Practice Alert[1]

Garcia Perez v. USCIS and the Asylum EAD Clock

March 7, 2023

What is the _Garcia Perez v. USCIS_ lawsuit and what policies are challenged?

Garcia Perez is a lawsuit filed in federal district court by five asylum applicants on behalf of a national class challenging the policies and practices of U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) preventing them from obtaining authorization to work while their asylum claims are pending. *See* Complaint, *Garcia Perez v. USCIS*, No. 2:22-cv-00806 (W.D. Wash., filed June 9, 2022).

Although Congress directed USCIS and EOIR to adjudicate asylum applications within six months after they are filed, *see* 8 U.S.C. § 1158(d)(5)(A)(iii), the agencies rarely meet this deadline. If an asylum application is not adjudicated within 180 days, an applicant may be provided employment authorization. 8 U.S.C. § 1158(d)(2). However, the running of this six-month waiting period, known as "the asylum EAD clock," is suspended for any applicant-caused delay. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2),

Garcia Perez challenges EOIR's and USCIS' failure to provide adequate notice of adverse asylum EAD clock determinations or a viable mechanism for asylum and withholding applicants to challenge these determinations. In addition, it challenges three specific policies and practices that impermissibly prevent asylum and withholding of removal applicants from accruing 180 days on the asylum EAD clock, namely:

> (1) failing to restart the asylum EAD clock and to credit time accrued where an immigration judge denies an asylum or withholding of removal application, but the applicant then prevails on appeal to the Board of Immigration Appeals or a federal court of appeals (the Remand Subclass),
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> (2) stopping the asylum EAD clock where the asylum or withholding applicant seeks a change of venue to another immigration court, including after being

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> released from custody or otherwise permitted to enter the country and relocate to a new residence seeks to change the location of their immigration court proceedings (the Venue Subclass); and
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> (3) for unaccompanied child applicants, stopping the asylum EAD clock where the application is transferred from the immigration court to USCIS or filed with USCIS in the first instance pursuant to the statutory directive at 8 U.S.C. § 1158(b)(3)(C) that USCIS be the first agency to adjudicate an unaccompanied child's asylum application (Unaccompanied Children Subclass).

What are the next steps in the lawsuit?

Shortly after the lawsuit was filed, the parties entered settlement negotiations. Pursuant to Federal Rule of Civil Procedure 408 and local district court rules governing settlement discussion, counsel are not at liberty to share information about settlement negotiations. However, Plaintiffs' counsel are optimistic about the parties' progress and hopeful that the parties will reach a settlement. Plaintiffs' counsel will provide a further update if a settlement is reached.

Have Defendants changed any asylum EAD clock policies since the lawsuit was filed?

Yes, with respect to the remand issue, Defendant USCIS amended its notice entitled The 180-Day Asylum EAD Clock Notice in September 2022, by adding the following language:

> If the [asylum denial] decision is appealed to the BIA or a U.S. Court of Appeals and the BIA or U.S. Court of Appeals remands it (sends it back) to an immigration judge or BIA for continued adjudication of your asylum claim, your 180-day Asylum EAD Clock will be credited with the total number of days on appeal (e.g. the time between the immigration judge's decision and the date of the BIA's remand order or between the BIA's decision and the date of the U.S. Court of Appeals remand order). You will continue to accumulate time on the180-day Asylum EAD Clock while your asylum claim is pending after the remand order, excluding any additional delays you request or cause.

As this Notice makes clear, an applicant's EAD clock will restart upon a remand from *either* a Court of Appeals to the Board of Immigration Appeals (BIA) *or* the BIA to an Immigration Judge (IJ). The applicant's clock will be credited with all the time that the case pended on appeal. Since appeals generally take months or longer to resolve, most—if not all—asylum and withholding applicants will satisfy the 180-day waiting period for EAD eligibility once this time is credited to their clock. Where an appeal was pending for less than 180 days, the applicant will again begin to accrue time on the clock following the remand.

The amended Notice is posted on USCIS' Asylum page under the heading "Permission to Work in the United States."

As a practical matter, NWIRP and NILA advise that applicants should submit a copy of the remand order from the BIA or Court of Appeals with Form I-765.