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EMPLOYMENT AUTHORIZATION AND ASYLUM: STRATEGIES TO AVOID STOPPING THE ASYLUM CLOCK

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TABLE OF CONTENTS

I.	INTRODUCTION	2
	A. EOIR Interpretation Problems	2
	B. EOIR Implementation Problems	3
II.	THE TWO ASYLUM CLOCKS	3
III.	HOW DID THE ASYLUM EAD CLOCK DEVELOP?	4
IV.	HOW DOES THE ASYLUM EAD CLOCK AFFECT WORK AUTHORIZATION?	4
V.	HOW IS THE ASYLUM EAD CLOCK STOPPED?	6
VI.	EOIR INTERPRETATIONS OF THE ASYLUM EAD CLOCK AND AILF'S ANALYSIS	6
	A. Respondent's Rejection of the "Next Available" Hearing Date	7
	B. Filing a Defensive Asylum Application	8
	C. Disputes about Timely Production of Biometrics	8
	D. Request for Evidence	10
	E. Delays for Additional Evidence or Amending Asylum Application	10
	F. Contesting the Charges, Filing for Other Forms of Relief	11
	G. Reopening a Case	12
	H. Remands from the BIA	13
VII.	WHAT HAS EOIR SAID ABOUT RESOLVING ASYLUM EAD CLOCK DISPUTES?	14
VIII.	ACTIONS AN ATTORNEY COULD TO TAKE TO RESTART THE ASYLUM EAD CLOCK OR PREVENT IT FROM STOPPING	14

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I. INTRODUCTION

Applicants for asylum in the United States are not immediately or automatically granted employment authorization. Before receiving an employment authorization document (EAD),² an asylum applicant must wait for a final grant of asylum or for an application to remain pending for 180 days according to the “asylum clock.” The asylum clock tracks how many days are credited towards the time an asylum application has been pending, not counting any delay caused by the asylum applicant.

A general lack of transparency plagues the administration of the asylum clock. Immigration judges (IJs) and asylum officers (AOs) often fail to inform the noncitizen of the determination to stop the clock. Asylum applicants who are unaware that the IJ has stopped the clock may discover this fact weeks or sometimes months later when the DHS denies their application for employment authorization. Despite repeated requests by the American Immigration Lawyers Association (AILA) for IJs to make this determination on the record, the Executive Office for Immigration Review (EOIR) continues to maintain that it will not require IJs to make formal findings on the record when the clock is stopped.³

This practice advisory explains how the asylum clock works in theory and in practice. The advisory focuses on both EOIR's interpretations and implementation of the asylum EAD clock. It also explains where AILF disagrees with EOIR's interpretations and implementation.

A. EOIR Interpretation Problems

Interpretation problems occur when the IJ or AO follows EOIR policy, but where AILF believes the policy is contrary to the regulations. This usually happens when EOIR improperly determines that the applicant for asylum caused the delay. *See infra* Section V, EOIR Interpretations of the Asylum EAD Clock and AILF's Analysis. Another problem involves restarting the asylum clock. The regulations require that the IJ restart an asylum clock when a delay no longer exists, but in practice, the asylum clock is often improperly permanently stopped. For example, EOIR's interpretation implies that once there is a denial of asylum, the EAD clock is permanently stopped. However, the only time the asylum EAD clock is permanently stopped is when the applicant does not show

² “Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, an applicant for asylum who is not an aggravated felon shall be eligible pursuant to §§ 274a.12(c)(8) and 274a.13(a)” to submit an application for EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). Sections 274a.12(c)(8) and 1274a.12(c)(8) include pending applications for asylum and withholding of removal. Applicants for deferral of removal under the Convention against Torture pursuant to 8 C.F.R. § 208.17 or 8 C.F.R. § 1208.17 are eligible to apply for an EAD once they receive a grant of deferral. 8 C.F.R. § 274a.12(c)(18); 8 C.F.R. § 1274a.12(c)(18); 8 C.F.R. § 241.5(c) (permitting the DHS, in its discretion, to grant work authorization to people with a final order of removal who are released on an order of supervision).

³ *See* Appendix, EOIR/AILA Liaison Agenda Question 2, March 7, 2002; EOIR/AILA Liaison Agenda Question 4, March 16, 2005.

exceptional circumstances for failing to attend an interview at the asylum office or the hearing at immigration court. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).

B. EOIR Implementation Problems

Implementation problems occur when the IJ stops the clock contrary to EOIR policy. A common problem occurs when testimony at the asylum hearing could not be completed in the allotted time.⁴ EOIR policy states that adjourning because the case could not be completed in the time allotted should not stop the clock.⁵ However, IJs are improperly stopping the clock, finding that the respondent is the cause for the delay. In response, in liaison meetings with AILA, EOIR has conceded that the clock should not be stopped when testimony does not fit within an allotted time “unless the reason why the hearing was protracted was due to the alien’s actions.”⁶

This practice advisory suggests arguments attorneys representing asylum applicants before an AO or respondents in immigration court proceedings can use to: 1) prevent the AO or IJ from stopping the clock or 2) convince the IJ or AO to restart a stopped clock. EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the issue arises after the hearing, the respondent should file a written motion with the IJ.⁷ *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

II. THE TWO ASYLUM CLOCKS

- Asylum Adjudication clock: The asylum adjudication clock measures the number of days an asylum application has been pending adjudication: “[I]n 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.” INA § 208(d)(5)(A)(iii).
- Asylum EAD clock: The asylum EAD clock also measures the number of days after submission of an asylum application that must elapse before the applicant may be provided an EAD. “An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.” INA § 208(d)(2).

⁴ *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁵ Under the current adjournment codes, continuing the hearing in this circumstance should be a code 13, which would not stop the clock. *See* EOIR Operating Policies and Procedures Memorandum (OPPM) OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁶ *See* Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁷ *Id.*

Different events may stop either the asylum adjudications clock or both the asylum adjudications clock and asylum EAD clock.⁸ This advisory focuses on the asylum EAD clock.

III. HOW DID THE ASYLUM EAD CLOCK DEVELOP?

- Prior to 1994, applicants could file for asylum and an EAD concurrently, and asylum officers could authorize employment for up to one year. The Immigration and Naturalization Service (INS) could renew the EAD and even if an asylum application was denied, the district director could grant further employment authorization. 8 C.F.R. § 208.7 (1991).
- In 1994, the government amended the regulations to require asylum applicants to wait 150 days after submitting a completed asylum application before applying for an EAD. The INS then had 30 days to adjudicate the EAD application. 59 Fed. Reg. 62,289-90 (Dec. 5, 1994) *codified at* 8 C.F.R. § 208.7 (1994).
- In 1996, Congress amended the INA by adding the 180-day waiting period for EAD purposes and implemented the 180-day period to adjudicate asylum applications. *See* Sec. 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (amending INA § 208).

IV. HOW DOES THE ASYLUM EAD CLOCK AFFECT WORK AUTHORIZATION?

- The clock starts on the date that the applicant submits a complete asylum application in accordance with 8 C.F.R. §§ 208.3 and 208.4. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- Once the asylum EAD clock reaches 150 days, the asylum applicant may apply for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- An asylum officer may grant, deny, refer or dismiss an asylum application. 8 C.F.R. § 208.14(b) & (c); 8 C.F.R. § 1208.14(b) & (c). Only a *denial* of an asylum application makes the applicant ineligible for an EAD. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).⁹ A *referral* to the immigration court by an asylum officer is not a denial.

⁸ EOIR outlines its interpretation of how different events stop either the asylum EAD clock or the asylum adjudications clock. *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁹ An asylum officer may deny asylum to a person who “is maintaining valid immigrant, nonimmigrant, or Temporary Protected Status” or who was “paroled into the United States and

8 C.F.R. § 208.14(c); 8 C.F.R. § 1208.14(c). Therefore, while a denial will stop the clock, a referral to the immigration court will not. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).¹⁰

- After the applicant has filed an application for an EAD, the U.S. Citizenship and Immigration Services (CIS) has 30 days from the date of the filing to grant or deny the EAD application. CIS cannot grant the application before the asylum clock has reached 180 days after the initial filing of the asylum application. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).
- The regulations state that “(a)n applicant whose asylum application has been denied by an asylum officer or by an immigration judge within the 150-day period shall not be eligible to apply for employment authorization.” 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). In addition, the regulations say that if an asylum application is denied while an application for employment authorization is pending with the CIS, the employment authorization application will be denied. *Id.* However, respondents who have received an EAD and later appeal a denial of asylum may continue to renew their EAD throughout administrative and judicial review.¹¹ If the IJ grants asylum and the DHS appeals, the respondent may be granted an EAD pursuant to 8 C.F.R. § 274a.12(c)(8)(ii). The EAD is renewable during the appeals process, including judicial review. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b). 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. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).
- The asylum clock does not apply to a person who filed an asylum application prior to January 4, 1995, or whose asylum application has been recommended for approval.¹² 8 C.F.R. § 208.7(a)(1) & (3); 8 C.F.R. § 1208.7(a)(1) & (3).

the parole has not expired or been terminated.” 8 C.F.R. § 208.14(c)(2) and (3); 8 C.F.R. § 1208.14(c)(2) and (3).

¹⁰ If charging documents may not be issued, an asylum officer shall dismiss an application instead of referring the case to immigration court. 8 C.F.R. § 208.14(c)(1), 8 C.F.R. § 1208.14(c)(1). With no pending asylum application, the asylum clock does not apply.

¹¹ If the respondent received the EAD while the 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. 8 C.F.R. § 208.7(b)(1); 8 C.F.R. § 1208.7(b)(1). If the application is denied by the IJ or BIA, the EAD terminates when the EAD expires. 8 C.F.R. § 208.7(b)(2); 8 C.F.R. § 1208.7(b)(2).

¹² If the applicant receives a letter of recommendation for asylum from the asylum office, but has not received the approval notice, the applicant may apply for an EAD under 8 C.F.R. § 274a.12(c)(8)(ii).

V. HOW IS THE ASYLUM EAD CLOCK STOPPED?

- A delay in the adjudication “caused” by the asylum applicant will stop the clock only during the time the delay exists: “Any delay requested or caused by the applicant shall not be counted as part of these time periods.” 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).
- 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. *Id.* The time between the issuance of a request for evidence and the receipt of a response to that request also is excluded. *Id.* Additionally, the period during which the applicant fails to appear to receive the decision of the asylum officer will not be counted towards the 180 days. 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d). The asylum clock restarts when the applicant “does appear to receive and acknowledge receipt of the decision or until the applicant appears before an immigration judge in response to the issuance of a charging document under § 208.14(c) [or § 1208.14(c)].” 8 C.F.R. § 208.9(d); 8 C.F.R. § 1208.9(d).
- The clock permanently stops if an asylum applicant fails to appear for an interview with an asylum officer or for a hearing before an IJ unless the applicant demonstrates that the failure to appear was due to exceptional circumstances. 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4).
- EOIR’s adjournment codes reflect the agency’s interpretation of what stops the clock.¹³ The chart of codes lists whether an adjournment is “alien-related” or “DHS-related” or “IJ-related” or “Operational.” An “alien-related” adjournment stops both the asylum EAD clock and the asylum adjudications clock.¹⁴
- IJs enter the adjournment code on a worksheet that is not part of the administrative record. The information on the worksheet is then recorded in the court’s computer system.

VI. EOIR INTERPRETATIONS OF THE ASYLUM EAD CLOCK AND AILF’S ANALYSIS

This section explains EOIR’s interpretations of what constitutes a “delay caused or requested by the applicant” and when the delay ends. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). This section also includes AILF’s analysis to the government’s interpretations. To resolve asylum EAD clock problems, a respondent may file a motion with the court. *See infra* Section VIII, Actions an Attorney Could Take to Restart the Asylum EAD Clock or Prevent it From Stopping.

¹³ *See* OPPM 05-07: Definitions and Use of Adjournment, Call-up and Case Identification Codes, available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

¹⁴ *Id.* at Adjournment Codes Appendix.

A. Respondent's Rejection of the "Next Available" Hearing Date

Many attorneys and unrepresented respondents, without realizing the consequences, reject the earliest available hearing date offered by the IJ. IJs stop the clock when respondents decline to take the next "open date" on the court's calendar, reasoning that the rejection of the proposed hearing date is an "alien caused delay."¹⁵

Even if an attorney accepts the date offered by the IJ, a clerk may later call the attorney and offer a hearing date in the very near future. If the attorney rejects this new date, EOIR takes the position that this refusal stops the clock.

When AILA suggested that rejecting the first available hearing date should not always be a delay caused by the respondent, EOIR stated: "We do not agree with your contention that attorney conflicts should not constitute 'alien caused delays.' An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered 'alien caused delays.'"¹⁶

EOIR has insisted that IJs must have flexibility to schedule asylum hearings in order to adjudicate cases within the 180 days mandated by the statute. In response to AILA's suggestion that there be a mandatory time period before a hearing date, EOIR stated: "[a] requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system."¹⁷

AILF's Analysis

Apart from the question whether an attorney's time conflict constitutes a delay caused by the applicant, AILF believes that if counsel does not accept a hearing date that would be within 14 days of an initial Master Calendar (MC) hearing, the resulting delay *should* not be charged to the respondent.¹⁸ EOIR policy states that the respondent should only be charged with the delay when the rejected date is "not less than 14 days from the date of the Master Calendar."¹⁹ EOIR written policy also states that a merits hearing should not be scheduled within 14 days of the MC unless failing to schedule the hearing in this time period would prevent adjudication of the

¹⁵ See Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000. However, accepting another hearing date within 24 hours of the hearing date that the IJ first offered will not stop the clock. See Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, page 9.

¹⁶ See Appendix, AILA-EOIR Liaison Agenda Question 11, March 30, 2000.

¹⁷ *Id.*

¹⁸ Instead, this should be coded as an adjournment from a master calendar to an individual calendar, current code 17, which would not stop the clock. See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes *available at* <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

¹⁹ See Revised OPPM No. 00-01, Asylum Request Processing, Revised August 4, 2000, page 9 *available at* <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

asylum application within 180 days.²⁰ Therefore, an applicant may argue that scheduling a MC to an individual hearing does not stop the clock. Additionally, EOIR policy advises the IJs to be aware of due process concerns.²¹

Even if the court stops the clock because the applicant refuses the next available hearing date, the clock should be restarted at the next hearing, because the delay would no longer exist. 8 C.F.R. § 1208.7(a)(2).

B. Filing a Defensive Asylum Application

The asylum clock applies to defensive asylum applications, that is, applications filed with the immigration court in the first instance as a defense to removal. The EAD provisions contained in 8 C.F.R. § 1208.7(a)(1) refer to the filing procedures for asylum applications in 8 C.F.R. § 1208.4(b)(3) & (4), which include filing a complete asylum application with the immigration court or Board of Immigration Appeals (BIA).²² Although the Department of Homeland Security (DHS) allows for submission of the affirmative asylum application by mail, EOIR policy only permits a respondent to file a defensive application for asylum at a hearing.²³

Under this EOIR policy, respondents may not file the asylum application during the time between two master calendar hearings or between a master calendar and an individual hearing. Respondents must wait for the next scheduled hearing to file their applications.

AILF's Analysis

Because the asylum EAD clock does not start until the respondent files a completed application, this policy unnecessarily prolongs the time until the clock will start. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1). AILF believes this policy is subject to challenge.

C. Disputes about Timely Production of Biometrics

Before adjudication of an asylum application, DHS must complete a biometrics check.²⁴ 8 C.F.R. § 1003.47(a). Section 208(d)(5)(A)(i) of the INA prohibits an AO or IJ from granting asylum until DHS completes a background check. Failure to comply with the fingerprinting

²⁰ *Id.* at Page 8.

²¹ See Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 4 available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

²² An asylum application filed with the BIA would only involve a motion to remand or a motion to reopen.

²³ See Revised OPPM No. 00-01, Asylum Request Processing, August 4, 2000, page 15 available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

²⁴ As of January 2005, biometrics included “digital fingerprints, photographs and, signature, and in the future may include other digital technology that can assist in determining an individual's identity and conducting background investigations.” See 70 Fed. Reg. 4743, n.2 (Jan. 31, 2005).

requirements without good cause may lead to dismissal of the application. 8 C.F.R. § 208.10; 8 C.F.R. § 1208.10. For work authorization purposes, the regulations provide that a “delay requested or caused by the applicant” may include “delays caused by failure without good cause to follow the requirements for fingerprint processing.” 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2). EOIR takes the position that if the IJ adjourns a case “to allow alien time to complete the required paperwork for a biometrics check or an overseas investigation,” the clock stops.²⁵ EOIR justified this position by citing the supplementary information to its January 2005 Background and Security Investigations Interim Rule.²⁶ This rule assigns the responsibility for providing biometrics or other biographical information to the respondent. EOIR has said that once the person has satisfied the biometrics requirements, the clock may be restarted. The respondent may notify the court that he or she did provide the requisite biometrics information and file a motion to restart the clock. *See infra* Section VIII.

AILF’s Analysis

AILF believes that allowing time for a respondent to comply with the biometrics requirement is not a delay caused or requested by the respondent. 8 C.F.R. § 1208.7(a)(2). In fact, the regulations support an interpretation that the respondent should not be charged with the delay unless and until he or she is notified of the obligation to provide biometrics information and fails to comply in a timely manner. By regulation, DHS is required to provide the respondent with notice of the biometrics requirements and instructions for the procedures. 8 C.F.R. § 1003.47(d).²⁷ The applicant must comply with the biometrics requirements “before or as soon as practicable after the filing of the application for relief in the immigration proceedings.” *Id.* Also, 8 C.F.R. § 1208.7(a)(2) states that the clock stops during “delays caused by failure without good cause to follow the requirements for fingerprint processing.” Therefore, under the regulations, the time it takes to comply with the biometrics information does not result in a respondent-created delay. Rather, the respondent should be charged with the delay only if he or she does not comply in a timely manner.

²⁵ 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: Definitions and Use of Adjournment, Call-up and Case Identification Codes, *available at*: <http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-07.pdf>.

²⁶ *See* Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005 (EOIR explained that in the supplement to the background check regulation, a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner). *See* 70 Fed Reg. 4743, 4745 (Jan. 31, 2005).

²⁷ Once a person files or indicates an intention to file an application for relief, DHS “shall notify the respondent of the need to provide biometrics and other biographical information and shall provide a biometrics notice and instructions to the respondent for such procedures.” 8 C.F.R. § 1003.47(d).

If DHS seeks a continuance due to a pending background check, the delay should be charged to DHS and the EAD clock should continue to run.²⁸ If the respondent joins in the request for a continuance, the delay will be charged to the respondent and the clock will stop.²⁹ If the respondent opposes or takes no position on the request for a continuance, the DHS should be charged with the delay.

D. Request for Evidence

A request for evidence may be issued if “the evidence submitted either does not fully establish eligibility” or “raises underlying questions regarding eligibility” for asylum. 8 C.F.R. § 103.2(b)(8). The regulations 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.” 8 C.F.R. § 208.7(a)(2). In practice, this means that a request for evidence is an action that will cause the clock to stop.

AILF’s Analysis

As soon as the applicant submits the requested evidence, the delay no longer exists and the AO or IJ should restart the clock immediately. 8 C.F.R. § 208.7(a)(2).

E. Delays for Additional Evidence or Amending Asylum Application

The clock starts when a completed application is filed. 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1).³⁰ A complete asylum application must: 1) have all the boxes checked, 2) be signed, and 3) include additional supporting evidence as required on the application instructions.³¹ 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). If the application has not been returned to the applicant within 30 days, it is deemed complete. 8 C.F.R. § 208.3(c)(3); 8 C.F.R. § 1208.3(c)(3). 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. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

In removal proceedings, after the respondent files an asylum application, the IJ may continue the case for a second MC hearing to receive evidence or an updated affidavit instead of scheduling an individual hearing. In this scenario, EOIR policy is to stop the clock even though

²⁸ Currently code 37. See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

²⁹ Currently code 45. *Id.*

³⁰ This includes defensive asylum applications. See 8 C.F.R. § 1208.7(a)(1) and 8 C.F.R. § 1208.4(b)(3) & (4).

³¹ The current version of the asylum application is dated 7/3/03. However, DHS still accepts the 10/18/01 version. Therefore, submitting the 10/18/01 version should not stop the clock.

the respondent did not request the second MC.³² EOIR has stated that in such a situation, the respondent has caused the delay “by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing.”³³ EOIR stated that “[i]t is the alien who is asking for a benefit here—that of amending or updating his or her application. Consequently, it is an alien caused delay.”³⁴

AILF’s Analysis

AILF believes that if a respondent submits additional information to the immigration court in advance of a hearing and does not cause a delay, the clock should not stop. If the respondent requests additional time to submit supplemental materials, the clock should stop only during the delay and should restart as soon as the delay no longer exists. 8 C.F.R. § 208.4(c); 8 C.F.R. § 1208.4(c).

F. Contesting the Charges, Filing for Other Forms of Relief

EOIR policy states that the clock stops if a respondent contests the charges of removability contained in the Notice to Appear.³⁵

AILF’s Analysis

AILF believes this interpretation may be subject to challenge based on arguments about DHS’s burden of proof. *See* INA § 240(c), 8 C.F.R. § 1240.8. Even if the EAD clock does stop, it should stop only until the IJ makes a determination on the allegations and the charges, then the clock should restart. 8 C.F.R. § 208.7(a)(2); 8 C.F.R. § 1208.7(a)(2).

Additionally, EOIR policy states that the clock is stopped when a respondent files for other forms of relief.³⁶ However, 8 C.F.R. § 208.7(a)(2) stops the asylum EAD clock only for any delay in the adjudication of the asylum application caused or requested by the respondent. Filing for another form of relief, on its own, does not delay the adjudication of the asylum application, as the asylum application may be adjudicated before the IJ addresses any other relief requested.

³² *See* Appendix 2, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.

³³ *Id.*

³⁴ *Id.*

³⁵ Currently code 51, *See* OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

³⁶ Currently code 6, *Id.*

G. Reopening a Case

An EOIR policy memorandum gives IJs three “options” for setting the asylum clock after the IJ has granted a motion to reopen:

- 1) Restart the clock after granting the motion to reopen.

EOIR suggests IJs choose the first option of not restarting the clock when reopening is based on a document that “was previously unavailable.” EOIR notes that the IJ can restart the clock at the first master calendar.

- 2) “Roll back” the clock and restart it from the date the IJ issued the final order, as if the clock never stopped from the denial of asylum to the granting of the motion to reopen.

EOIR states that IJs should use this second option when the respondent did not cause the delay. An example of this is a motion to reopen an *in absentia* order where the respondent did not receive notice of the hearing.

- 3) Restart the clock from the date the motion to reopen is granted.³⁷

EOIR suggests IJs use the third option of restarting the clock when the motion was granted when proceedings are reopened based on changed country conditions.

AILF’s Analysis

In response to the first option, AILF believes that if the document previously was unavailable to the respondent, the respondent has not caused the delay. Furthermore, EOIR’s position is undermined by the fact that once the BIA or IJ reopens a case after the IJ denied asylum, there is no longer an order denying the asylum application. *See Orichitch v. Gonzales*, 421 F.3d 595, 598 (7th Cir. 2005) (the grant of a motion to reopen vacates the previous voluntary departure order and therefore INA § 240B(d) does not continue to operate); *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings.); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (the BIA’s granting of the motion to reopen means there is no longer a final decision to review); *Excellent v. Ashcroft*, 359 F. Supp. 2d 333, 335 (S.D.N.Y. 2005) (same). Therefore, the IJ should treat the asylum EAD clock as never having stopped by restarting the clock from the date the final order was given. That is, the IJ should “credit” all the time that elapsed since the original order denying asylum because a valid order denying asylum no longer exists.

³⁷ See Revised OPPM 00-01, Asylum Request Processing, Revised August 4, 2000, pages 6-7, available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>.

AILF agrees with EOIR's interpretation of the second option, but disagrees that the scope is so narrow. AILF believes this interpretation is applicable to more scenarios than EOIR's example of the *in absentia* context.

Regarding the third option, AILF believes that while the adjudications asylum clock should not be reset, the IJ should credit all the time since the original order denying asylum on the asylum EAD clock, based on same arguments discussed above to counter the first option.

H. Remands from the BIA

EOIR takes the position that if the BIA remands a case to the IJ, the remand does not restart the clock.³⁸ In support of this position, EOIR cites INA § 208(d)(5)(A)(iii), which 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.

INA § 208(d)(5)(A)(iii).

AILF's Analysis

AILF does not believe this statutory provision provides support for EOIR's position on remanded cases. First, section 208(d)(5)(A)(iii) of the INA describes the timeline for adjudication of the asylum application, not work authorization. Work authorization is addressed separately in the statute. Section 208(d)(2) of the INA prohibits an asylum applicant from receiving work authorization within 180 days of filing the application. Although both sections of the statute have 180 day requirements, this does not link the two asylum clocks together. Additionally, EOIR policy treats the two clocks as separate by stating that different actions can stop just the asylum adjudications clock or both the asylum EAD clock and the asylum adjudications clock.³⁹

Further, once on remand, a case is no longer on appeal and there is no final order. Reversal of a denied asylum application means that no denial exists and the person is put in the status he or she was in before the order denying asylum was issued. *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); *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987) (same); *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1996) (court reversal of a BIA order of deportation nullifies the order); *Katsis v. INS*, 997 F.2d 1067 (3d Cir. 1993) (same). Although the EAD clock stops upon the denial of an asylum application, 8 C.F.R. § 208.7(a)(1); 8 C.F.R. § 1208.7(a)(1), with no order denying asylum in effect, there is no bar to applying for work authorization. In such a situation, the clock should not be *restarted*, but rather should be treated as never having stopped.

³⁸ See Appendix 2, AILA-EOIR Liaison Agenda Question 1, October 17, 2005.

³⁹ See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

The time should be recalculated from the date of the first order denying asylum. The IJ should “credit” all the time that elapsed since the original order denying asylum.

VII. WHAT HAS EOIR SAID ABOUT RESOLVING ASYLUM EAD CLOCK DISPUTES?

- Currently, EOIR has identified two tracks for a respondent to pursue to restart a stopped clock. A respondent or attorney may (1) contact the court administrator, and/or (2) file a motion with the immigration court.⁴⁰ EOIR says 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.”⁴¹
- EOIR has suggested that arguments about the asylum EAD clock should be made at the hearing, and if the issue arises after the hearing, the respondent should file a written motion with the IJ.⁴² EOIR said that the Office of the Chief Immigration Judge has no authority to overrule an IJ’s decision.
- EOIR also has suggested that a respondent who thinks the clock has been improperly stopped due to a data entry error contact the court administrator by mail.⁴³ If the court administrator fails to timely respond or provides an unsatisfactory response, EOIR suggests contacting the assistant chief immigration judge at EOIR headquarters.⁴⁴ If a case is pending at the BIA, EOIR’s Office of General Counsel may be contacted.⁴⁵

VIII. ACTIONS AN ATTORNEY COULD TAKE TO RESTART THE ASYLUM EAD CLOCK OR PREVENT IT FROM STOPPING

- Once the clock reaches 150 days, immediately file the I-765, the EAD application. CIS then has 30 days to adjudicate the application. If the EAD is approved while the application is pending before the asylum office, the EAD may be renewed even if the case is later referred to the Immigration Court and while it is appealed to the BIA. 8 C.F.R. § 208.7(b); 8 C.F.R. § 1208.7(b).

⁴⁰ Contact information for the court administrator for each court is available at: <http://www.usdoj.gov/eoir/sibpages/ICadr.htm>.

⁴¹ See Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

⁴² See Appendix, AILA-EOIR Liaison Agenda Question 8, March 27, 2003.

⁴³ See Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005.

⁴⁴ See Appendix, AILA-EOIR Liaison Agenda Question 3, October 17, 2005. A list of the Assistant Chief Immigration Judges and their respective territory is *available at* <http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm>.

⁴⁵ See Appendix, EOIR/AILA Liaison Agenda Question 3, March 16, 2005; AILA-EOIR Liaison Agenda Question 3, October 17, 2005.

- Be aware of the code. How an adjournment is coded likely will determine whether the clock is stopped. If there are a variety of possibilities as to how to code the adjournment, assert that the clock is stopped based on an event that will not charge the respondent with delay. During the hearing, ask the IJ to indicate on the record the code used for continuing the case. It may be helpful to bring the list of codes to the hearing.⁴⁶
- Where a respondent failed to attend an asylum interview or a hearing at the immigration court due to exceptional circumstances, the clock should not stop. If the case is before the IJ, the respondent may file a motion citing 8 C.F.R. § 208.7(a)(4); 8 C.F.R. § 1208.7(a)(4) and demonstrate exceptional circumstances.
- Comply with the biometrics requirements. Promptly complete the biometrics requirements and submit proof to the court showing compliance. Even if there was a respondent caused delay (see discussion of biometrics above), as soon as the respondent has met the biometrics requirements, he or she may notify the IJ and request that the clock be restarted. EOIR says a respondent “may file a motion to inform the immigration judge that he or she has provided the requisite biometrics.”⁴⁷ EOIR says this will “allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.”⁴⁸ In addition, or in the alternative, EOIR has said that the respondent may send a letter to the court administrator.⁴⁹
- Monitor the status of the clock. Many people discover that the clock has been stopped after attempting to file for an EAD. Respondents may check the status of the clock at any time by calling EOIR’s Automated Status Query System at 1-800-898-7180. According to EOIR, the 800-number is updated within the next day whenever there is a change to the clock.⁵⁰
- Make a record: file a motion to restart the clock and argue your case. The clock stopping guidelines are confusing to IJs, court staff, attorneys, respondents, and the DHS. The case law, statutes and regulations are sparse; however, there are strong 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 to assert a code that properly reflects the cause of the delay.
- This motion, like any other motion, must be adjudicated. Since motions fall under the case completion goals for EOIR, the adjudication should be timely. Also, filing a

⁴⁶ See OPPM 05-07, Definitions and Use of Adjournment, Call-up and Case Identification Codes available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

⁴⁷ See Appendix, AILA-EOIR Liaison Agenda Question 2, October 17, 2005.

⁴⁸ *Id.*

⁴⁹ See Appendix, EOIR/AILA Liaison Agenda Question 8, March 27, 2003.

⁵⁰ See Appendix, AILA-EOIR Liaison Agenda Question 4, March 16, 2005.

motion and making an argument will ensure the issue is in the administrative record for possible review by the BIA and/or federal court.

- Appeal clock-related issues to the BIA. The BIA has not yet ruled on whether it will consider EAD clock issues on interlocutory or direct appeal. It could be argued that stopping the clock is a legal determination and an application of the regulations, so the BIA would be able to entertain such an appeal under 8 C.F.R. § 1003.1(b)(9) (relating to IJ decisions regarding asylum). The BIA has noted that the IJ has the authority to determine who caused a delay in processing an asylum case. *Matter of Hernandez*, 21 I&N Dec. 224, 228, n.2 (BIA 1996).

If you have questions or comments regarding this advisory, or current clients adversely affected by the asylum clock, contact Emily Creighton at ecreighton@ailf.org.

Appendix
Selected AILA-EOIR Liaison Notes on the Asylum Clock⁵¹

March 30, 2000, AILA-EOIR Liaison Meeting

11. *As you know, when an asylum case is proceeding before an immigration judge, the IJ stops the clock for purposes of employment authorization if the alien requests a continuance. Could EOIR issue instructions to IJs regarding the interpretation of this requirement? At present, some IJs stop the clock whenever alien's counsel is "unavailable" for the next "open date" on the court's calendar. Often the next "open date" is so soon that it is not realistic or just to expect that the alien or his or her advocate could be prepared to present the hearing on merits. We suggest the IJ offer a date that is no sooner than 30 days after the Master Calendar hearing.*

Also, if the attorney is "unavailable" because of a conflict with another EOIR hearing or interviews with the INS, this should not be considered an as alien-requested continuance.

Some IJs say that they are required to offer the soonest available date. Is there an instruction from EOIR to this effect? If so, could we obtain a copy of it?

RESPONSE

OPPM 97-6: Definitions and Use of Adjournment and Call-up Codes covers the use of adjournment codes in Immigration Court, as attached (for a list of OPJM's available on the agency's website, click [here](#)). There are no instructions which require an Immigration Judge to offer the earliest available date. One adjournment code which is considered an "alien-caused delay" is a rejection of the original hearing date. Immigration Judges must be given the flexibility to schedule asylum cases. Under section 208(d)(5)(A)(iii) of the Immigration and Nationality Act, in the absence of exceptional circumstances, final administrative adjudication of an asylum application shall be completed within 180 days after the application is filed. This statutory requirement may be an important consideration in scheduling asylum cases. Any policies cannot detract from the ability to meet this important statutory goal. A requirement to offer a hearing date no sooner than 30 days after the master calendar hearing is unrealistic for an expedited system.

We do not agree with your contention that attorney conflicts should not constitute "alien caused delays." An attorney acts on behalf of the alien. Any delays caused by an attorney conflict should be considered "alien caused delays."

⁵¹ Complete AILA-EOIR Liaison Agenda Questions available at <http://www.usdoj.gov/eoir/statspub.htm>.

March 7, 2002, AILA-EOIR Liaison Meeting

2. *Will EOIR request that Immigration Judges make formal findings on the record when the "clock" is stopped during the pendency of an asylum application through no fault of the alien? When there is no indication as to why the clock has stopped, who should we deal with at EOIR?*

RESPONSE

All continuances must be accurately assigned to the appropriate requesting party. The clock is tolled (stopped) for any alien caused delay. The clock remains stopped for the total number of days during which the delay continues. Immigration Judges must continue to give due consideration to requests from all parties for adequate time to prepare and to present their cases at the individual hearing. For further guidance on this issue, please see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

EOIR will not require Immigration Judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. If there is a question regarding the clock, please contact the Court Administrator. If the issue cannot be resolved at that level, then you may contact Loreto Geisse, Counsel to the Chief Immigration Judge, at: (703) 305-1247.

March 27, 2003, AILA-EOIR Liaison Meeting

8. *At the March 2002 EOIR liaison meeting, AILA inquired whether IJs would be required to state on the record the code for the "asylum clock" and to whom the continuance is attributable. There remain additional problems with the clock and the rights of asylum seekers to obtain an employment authorization document (EAD) which the OCIJ Operating Policy and Procedures Memoranda (OPPM) do not address.*

--There are times when an asylum hearing is not completed because the length of the testimony does not fit within the allotted time, even where the alien has requested a longer time slot. The clock remains stopped even when this is not the alien's fault.

--There are times when an IJ will continue the case for a second Master Calendar Hearing (MCH) after the filing of the I-589 to receive "evidence" or an updated affidavit at the second MCH when those items could be filed at a date prior to the Individual Hearing (IH). The clock remains stopped even though the alien did not request the second MCH.

(a) Will OCIJ issue further instructions on the clock to deal with these and other circumstances that keep arising?

RESPONSE

The OCIJ is constantly examining its policies and directives to the field in order to address issues that arise. This includes policies regarding the issue of asylum clocks. In the first example, the clock should not be stopped unless the reason why the hearing was protracted was due to the alien's actions. In the second example, the clock should be stopped, as the alien is causing the delay by not submitting all the documents required at the time the original asylum application was filed or at the first master calendar hearing. It is the alien who is asking for a benefit here—that of amending or updating his or her application. Consequently, it is an alien caused delay.

(b) What recourse do aliens have if they believe the clock has been improperly stopped? If the recourse is to file a motion to restart the clock, and it is denied, will OCIJ review that decision of the IJ?

RESPONSE

While cases are pending before the Immigration Court, an alien can contact the Court Administrator, by mail, if they believe that their asylum clock has been improperly stopped due to a data input error (e.g., the legal technician has entered into the system an incorrect code). If it cannot be corrected in a timely manner, please contact OCIJ headquarters. For concerns regarding the IJ's determination to whom the delay will be attributed, the parties should make their arguments at the hearing. If the issue arises after the hearing, please file a written motion with the Judge. Please note, however, that the OCIJ has no authority to overrule an IJ's decision.

(c) In its March 2002 response, EOIR advised AILA to contact the court administrator with regard to clock problems. Do you really want court administrators to deal with these matters on a case by case basis and, if not satisfied, to contact OCIJ?

RESPONSE

Yes.

March 16, 2005, AILA-EOIR Liaison Meeting

3. Members continue to have problems with the setting and resetting of the asylum clock for applicants in proceedings. On a case that is remanded or reopened, under what circumstances should the clock be restarted or reset where an asylum application has already been tendered and the clock "stopped" by some intervening event?

RESPONSE

If a motion to reopen is granted, and the decision on the asylum application was a grant, deny, or other, the ANSIR system displays the following three clock options: (1) restart the clock from the IJ completion date, (2) restart the clock from the motion to reopen completion date, (3)

do not restart the clock. For specific details, see the Office of the Chief Immigration Judge's Operating Policy and Procedures Memorandum (OPPM) 00-01, "Asylum Request Processing," available at <http://www.usdoj.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf>. Based on the immigration judge's selection, the clock will then be recalculated or will continue to be stopped. With respect to remands, OCIJ is currently reviewing clock issues and the ANSIR system and will provide further guidance at a later date.

If a practitioner disagrees with the clock setting, the first step is to try to resolve the concern locally with either the court administrator or the immigration judge and thereafter with the Assistant Chief Immigration Judge having jurisdiction over the particular court. However, if at any point the result is unsatisfactory and the case is on appeal to the Board, the request should instead be directed in writing to the Office of General Counsel. See <http://www.usdoj.gov/eoir/sibpages/ICadr.htm> for contact information, a list of the Immigration Courts, and the link to the list of areas of responsibility and jurisdiction of the Assistant Chief Immigration Judges.

4. *Members continue to report confusion by the bar and Respondents as to whether and when the clock has been stopped and on what basis, only finding out weeks or months later when an application for an EAD is denied due to a stopped clock. Will EOIR reconsider requiring Immigration Judges to inform Respondents when their actions have resulted in stopping the clock for asylum purposes? [A similar question was asked in the March 7, 2002 Agenda Questions (#2). See <http://www.usdoj.gov/eoir/statspub/eoiraila0203.htm> . Asylum clock questions were also raised in the March 27, 2003 (#8) and March 30, 2000 (#11) Agenda Questions.]*

RESPONSE

EOIR will not require immigration judges to make formal findings on the record when the "clock" is stopped. However, if a party wishes to know whether his or her action will stop the clock, the party should inquire at the time of the action. For further guidance on which actions will stop the clock, see the Office of the Chief Immigration Judge's OPPM 03-03, titled "Definitions and Use of Adjournment, Call-up and Case Identification Codes," available at <http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm>.

Moreover, the status of the clock can be checked at any time by calling EOIR's Automated Status Query System at 1-800-898-7180. Whenever there is a change to the clock, the 800-number is updated within the next day.

October 17, 2005, AILA-EOIR Liaison Meeting

1. *At the last liaison meeting held on March 16, 2005, OCIJ stated that it was reviewing the clock stopping provisions as they relate to asylum cases that are remanded or reopened and would provide guidance at a later date. Has this issue been resolved and if so, how? If OCIJ has not yet addressed the issue, when does it anticipate resolving this issue?*

RESPONSE:

Since the March 16, 2005, liaison meeting, the Office of the Chief Immigration Judge (OCIJ) has reviewed the issue of the clock and remands. When the Board of Immigration Appeals (Board) remands an asylum case to an immigration judge, the immigration judge does not restart or reset the asylum clock. OCIJ has considered the propriety of restarting or resetting the asylum clock and concluded that the clock would not restart upon remand. In reaching that conclusion, OCIJ relied on section 208(d)(5)(A)(iii) of the Immigration and Nationality Act. That section provides that 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. When an immigration judge enters an order, the immigration judge stops the clock. Thus, if the immigration judge denied an asylum application on day 160, the clock would remain on day 160 while the case was on appeal and during any further proceedings.

2. *At the AILA Annual Conference in Salt Lake City, EOIR commented that the new biometrics regulation would result in stopping the clock in expedited asylum cases between an initial master calendar and the next. Given the time in receipting in applications before the court and obtaining biometrics appointments, such a policy could result in a delay of three to four months. Please comment on the exact policy and mechanism that EOIR anticipates an asylum seeker in proceedings to follow in order to comply with the biometrics requirements, and their impact on the clock.*

RESPONSE:

When adjourning a hearing and scheduling the next, immigration judges consider the reason for the delay and properly attribute the delay to the respondent or the Department of Homeland Security. As explained in the supplement to the background check regulation, **a respondent seeking relief is responsible for taking the initiative to provide biometrics or other biographical information in a timely manner.** See 70 Fed Reg. 4743, 4745 (Jan. 31, 2005). Therefore, when an immigration judge adjourns a case to allow the respondent time to complete the necessary paperwork or other requirements for the background investigations and security checks, the delay is attributed to the alien. Conversely, if DHS needs time to complete the background investigations and security checks, the delay is properly attributed to the government.

Because the Executive Office for Immigration Review (EOIR) has no role in the provision of biometrics or the processing of background checks, an immigration judge does not know whether a respondent has complied with the regulation. Therefore, an immigration judge generally learns that a respondent has complied during the next scheduled hearing. However, a respondent may file a motion to inform the immigration judge that he or she has provided the requisite biometrics. A motion reflecting the alien's compliance with the regulation would allow an immigration judge to attribute the future delay to DHS in advance of the next hearing.

3. *Despite the recent instruction regarding procedures for restarting or correcting the asylum clock, many members report that the issues are not being resolved even when following*

the steps noted in prior liaison minutes. Court administrators and immigration judges alike are telling respondents that they have no power over the issue and inquiries to both OCIJ and the Board remain unanswered after up to two months. Will EOIR review its procedures or revise its liaison instructions for resolving such cases?

RESPONSE:

EOIR agrees that asylum clock questions generally should not require two months for review. Any specific information that AILA can provide about cases illustrating delay may assist EOIR in identifying the source of any delay. In the event a court administrator or immigration judge has declined to respond to an asylum clock inquiry, if AILA provides the A number, OCIJ is willing to look into the matter. Please contact the Assistant Chief Immigration Judge (ACIJ) with control over the relevant geographic location. A list of the ACIJ's and their respective territory is available at <http://www.usdoj.gov/eoir/sibpages/ACIJAssignments.htm>.

When 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. OCIJ recently reminded court administrators and immigration judges about the importance of addressing asylum clock issues. In particular, court administrators were reminded that they had the responsibility for reviewing and addressing such inquiries in consultation with the immigration judges.

When a case is pending at the Board, asylum clock questions should be directed to the attention of the Office of General Counsel (OGC), who works with OCIJ to respond appropriately to the clock inquiry. Practitioners interested in additional information about the asylum clock and asylum clock inquiries may consult question 3 of the AILA-EOIR liaison agenda questions dated March 16, 2005, available at <http://www.usdoj.gov/eoir/statspub/eoiraila031605.pdf>.