Practice Alert[1]

Asylum EAD Clock Settlement Agreement FAQs

Garcia Perez v. USCIS

Updated January 30, 2025

This practice alert addresses the final settlement agreement in *Garcia Perez v. USCIS*, No. 2:22-cv-00806 (W.D. Wash.), approved by the district court on September 26, 2024. In that case, four asylum seekers, represented by the Northwest Immigrant Rights Project and National Immigration Litigation Alliance, challenged the policies and practices of U.S. Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) preventing asylum seekers from obtaining authorization to work while their asylum claims are pending. The settlement agreement took effect on September 26, 2024.

This practice alert provides information about the terms of the settlement agreement, as well as policy changes that USCIS and EOIR implemented after the lawsuit was filed.

What is the Asylum EAD Clock?

Although the asylum statute requires USCIS and EOIR to adjudicate asylum applications within 180 days, *see* 8 U.S.C. § 1158(d)(5)(A)(iii), the agencies rarely meet this deadline. If an asylum application is not adjudicated within that timeframe, USCIS may provide employment authorization to the asylum applicant. 8 U.S.C. § 1158(d)(2). The running of this 180-day waiting period is known as the "Asylum EAD Clock." The clock is suspended for any applicant-caused delay. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2).

What is the *Garcia Perez v. USCIS* lawsuit and what policies did it challenge?

Garcia Perez is a lawsuit filed in federal district court by four asylum applicants on behalf of a national class challenging certain policies and practices of USCIS and EOIR related to the Asylum EAD Clock that prevent them from obtaining employment authorization while their

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asylum and/or withholding of removal claims are pending.[2] *See* Complaint, *Garcia Perez v. USCIS*, No. 2:22-cv-00806 (W.D. Wash., filed June 9, 2022).

Specifically, *Garcia Perez* challenged the agencies' 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 challenged three specific policies and practices that prevent applicants from accruing 180 days on the Asylum EAD Clock—namely policies and practices related to (1) remanded asylum applications after an individual has prevailed before the Board of Immigration Appeals or a circuit court of appeals, (2) asylum applications filed by unaccompanied children, and (3) asylum applications pending after change of venue motions.

How are the certified classes defined?

The nationwide class and three subclasses, certified by the district court on July 29, 2024, are defined as follows:

> **CLASS**: All noncitizens in the United States who have filed or will file with USCIS or EOIR a complete Asylum Application and who would be eligible for employment authorization under 8 C.F.R. § 274a.12(c)(8) but for the fact that their Asylum EAD Clock was stopped or not started prior to 180 days after the date the noncitizen filed a complete Asylum Application.

- **Remand Subclass**: Class members whose Asylum EAD Clocks were or will be stopped following a decision by an Immigration Judge and whose Asylum EAD Clocks are not or will not be started or restarted following an appeal in which either the BIA or a federal court of appeals remands their case for further adjudication of their asylum and/or withholding of removal claims.

- **Unaccompanied Children Subclass**: Class members in removal proceedings who are unaccompanied children (UCs) pursuant to 6 U.S.C. § 279(g) and whose Asylum EAD Clocks are not started or will be stopped while waiting for USCIS to adjudicate the filed Asylum Application.

- **Change of Venue Subclass**: Class members in removal proceedings whose removal proceedings have been or will be transferred to a different Immigration Court through a granted change of venue motion, and for whom EOIR has stopped or will stop the Asylum EAD Clock based solely on the change of venue.

[2] The agencies' Asylum EAD clock applies to all Form I-589 (Application for Asylum and for Withholding of Removal) applications and thus to requests for asylum and requests for withholding of removal. The settlement provisions also apply to both forms of relief. The references to "asylum" in this alert thus encompass both asylum and withholding of removal.

What benefits do *Garcia Perez* class members receive under the settlement agreement?

The settlement agreement entitles class members to obtain information about their Asylum EAD Clock status and, when the Clock is stopped due to applicant-caused delay, the reason for such stoppage. In addition, the agreement provides applicants with the opportunity to contest the stoppage if they believe USCIS or EOIR has incorrectly stopped their Asylum EAD Clock.

- *EOIR: Notice of Asylum EAD Clock status*

On December 19, 2024, immigration judges (IJ)s received guidance that they must clearly state on the record, at the end of each hearing, the "Adjournment Code" applied to the case.[3] The guidance also instructs that IJs may inform the parties whether the Asylum EAD Clock is running or stopped. *See* Operating Policies and Procedures Memorandum 25-01: *Asylum EAD Clock in Immigration Court Proceedings*.

Individuals represented by attorneys and accredited representatives can determine when and for what reasons their Asylum EAD Clocks have been stopped through EOIR Courts & Appeals System (ECAS). After this lawsuit was filed, in July 2023, EOIR changed the ECAS CASE Portal so that it now includes case-specific Adjournment Code history relating to the 180-day Asylum EAD Clock.

Individuals who are *pro se* can obtain a printout of their case-specific Adjournment Code history relating to the 180-day Asylum EAD Clock by making an in-person, oral request to EOIR personnel or by submitting a written request. EOIR personnel must provide a printout (1) immediately at the time of an in-person, oral request, (2) by mail within 25 business days of a telephonic request, absent exceptional circumstances, or (3) by mail within 25 business days of a written request, absent exceptional circumstances.

[3] "Adjournment Codes" reflect the reason that a removal hearing is concluded or continued; each code indicates either that EOIR will stop an applicant's Asylum EAD Clock or will allow it to run. Thus, if applicants know the case adjournment code used at the end of a removal hearing, they can determine whether EOIR has incorrectly stopped their Asylum EAD Clock. Prior to January 20, 2025, EOIR's website had a page dedicated to listing the adjournment codes. Following the change in administration, that information was moved to the EOIR policy manual. The adjournment code information can be found on pages 627–38 (PDF pagination) of the revised EOIR manual.

- *EOIR: Opportunity to Challenge Asylum EAD Clock status*

EOIR will permit class members to raise challenges to their Asylum EAD Clock status either in writing or orally at an immigration court proceeding.

For oral requests, IJs should address the request for a correction to an individual's Asylum EAD Clock status on the record.

For written requests, class members must address their requests to the Court Administrator of the immigration court holding their removal proceedings, either by email to a designated Asylum EAD Clock Correction Request email box or by mail. For cases on appeal, class members must submit their requests in writing to EOIR's Office of the General Counsel (OGC). A list of the email and physical addresses applicants must use for such requests on EOIR's website for immigration courts and for the OGC.

Immigration courts and EOIR's Office of the General Counsel must respond to written requests in writing within 25 business days of receipt of a request, absent exceptional circumstances. If the immigration court or Office of the General Counsel rejects or denies a written request for Asylum EAD Clock correction, the response will provide the reasoning for the rejection or denial.

The EOIR guidance reflecting these policies can be found in an EOIR Memorandum entitled Operating Policies and Procedures Memorandum 25-01: *Asylum EAD Clock in Immigration Court Proceedings*, which is available on EOIR's website.

- *USCIS: Notice of Asylum EAD Clock status*

Individuals who have submitted affirmative asylum applications to USCIS will be able to use USCIS' automated Case Status Online Tool (CSOL Tool) to determine whether their Asylum EAD Clock is stopped as a result of an applicant-caused delay. The CSOL Tool will show whether there is an Asylum EAD Clock stoppage and the total number of days accrued at the time of the stoppage. USCIS has agreed to implement these additions to the CSOL Tool within 180 days of the effective date of the settlement agreement, i.e. March 25, 2025.

USCIS revised the 180-Day Asylum EAD Clock Notice, available on USCIS' Asylum page under the heading "Permission to Work in the United States," to provide an exhaustive list of clock-impacting events in the affirmative asylum process.

- *USCIS: Opportunity to Challenge Asylum EAD Clock status*

By March 25, 2025, USCIS also will create two mechanisms by which class members with affirmative asylum applications can seek corrections to their Asylum EAD Clock status.

First, applicants can use USCIS' eRequest Self-Service Tool to inquire about stoppages related to their Asylum EAD Clock. Inquiries related to Asylum EAD Clock stoppages will be routed to

the asylum office having jurisdiction over the applicant's asylum application (or to EOIR, if the application is within EOIR's jurisdiction).

Second, applicants will be able to call the USCIS Contact Center if they believe that their Asylum EAD Clock information reflected in the CSOL Tool is erroneous or inaccurate. The USCIS customer service agent will route the inquiry to the asylum office having jurisdiction over the applicant's asylum application (or to EOIR, if the application is within EOIR's jurisdiction).

With respect to either method of correction request, USCIS will respond, absent exceptional circumstances, within 25 business days. USCIS will provide the reason(s) for any denial or rejection in its written response.

As noted above, USCIS has agreed to update its public guidance to reflect these policies by March 25, 2025.

What benefits do Remand subclass members receive under the settlement agreement?

The settlement agreement requires that, where a class member's case is remanded by the BIA or a U.S. Court of Appeals, USCIS and EOIR will credit the Asylum EAD Clock with the time accrued during the BIA appeal or petition for review.

Specifically, in August 2024, USCIS amended its notice entitled The 180-Day Asylum EAD Clock Notice 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 the 180-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 Asylum EAD Clock will restart upon a remand from *either* a Court of Appeals to the BIA *or* the BIA to the 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.

Consistent with the settlement agreement, the 180-Day Asylum EAD Clock Notice also states that "Because EAD eligibility relies upon time credited from remand, [applicants should] provide a copy of the complete remand order from the BIA to the immigration judge or, where applicable, from the U.S. Court of Appeals to the BIA, when you submit your Form I-765." As a

result, it is important that applicant include the circuit court order or the BIA order, and not some other document to prove to the agency that the clock has restarted. Failure to include this document is likely to result in denial of the application.

The amended notice is posted on USCIS' Asylum page under the heading "Permission to Work in the United States." It is recommended that practitioners highlight this policy in a cover letter to avoid erroneous denials.

What benefits do Unaccompanied Children subclass members receive under the settlement agreement?

USCIS will issue guidance on its website and public messaging affirming that the Asylum EAD Clock should not stop for UCs with pending asylum applications before USCIS.

Where an unaccompanied child, as defined in 6 U.S.C. § 279(g), has a pending asylum application with USCIS, any Adjournment Code associated with the transfer of jurisdiction from EOIR to USCIS will not stop the Asylum EAD Clock, and USCIS controls the Clock in such cases. However, if an unaccompanied child's case is referred to EOIR by USCIS, subsequent applicant-caused delays while the asylum application is pending before EOIR will stop the Asylum EAD Clock.

What benefits do Change of Venue subclass members receive under the settlement agreement?

EOIR changed its policy to reflect that a change of venue does not stop the Asylum EAD Clock in cases pending before EOIR. EOIR has updated the relevant Adjournment Codes to reflect that a granted change of venue does not stop the Asylum EAD Clock. Therefore, class members who file motions to change venue will continue to accrue time on their Asylum EAD Clock while the motion is pending and adjudicated, as well as while the case is transferred to the new court. *See* Operating Policies and Procedures Memorandum 25-01: *Asylum EAD Clock in Immigration Court Proceedings*.

How are disputes under the settlement agreement resolved?

If either Plaintiffs or Defendants believe that the opposing party failed to comply with the settlement agreement, they must provide notice to the opposing party in writing within 180 days of discovering the failure to comply, and the opposing party must respond within 45 days. If the parties cannot resolve the dispute following negotiation, they may apply to the district court to enforce the relevant provision of the agreement.

Please note that this dispute resolution mechanism exclusively applies to disputes about enforcing the settlement agreement and may not be used as an alternative procedure to inquire about or contest an individual class member's Asylum EAD Clock status.

How long will the settlement agreement be in effect?

The settlement agreement will be in effect until whichever occurs first: (1) four years after USCIS and EOIR fully implement all of the requirements under the settlement agreement, or (2) six years after September 26, 2024, the date on which the district court gave final approval to the settlement agreement.