that USCIS establish regular lines of internal communication for identifying and addressing asylum clock issues and related concerns.

(b) Provide updated asylum clock training to appropriate USCIS personnel.

In order to assist stakeholders in quickly and efficiently resolving asylum clock issues, USCIS employees must have appropriate training on the statutes, regulations, and policies affecting asylum clock calculations. In addition, these employees must be familiar with common asylum clock issues.

At each asylum office, USCIS should provide designated personnel with sufficient training on employment authorization and the asylum clock in order to assist customers who are experiencing asylum clock difficulties. The asylum office could then provide guidance to the public on issues that arise in connection with the asylum clock.

At each service center, designated personnel should undergo training regarding asylum clock calculations, in order to better understand stoppages and quickly identify issues. USCIS could consider establishing a dedicated unit of ISOs at each service center for adjudicating asylum-based employment authorization applications.

USCIS should also provide appropriate training to personnel at the National Customer Service Center. Customer service representatives would then be able to provide individuals with asylum clock information.

3. Make asylum clock information easily available to asylum applicants:

Access to information would alert a customer of any potential problems enabling them to take corrective action and seek prompt and effective resolution through appropriate channels. USCIS does not currently provide

customers with any mechanism to acquire accurate information about the amount of time accrued on their asylum clocks.¹⁷

(a) Provide direct public access to service centers on asylum clock issues;

The Asylum Division has taken important steps in opening communication channels by providing direct access to its personnel on asylum clock matters.¹⁸ Similarly, each service center and the Service Center Operations Directorate should provide direct access for assistance with asylum-based employment authorization matters.

(b) Allow customers to view their asylum clock online; and

With USCIS' Transformation under way, USCIS has a unique opportunity to provide asylum applicants with the tools necessary to track their asylum clocks. As Transformation continues, USCIS could consider integrating an online option to view an applicant's asylum clock through a customer's account.

(c) Give clear, written notice when a clock has been stopped.

When an asylum office refers a case to the Immigration Court, language in its Referral Notice clearly indicates the reason why an asylum clock was stopped, the number of days accrued prior to the stop, and the expected action that would restart the clock: :

“...The earliest possible date you are eligible to apply for employment authorization is **[Insert date in PROJECTED 150-DAY DATE]**. Your failure to appear at a scheduled appointment will extend the period of time you must wait before you may apply for employment authorization by the number of days between the missed appointment and your appearance...”¹⁹

USCIS should expand this practice of providing asylum applicants with clear notice regarding the status of their asylum clock, and include similar language on receipt notices, other notices, decisions, and notifications of missed appointments. By revising USCIS templates to include asylum clock information on its communication with asylum applicants, USCIS will better serve applicants seeking employment authorization. Providing clear information about the asylum clock may prevent applicants from filing premature requests for EADs and will enable applicants to proactively correct errors.

Conclusion

The asylum clock presents challenges for asylum applicants, advocates, USCIS, and EOIR. While steps have recently been initiated to more promptly resolve issues, many of the challenges can be attributed to a lack of communication and coordination among the agencies responsible for monitoring the asylum clock and a lack of standardization of the procedures used to calculate asylum-based employment authorization eligibility. These recommendations seek to improve asylum-based employment authorization adjudications while helping USCIS achieve a fair, efficient process.

¹ INA § 101(a)(42)(2009).

² INA § 208(d)(2)(2009); 8 CFR § 208.7(a)(2011); 8 CFR § 1208.7(a)(2011); 8 CFR § 274a.12(c)(8)(2011).

³ Immigration Courts and the Board of Immigration Appeals are located with the U.S. Department of Justice's Executive Office for Immigration Review.

⁴ *Supra n. 1.*

⁵ *Supra n. 2.*

⁶ *Id.* These provisions only apply to applicants filing for asylum after January 4, 1995.

⁷ *Id.* “Any delay requested or caused by the applicant shall not be counted as part of these time periods.” See also USCIS, *Refugee, Asylum, and International Operations Directorate, Affirmative Asylum Procedures Manual, Sect. III.F. Employment Authorization Document (EAD)* (2007, revised July 2010) at 88; http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf (accessed Apr. 6, 2011).

⁸ The authority under INA § 208(d)(2) to promulgate a regulation allowing for employment authorization for asylum applicants rests with the Secretary under section 103(a) of the Immigration and Nationality Act, 8 USC 1103(a), as amended by the Homeland Security Act of 2002, Pub. L. No. 107-296, tit. XI, § 1102, 116 Stat. 2273, and the Homeland Security Act of 2002 Amendments, Pub. L. 108-7, Div. L, § 105(a)(1), (2), 117 Stat. 531 (2003).

⁹ Information provided by USCIS to the Ombudsman’s Office (Mar. 29, 2011).

¹⁰ *Supra n. 1.*

¹¹ *Id.*

¹² USCIS, Form I-765, Application for Employment Authorization; <http://www.uscis.gov/files/form/i-765.pdf> (accessed Aug. 5, 2011).

¹³ Case examples provided by USCIS Vermont Service Center (Mar. 2011).

¹⁴ USCIS, *Asylum Employment Authorization and Clock Contacts* (June 6, 2011);

<http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/April%202011/EAD%20and%20KLOK%20POCs%204%2011%2011.pdf> (accessed Aug 19, 2011).

¹⁵ *Id.* Each asylum office has published names, emails, and telephone numbers for a point of contact for issues with the clock. In addition, the Asylum Division’s Headquarters has made an email public that can be used for inquiries. See USCIS, *Refugee, Asylum, and International Operations Directorate, Affirmative Asylum Procedures Manual, Sect. III.F. Employment Authorization Document (EAD)* (2007, revised July 2010) at 88; http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf (accessed Apr. 6, 2011). See also EOIR Adjudgment Codes, OPPM 05-07: Definitions and Use of Adjudgment, Call-up and Case Identification Codes; <http://www.justice.gov/eoir/efoia/ocij/oppm05/05-07.pdf> (accessed Apr. 6, 2011).

¹⁶ Information provided by USCIS to the Ombudsman’s Office (Mar. 29, 2011).

¹⁷ EOIR, *Case Status Information*; <http://www.justice.gov/eoir/contact.htm> (accessed Aug. 13, 2011).

¹⁸ *Supra n. 14.*

¹⁹ USCIS, “Standard Referral Notice” *Refugee, Asylum, and International Operations Directorate, Affirmative Asylum Procedures Manual, Sect. IV Appendices* (2007, revised July 2010) at 82; http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/2007_AAPM.pdf (accessed Apr. 6, 2011).