

Frequently Asked Questions:

Employment Authorization for Asylum Applicants and the Asylum Clock

The information in this FAQ is subject to change. Attorneys should consult www.uscis.gov for the current filing instructions, location, and fee prior to preparing any immigration applications.

The Asylum Clock Settlement

1. I have heard that my asylum client's ability to obtain employment authorization depends on how many days she has on her "asylum clock." What is this clock?

The asylum clock is an electronic tracking system managed by the asylum office and the Executive Office for Immigration Review (EOIR), which tracks how many days have elapsed since an asylum applicant filed a complete asylum application (form I-589) with the asylum office or the immigration court. It can be stopped and started depending on what happens in the course of the application period. An asylum applicant becomes eligible to file for an Employment Authorization Document (EAD) 150 days after filing a "complete" asylum application and can receive an EAD 180 days after filing a "complete" asylum application.

2. What is the asylum clock settlement?

B.H., et al. v. USCIS, et al., (also known as the ABT asylum clock lawsuit) is a lawsuit that challenged the way that U.S. Citizenship and Immigration Services ("USCIS") and EOIR interpreted rules regarding eligibility for employment authorization during the asylum application process. The case was filed in district court in Seattle, Washington, and it resulted in a settlement that created clearer and fairer asylum clock guidelines and procedures.

3. Why does it matter when an asylum application is considered "filed"?

The date an asylum application is "filed" is important for two reasons:

1. It is the date the asylum clock starts running and
2. It determines whether or not the asylum applicant met the one-year filing deadline for asylum eligibility (i.e., filed the asylum application within one year of the applicant's last date of entry into the United States).

For an affirmative (asylum office) case, an asylum application is deemed "filed" when it is received by USCIS. For a defensive (immigration court) case, EOIR policy from September

2016 states that an asylum application is considered filed when it is received by the immigration court at the immigration court window, by mail, or in open court during a hearing.

4. Does the asylum clock settlement address issues related to the scheduling of merits hearings?

Yes. Pursuant to the settlement, immigration judges must offer eligible, non-detained asylum applicants an expedited hearing date that is at least 45 days after the master calendar hearing. Note, however, that if your client did not file (or lodge) an asylum application within one year of her date of entry, a judge may determine that your client is not “eligible” for asylum and thus not eligible for an expedited hearing date.

If you are an NIJC pro bono attorney and your case involves a one-year deadline issue, please contact NIJC in advance of the master calendar hearing to prepare to address this issue in court

5. How can I find out how many days are on my client’s asylum clock?

It depends on where your client is in the asylum process.

- If your client’s case is pending before the asylum office, you will need to count the number of days that have passed since the date the I-589 was received by USCIS as noted on the I589 receipt notice.
- If your client is in removal proceedings and has lodged – but not filed – her application with the court, you will need to count the number of days from the lodged date stamped onto the I-589.
- If your client is in removal proceedings and her application has been filed with the court, you can call the EOIR Automated Information Line at 1-800-898-7180 and choose option #2.

Affirmative Asylum Applications

6. We are in the process of filing an affirmative (asylum office) asylum application and my client wants to know when she will be able to work.

An asylum applicant can apply for an EAD when she has accrued 150 days on her asylum clock and USCIS can grant an EAD once 180 days have accrued on the clock. The only exception is for an asylum applicant who receives a recommended approval from the asylum office. An asylum applicant who receives a recommended approval can apply for an EAD immediately upon receiving the recommended approval, even if she does not have 150 days on her clock.

7. We filed an affirmative asylum application and are waiting to receive the interview notice. What can make my client’s clock stop at this stage?

Your client’s asylum clock will stop accruing days if: 1. Your client requests to reschedule the date of her asylum interview. The clock should restart on the date of the rescheduled

interview. 2. Your client misses her fingerprint appointment. 3. Your client fails to appear for the asylum interview. However, if your client establishes an exception for failing to appear or if improper notice of the interview was provided, the clock should restart on the date of the next asylum interview. Please see the answer to question #8 below for more information. 4. Your client fails to appear to pick up the asylum decision from the asylum office. 5. The asylum office issues a final denial in your client's asylum case because your client has other legal immigration status in the United States.

8. What happens to the clock if an applicant misses her asylum interview?

After an affirmative asylum applicant misses her scheduled interview, the asylum office will mail a "failure to appear" warning letter, advising the applicant of the procedural steps the applicant must take within 45 days to establish "good cause" for missing the interview. If the applicant responds within 45 days and demonstrates "good cause," the asylum office will treat the response as a request to reschedule the interview and the clock will restart on the date of the rescheduled interview. If the applicant does not respond within 45 days or fails to establish good cause, USCIS will send the applicant a "Referral Notice for Failure to Appear" and charging documents, and will refer the applicant to immigration court. The notice will also explain the procedures for establishing "exceptional circumstances" for missing the interview. If the applicant responds and establishes that exceptional circumstances exist, the asylum office will issue a determination letter to the applicant and her attorney of record and provide notice to the Immigration and Customs Enforcement (ICE) Office of Chief Counsel of the determination. The applicant can then request that ICE join in a joint motion to terminate immigration proceedings and if the immigration judge grants the motion, the asylum office will reopen the asylum application. The asylum clock will then restart on the date the applicant appears for a rescheduled interview with the asylum office.

Referral to the Immigration Court and Defensive Applications

9. The asylum office referred my client's asylum case to the immigration court. Will this referral stop my client's clock?

A referral to the immigration court will not stop your client's clock unless the case was referred because your client failed to appear for the asylum interview. Please see the answer to question #8 above for more information about the impact of missing an asylum office interview.

10. The asylum office referred my client's asylum case to the immigration court. What will make my client's clock stop at this stage?

Your client's clock will stop if your client causes a delay in the adjudication of her asylum application before the immigration court. Requesting a continuance to find an attorney, declining an expedited hearing, or requesting a change of venue are examples of such delays that will stop the clock. At the next hearing after the "delay," the clock will either remain stopped or will restart, depending on whether your client continues to cause a delay. See OPPM (Operating Policies and Procedures Memorandum) 13-02.

11. My client's clock has already accrued 180 days, and my client has employment authorization. Will declining an expedited hearing have any effect on her employment authorization?

Since your client has already accrued 180 days and has employment authorization, declining an expedited hearing will not affect your client's current employment authorization or her ability to renew her EAD in the future.

12. The judge denied my client's applications for asylum. I am appealing the immigration judge's decision to the BIA. Is my client still eligible for employment authorization?

Your client is only eligible for employment authorization if she accrued 180 days on her clock prior to the judge's denial. If you believe an error occurred with the asylum clock prior to the immigration judge's decision, you can still address those issues while the case is pending at the BIA. Please see OPPM 13-02 and the answer to question #12 above for more information about addressing clock errors.

Stopped Clocks and Restarting the Clock

13. I began representing my client after she already had several hearings before the immigration court. I called the EOIR Automated Information Line, and it says my client's clock has stopped. Why would that be and how can I get the clock restarted?

Many of NIJC's clients appeared before the immigration court pro se before NIJC began representing them and their cases were continued so they could find representation. A continuance to find representation stops the clock. At the next master calendar hearing you attend with your client, the clock will remain stopped or will restart depending on whether your client continues to cause a delay in the adjudication of her case. Unless the clock was stopped in error, the judge will not restart the clock before the next hearing. If you believe the clock was stopped in error, please see the answer to question #12 below for information about adjusting the clock.

14. I think that the immigration judge improperly stopped my client's clock. How can I correct the error and get the clock restarted?

Note that as a result of the asylum clock settlement, immigration judges must state on the record their reason(s) for stopping the clock. If your client has an upcoming master calendar hearing, you should address the clock error with the judge during the hearing. Otherwise, you should send a letter to the Chicago Immigration Court Administrator, Christine Epstein, explaining the error and requesting that the clock be restarted.¹ If the judge or court administrator fails to respond to your request, you may need to contact the Assistant Chief Immigration Judge (ACIJ) for Chicago. See OPPM 13-02. If you are an NIJC pro bono attorney and you believe that you need to contact the ACIJ about your NIJC client's clock, please contact NIJC first.

15. The BIA just remanded my client's case back to the immigration judge. Will my client's clock start to run again?

In the past, the asylum clock permanently stopped on the date the immigration judge issued a decision and would not be restart upon remand. Now, pursuant to the asylum clock settlement, the asylum clock will restart on the date the BIA remands a case back to the immigration court if the case was remanded for consideration of the asylum claim (as opposed to withholding of removal or Convention Against Torture relief). On the date of the remand, the clock will be credited with the number of days that have passed since the initial immigration judge decision.

16. How do I demonstrate to that the clock has been restarted because of a BIA remand when applying for work authorization?

When filing the application for work authorization (form I-765), attach a copy of the BIA order remanding the case to the immigration judge.

17. Does the clock also restart when an asylum applicant's case is remanded from the court of appeals to the BIA?

No. It only starts when remanded from the BIA to the immigration judge.

Filing and Fees

18. My client's clock has accrued 150 days. How do I file for employment authorization for my client?

To obtain employment authorization, you must file form I-765, Application for Employment Authorization, and supporting documents with USCIS. This form is available on the USCIS website, www.uscis.gov. For more information on filing Form I-765, please see NIJC's asylum manual.

A sample I-765 cover letter is available in the appendix to the manual. Please note that pro bono attorneys should file the employment authorization application on behalf of their clients and include an appearance form; represented individuals should not file this form on their own.

19. How do I renew my client's EAD?

You can renew your client's EAD so long as your client's asylum application remains pending before the immigration court, the Board of Immigration Appeals (BIA), or a U.S. Court of Appeals. The renewal should not be filed more than 180 days before the previously issued EAD expires, but you should plan to file right at the 180-day point to avoid any gaps in employment authorization. To renew the EAD, you must file form I-765, the filing fee, and supporting document, with USCIS.

At present, so long as the EAD renewal is filed prior to the expiration of the prior EAD, the client will receive a notice from USCIS, automatically extending the EAD for up to 180 days while the renewal is pending.

For more information, please see NIJC's asylum manual and www.uscis.gov.

20. How much does it cost to apply for employment authorization?

An asylum applicant does not have to pay a filing fee the first time she applies for employment authorization. For all subsequent renewals, the filing fee is \$410.00. If an applicant can demonstrate an inability to pay the filing fee, then she may file a fee waiver request with the I-765 application.

21. How do I file a fee waiver request for my client?

To request a waiver of the filing fee for your client's I-765 application, use form I-912. You may also want to include an affidavit from your client with additional details regarding her inability to pay the filing fee.

22. I just filed the employment authorization application for my client. How long will it take for my client to receive her EAD?

It generally takes a little over 90 days from the filing date for an applicant to receive her EAD.

23. My client already obtained employment authorization based on her asylum application. For how long is her EAD valid?

A pending asylum application-based EAD is valid for two years. (Please note that prior to October 2016, a pending asylum application-based EAD was only valid for one year and EADs that were approved prior to October 2016 will only be valid for one year.)

More information on EADs

24. Where can I find the law and regulations on obtaining an EAD?

The laws and regulations regarding employment authorization for asylum applicants can be found in INA § 208(d)(2) and 8 C.F.R. §§ 208.7 and 274a.12(c)(8).

25. Where can I find more information about the asylum clock settlement and EOIR and USCIS guidance?

- The Immigration Court Practice Manual
- Memorandum from the Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 16-01: Filing Applications for Asylum (Sept. 14, 2016)
- Memorandum from the Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 13-03: Guidelines for Implementation of the ABT Settlement Agreement (Dec. 2, 2013)

- Memorandum from the Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 13-02: The Asylum Clock (Dec. 2, 2013)
- USCIS policy memorandum, Issuance of Revised Procedures Regarding Failure to Appear and Reschedule Requests (Oct. 17, 2013)
- USCIS policy memorandum, Application of the ‘Exceptional Circumstances’ Standard in Cases Where an Applicant has Failed to Appear for an Asylum Interview (Oct. 17, 2013)
- B.H., et al. v. USCIS asylum clock complaint and settlement documents

If you have any additional questions, please contact Anna Sears at 312-660-1307 or ansears@heartlandalliance.org.

For more information, read NIJC’s Asylum Procedural Manual, available at immigrantjustice.org/attorney-resources.