



OOD
PM 19-05

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To: All of EOIR
From: James R. McHenry III, Director *KHR for JRM*
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GUIDANCE REGARDING THE ADJUDICATION OF ASYLUM APPLICATIONS CONSISTENT WITH INA § 208(d)(5)(A)(iii)

PURPOSE:	Provides guidance regarding the adjudication of asylum applications consistent with INA 208(d)(5)(A)(iii)
OWNER:	Office of the Director
AUTHORITY:	8 U.S.C. § 1158; 8 C.F.R. §§ 1003.0(b), 1208.7
CANCELLATION:	None

This Policy Memorandum establishes the policy of EOIR—consistent with INA § 208(d)(5)(A)(iii)—to complete adjudications of asylum applications within 180 days to the maximum extent practicable.

Asylum applications received by EOIR have more than tripled since FY 2014, and there are currently over 350,000 cases in immigration proceedings with an asylum application pending. Consequently, it is imperative that EOIR adopt sound strategies for handling asylum cases in a timely manner consistent with the intent of the Immigration and Nationality Act (INA). Doing so will ensure that aliens with meritorious claims will not have to wait any longer than necessary to receive benefits associated with asylee status while aliens with unmeritorious claims will be allowed to depart voluntarily or removed as expeditiously as possible.

The INA contains two separate provisions relating to a 180-day time frame in the context of an asylum application.

The first, INA § 208(d)(5)(A)(iii), directs the Attorney General to set procedures for processing asylum applications so that such applications should be adjudicated within 180 days:

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.

Implementing regulations clarify that the “time periods within which . . . the asylum application must be adjudicated pursuant to section 208(d)(5)(A)(iii) of the Act shall begin when the alien has filed a complete asylum application in accordance with” applicable procedures. 8 C.F.R. § 1208.7(a)(2).

The second, INA § 208(d)(2), addresses when an asylum applicant may be granted employment authorization based on an asylum application:

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.

Implementing regulations relevant to employment authorization provide that aliens (1) cannot apply for employment authorization until at least 150 days after they file their application for asylum and (2) “no employment authorization shall be issued to an asylum applicant prior to the expiration of the 180-day period following the filing of the asylum application.” 8 C.F.R. § 1208.7(a)(1). Furthermore, “[t]he time periods within which the alien may not apply for employment authorization . . . shall begin when the alien has filed a complete asylum application in accordance with” applicable regulations. *Id.* § 1208.7(a)(2).

Although neither provision is subject to private enforcement against the Government, INA § 208(d)(7), both statutory provisions express Congress’s strong expectation that asylum applications would be adjudicated within 180 days of the date of filing. INA § 208(d)(5)(A)(iii) does so expressly, by indicating that asylum applications should be adjudicated within 180 days absent “exceptional circumstances.” And INA § 208(d)(2) does so implicitly, by providing that employment authorization shall not be granted prior to 180 days after an alien files an asylum application, i.e., after the claim is supposed to have been adjudicated.

Although both of these provisions reflect an expectation that asylum applications should be adjudicated within 180 days of filing, the provisions themselves are not identical. For example, the adjudication deadline for the asylum application itself is subject to tolling for “exceptional circumstances.” INA § 208(d)(5)(A)(iii). In contrast, the period during which an alien is barred from filing an application for employment authorization based on an asylum application, as implemented by DHS in concert with EOIR, may be tolled solely for an alien-caused continuance, 8 C.F.R. § 1208.7(a)(1), and continuances are subject to a “good cause” standard, *see infra*.

Aliens in removal proceedings sometimes request continuances pursuant to 8 C.F.R. § 1003.29 that, if granted, would delay adjudication of their asylum applications past the 180-day deadline. Section 1003.29 imposes a “good cause” standard for granting continuances. But if granting a continuance would result in missing the 180-day deadline, the Immigration Judge may only grant the continuance if the respondent satisfies both the good-cause standard of 8 C.F.R. § 1003.29 and also shows the “exceptional circumstances” required by INA § 208(d)(5)(A)(iii). Under 8 C.F.R. § 1208.7(a)(2), “[a]ny delay requested or caused by the applicant shall not be counted as part of” the 180-day adjudication deadline described in INA § 208(d)(5)(A)(iii). This means that an alien who causes delays in the adjudication process is not entitled to such a prompt adjudication of his asylum claim. But, absent delays that qualify as exceptional circumstances, 8

C.F.R. § 1208.7(a)(2) does not relieve Immigration Judges of their obligation to adjudicate asylum claims within 180 days.

“Good cause” remains the appropriate standard for granting continuances in Immigration Court. *See Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). A continuance does not automatically justify exceeding the 180-day timeline in INA § 208(d)(5)(A)(iii), however, because the statute’s “exceptional circumstances” standard is higher than the “good cause” standard for continuances. INA § 208(d)(5)(A)(iii) does not define the “exceptional circumstances” that would warrant extending asylum adjudications beyond 180 days. But Congress defined the term “exceptional circumstances” elsewhere in the INA in ways that suggest it represents a higher standard than “good cause.” In INA § 240, Congress defined “exceptional circumstances” to mean “exceptional circumstances . . . beyond the control of the alien,” such as “battery or extreme cruelty” or “serious illness” suffered by the alien or his child or parent. INA § 240(e)(1); *see also Matter of J-P-*, 22 I&N Dec. 33, 34 (BIA 1998) (describing “exceptional circumstances” in former INA § 242B as a “high standard”). Definitions of “extraordinary circumstances” in immigration-related regulations are similarly demanding. *E.g.*, 8 C.F.R. § 1212.7(d) (examples involve “national security or foreign policy considerations, or . . . exceptional and extremely unusual hardship”).

By contrast, the Attorney General recently explained that the “good cause” standard for continuances is an open-ended term that requires a balancing of all relevant factors, a standard that would allow a broader set of reasons for delay. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018). Although the Attorney General described continuances in *Matter of Castro-Tum* as an “appropriate way to deal with exceptional circumstances,” 27 I&N Dec. 271, 293 (2018), continuances may be justified in certain commonplace, unexceptional scenarios as well, *see, e.g., Matter of L-A-B-R-*, 27 I&N Dec. at 417 (alien is the subject of a viable visa petition and prospective application for adjustment of status); *Matter of Sibrun*, 18 I&N Dec. 354, 356–57 (BIA 1983) (despite a diligent good faith effort to prepare, alien needs additional time to obtain probative, noncumulative and significantly favorable evidence). That is consistent with the way “good cause” is defined elsewhere in the INA. *See, e.g.*, 8 U.S.C. § 1253(a)(3) (setting forth numerous factors relevant to “good cause” for suspending an alien’s sentence for failure to depart); *cf. Matter of S-A-*, 21 I&N Dec. 1050, 1053 (BIA 1997) (“reasonable cause” standard is “far less demanding” than “exceptional circumstances” standard).

In short, good cause that warrants a continuance in general does not necessarily—and in every case—constitute exceptional circumstances that justify missing the 180-day deadline in INA § 208(d)(5)(A)(iii).

EOIR has not always clearly and carefully distinguished between INA § 208(d)(5)(A)(iii) and INA § 208(d)(2) in its operational guidance. For instance, EOIR currently maintains a single “asylum clock” that purports to capture the running of both 180-day periods, even though, as discussed above, the standards for tolling those periods differ.¹ Nevertheless, the statutory

¹ This PM does not replace Operating Policies and Procedures Memorandum (OPPM) 13-03, *Guidelines for Implementation of the ABT Settlement Agreement*. EOIR remains subject to the terms of the settlement of *B.H., et al. v. U.S. Citizenship and Immigration Services, et al.*, No. CV11-2108-RAJ (W.D. Wash.) (ABT Settlement Agreement), and nothing in this PM is intended to abrogate any extant obligation under that settlement. Further, EOIR will continue to maintain its current “asylum clock” underpinning the “180-day Asylum EAD Clock” for purposes of the ABT Settlement Agreement. Except as clarified herein, EOIR will also maintain its current guidance in OPPM

distinction between these periods is clear, as is the difference between “good cause” and “exceptional circumstances.” Thus, EOIR must also be more precise in how it considers these related, but distinct, provisions.

Accordingly, it is the policy of EOIR, as a matter of sound case management, to complete adjudications of asylum applications within 180 days consistent with INA § 208(d)(5)(A)(iii) to the maximum extent practicable.² To that end, it is expected that once an asylum application is filed—and regardless of whether the application is filed by mail, at the window, or at a hearing—the Immigration Court will adjudicate it within 180 days, absent exceptional circumstances, consistent with INA § 208(d)(5)(A)(iii).³ Further, good cause that warrants a continuance in general does not necessarily—and in every case—constitute exceptional circumstances that justify exceeding the 180-day deadline in INA § 208(d)(5)(A)(iii).⁴

This PM is intended to provide guidance to assist adjudicators in the timely adjudication of asylum applications consistent with principles of sound case management and the clear expectations of Congress codified in the INA. It is not intended to limit the discretion of an Immigration Judge, and nothing herein should be construed as mandating a particular outcome in any specific case. Rather, its purpose is to provide clear policy direction regarding the importance of adhering to statutory responsibilities in adjudicating asylum cases in order to ensure that both

13-02, *The Asylum Clock*. In the future, however, EOIR may develop a more precise mechanism for differentiating and tracking the 180-day period prescribed by INA § 208(d)(5)(A)(iii) independently of the 180-day period prescribed by INA § 208(d)(2) and will update its guidance accordingly at that time. Additionally, as in all cases, when an Immigration Judge continues an asylum case or gives a call-up date, the Judge is responsible for making the reason(s) for the adjournment or call-up date clear on the record. In all cases, including asylum cases, the Judge should annotate the case worksheet on the left side of the Record of Proceedings with the corresponding adjournment code or call-up code. The Court Administrator and court staff are responsible for ensuring that each adjournment code and call-up code is accurately entered into CASE or any successor database. The Immigration Judge and Court Administrator are also responsible for ensuring that a correct case identification code, if any, is accurately noted and entered into CASE or its successor. The Immigration Judge must be careful to use the adjournment code that most accurately reflects the basis for the continuance and must ensure that, if applicable, the party requesting a continuance is the same as the party to whom the continuance is credited. For example, in cases in which an alien requests a continuance to await the adjudication of an application by U.S. Citizenship and Immigration Services, the adjournment code should be credited to the alien unless DHS joins the request. Intentional or repeated negligent use of an incorrect code or assignment of a continuance to an incorrect party not only affects the integrity of EOIR’s data but may also result in corrective action.

² Pursuant to the ABT Settlement Agreement, when setting a case from a master calendar hearing to an individual calendar hearing, a minimum of 45 days for a non-detained case and 14 days for a detained case must be allowed, even if the 180-day adjudications deadline is imminent. The instant PM does not alter that requirement.

³ This policy should be read as being incorporated into the January 17, 2018 memorandum entitled “Case Priorities and Immigration Court Performance Measures” and Appendix A to that memorandum. As with the other goals outlined in that memorandum, EOIR recognizes that it may take time to effectuate this policy fully due to current operational constraints. Nevertheless, the agency remains wholly committed to fulfilling the expectations enshrined in the INA regarding the adjudication of asylum applications to the maximum extent practicable.

⁴ Any suggestion in any prior guidance that “good cause” and “exceptional circumstances” are coterminous in every case is now expressly clarified to state that they are not.

meritorious and unmeritorious claims are addressed as efficiently as possible consistent with the law.⁵

This PM is not intended to, does not, and may not be relied upon to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Please contact your supervisor if you have any questions. Further guidance on this subject may be forthcoming.

⁵ Although administrative appeals are excluded from the provisions of INA § 208(d)(5)(A)(iii), the Board of Immigration Appeals (Board) is subject to general regulatory requirements regarding the timely adjudication of appeals. *See* 8 C.F.R. § 1003.1(e)(8). Those provisions, while not enforceable by parties against the Government, reflect an internal management directive in favor of timely dispositions. *Id.* § 1003.1(e)(8)(vi). Accordingly, except in exigent circumstances determined by the Chairman of the Board, appeals assigned to a single Board member shall be adjudicated within 90 days of the completion of the record on appeal and appeals assigned to a three-member panel shall be adjudicated within 180 days of the completion of the record. *Id.* § 1003.1(e)(8)(i). The Board is expected to adhere to those regulations for all appeals, including appeals of asylum cases.