



New EOIR Policy Memorandum on Expedited Hearings and Employment Authorization for Asylum Applicants

On November 15, 2011, the Executive Office for Immigration Review (EOIR) issued a new memorandum (OPPM 11-02) regarding the “asylum clock.” The memo significantly alters the way immigration judges (IJs) are instructed to assess an applicant’s eligibility for an expedited merits hearing and the manner in which IJs control the accrual of asylum clock time – which directly impacts employment authorization eligibility. While the memo offers some improvements, other aspects of the memo seem likely to give rise to confusion regarding the clock. Please see below for an overview of the memo. NIJC recommends that attorneys representing asylum seekers review the [full memo](#) to determine its impact on their clients’ cases and raise any ensuing questions with NIJC.

For more information regarding employment authorization for asylum applicants, please see NIJC’s Representing Asylum Seekers Manual and employment authorization FAQ, available online at www.immigrantjustice.org.

Background

- The asylum clock measures the number of days an asylum application has been pending before the Asylum Office and the immigration court. This assessment of case pendency is used by IJs to discern whether an applicant is entitled an expedited hearing and by U.S. Citizenship and Immigration Services (USCIS) to determine whether an asylum applicant is eligible for employment authorization.
- For applications filed with the Asylum Office, the clock begins to accrue days on the date USCIS receives the complete application. If the Asylum Office refers the case to the immigration court, the asylum clock continues to run unless the applicant has delayed case processing.
- For applications initially filed with the immigration court, the clock begins to accrue days on the date the applicant files a complete application with the court. According to the memo, an application is not “filed” until it is accepted by a judge at a hearing. However, neither the statute nor the regulations require that an asylum application be filed in open court. If attorneys must file an application at the clerk’s window to meet the one-year deadline or for some other reason, NIJC encourages the attorneys to argue that the clock should begin to run on the date the application is received by the clerk.
- Any delays determined to have been requested or caused by the asylum applicant stop the asylum clock.
- The clock runs or stops based on adjournment codes entered into the EOIR electronic database by the IJ. While some IJs suggest that they do not control the asylum clock, this memo clarifies IJs have **primary control** over the asylum clock.

Expedited Processing

- INA § 208(d)(5)(A) establishes that the Asylum Office and IJ must adjudicate asylum applications within 180 days of filing, barring exceptional circumstances. The phrase “exceptional circumstances” is not defined in the statute or regulations and the memo does not offer a definition of this term.

- If the clock has less than 75 days **when a case is referred** to the IJ from the Asylum Office, the judge must offer an expedited merits hearing, unless certain exceptions apply. According to the memo, asylum seekers with cases that have been pending for more than 75 days are not entitled to an expedited hearing. If your client's case has been pending for more than 75 days at the time of referral and you wish to see an expedited hearing, please contact NIJC.
- When offering expedited hearing dates, the IJ should offer the first available date within the 180 day deadline, but should provide a minimum of 14 days. If you are requesting an expedited hearing, consider appearing at the master calendar hearing with all documents you expect to file in support of your case so your submission will be timely in the event you are given a very quick hearing date.
- If the Asylum Office refers a case to the Court with 75 or more days on the clock, the applicant is not eligible for expedited processing.

Employment Authorization

- INA § 208(d)(2) establishes that an asylum applicant may be able to obtain employment authorization, but not before 180 days after the asylum application was filed.
- If the clock stops due to an applicant-caused delay, **the clock will restart at the next hearing** unless there is another applicant-caused delay.
- If an applicant is eligible for an expedited hearing, but declines the hearing for any reason, the clock will stop.
- If an applicant is not eligible for expedited processing, the clock will still run so long as the applicant does not request or cause any delays.

Actions that Affect the Clock

- Rescheduling hearings:
 - If the IJ grants an applicant's motion to advance a hearing, the clock is not impacted. After the new hearing, the clock will run or stop depending on what happens at that hearing.
 - If a future hearing is rescheduled by the court or at the request of DHS, the clock will run starting on the date the original hearing would have taken place.
 - If a future hearing is continued at the request of the applicant, the clock will stop running on the date the hearing would have taken place.
- Changing venue:
 - If an applicant files a motion to change venue, the clock is stopped from the date the motion is granted. The clock may be restarted at the next hearing.
 - If DHS files a motion to change venue and the clock was already running, the clock will continue to run. If the clock had been stopped prior to the motion, the clock will start to run from the date the motion is granted.
- Applying for asylum after the one-year filing deadline:
 - If an applicant files an asylum application after her one-year filing deadline, the asylum clock will run (except during applicant-caused delays) until the IJ adjudicates whether the asylum application was timely filed or an exception to the one-year filing deadline applies. **This is a significant change from prior EOIR policy.**
 - The clock will not run if the applicant concedes the application was not timely and that no exceptions apply; if the IJ has adjudicated that the application was not timely and that no exceptions apply; or if the judge has adjudicated the asylum application.
 - Please contact NIJC to discuss strategy in cases where the one-year filing deadline is an issue.

- IJ adjudication of the asylum case:
 - The asylum clock exists to measure compliance with the 180-day asylum adjudications goal. As such, the clock “permanently” stops when the IJ issues a decision granting or denying asylum and will not run during any appeal, during judicial review, or if the case has been remanded to the immigration court. Please contact NIJC if your case has been remanded and your client has not accrued sufficient time to apply for employment authorization.
 - If an asylum case is pending before the Board and the applicant believes a clock error occurred during the proceedings before the immigration court, the applicant may contact EOIR, Office of the General Counsel, by letter.

Correcting the Asylum Clock

- The memo instructs attorneys to not file motions with the IJ to address a problem with the clock. Instead, attorneys are instructed to address any clock issues with the IJ in open court. The memo states that the asylum clock is an administrative function and therefore, judges should not issue orders regarding the asylum clock. **This is a significant change from prior EOIR policy.**
- If an attorney is unable to address a clock problem with an IJ in open court in a timely manner, the attorney should address the clock issue by writing to the court administrator. If an attorney is unable to obtain resolution of the clock issue with the judge or court administrator, the attorney may then contact the Assistant Chief Immigration Judge in writing. Please contact NIJC if you believe such action is warranted in your case.

Litigation Targeting the Asylum Clock

On December 15, 2011, the American Immigration Council (AIC) filed a nationwide class action complaint against USCIS and EOIR alleging widespread problems with the asylum clock. The complaint addresses three main problems with the asylum clock: (1) that decisions to stop the clock are made without notice to the asylum seeker and are not subject to appeal; (2) that for asylum applications filed in removal proceedings, the clock does not start until the first appearance before the immigration judge, rather than with the filing of the application with the immigration court; and (3) that immigration courts refuse to restart the clock in cases that have been remanded by federal courts or the Board of Immigration Appeals. The complaint alleges that these problems violate the Due Process Clause of the Fifth Amendment, the Immigration and Nationality Act, the Administrative Procedures Act, and federal regulation. To view the complaint and motion for class certification, please go to <http://immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers>.

In connection with the lawsuit, the AIC would like to hear about problems that attorneys have encountered stemming from EOIR’s policy that the clock can only start or restart at a hearing before an immigration judge. Please contact AIC at asylumclock@immcouncil.org if you have a case in which the following occurred:

- (1) The asylum clock was properly stopped or not started due to an applicant-caused delay;
- (2) The applicant-caused delay was cured before the next scheduled hearing;
- (3) You notified the immigration court of the cure and asked that the clock be started, restarted or that the hearing date be advanced; and
- (4) The immigration court refused to start or restart the clock