OOD
PM 21-06

Effective: December 4, 2020

To: All of EOIR
From: James R. McHenry III, Director
Date: December 4, 2020

JAMES MCHENRY
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ASYLUM PROCESSING

PURPOSE:	Consolidate and update Executive Office for Immigration Review policy regarding the processing of asylum applications
OWNER:	Office of the Director
AUTHORITY:	8 C.F.R. § 1003.0(b)
CANCELLATION:	Operating Policies and Procedures Memoranda 00-01 and 13-02

I. Background

This Policy Memorandum (PM) consolidates and replaces Operating Policies and Procedures Memoranda (OPPM) 00-01, *Asylum Request Processing*, OPPM 13-02, *The Asylum Clock*. Much of the information in those OPPM has become outdated or unnecessary, especially as asylum applications have increased in recent years and immigration court personnel have become increasingly familiar with processing them. Nevertheless, although this PM supersedes the two OPPM listed above, it retains their core principles emphasizing the timely and impartial adjudication of asylum applications consistent with due process. Accordingly, any applicable references to either of those OPPM in any other OPPM or other memorandum shall be considered a reference to the instant PM.[1]

II. Affirmative Asylum Applications

In general, an alien who is not in immigration proceedings and files an asylum application with the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) files an affirmative asylum application.[2]

[1] This PM applies principally to asylum applications filed after April 1, 1997. Asylum applications filed prior to that date may be subject to different requirements than those outlined herein. Immigration Judges should always review the applicable law when adjudicating an asylum application.

[2] USCIS has initial jurisdiction over an asylum application filed by an alien who meets the statutory definition of an unaccompanied alien child (UAC), 6 U.S.C. § 279(g), at the time of filing, regardless of whether the UAC is in removal proceedings. INA § 208(b)(3)(C). An asylum application filed with USCIS by a current UAC in removal proceedings is treated as an affirmative application. Immigration Judges retain authority, however, to determine whether an alien met or meets the legal definition of a UAC at the time an asylum application is filed and, thus, to determine whether

If an affirmative asylum application is not granted by USCIS and the alien is not in a legal status, the application, along with any supporting documents, will be referred to an immigration court at the time the charging document is filed. 8 C.F.R. § 208.14(c)(1). All affirmative asylum applications referred to the immigration court by USCIS must contain all supporting documentation. The immigration court will not accept any affirmative asylum applications that do not contain all of the documents referred to in the Uniform Docketing System Manual (UDSM).

III. Defensive Asylum Applications

For cases other than affirmative asylum applications referred to immigration court by USCIS, if an alien expresses fear of persecution or harm upon return to any of the countries to which the alien may be removed, the Immigration Judge shall (1) advise the alien that he or she may apply for asylum or withholding of removal; (2) make available the appropriate application forms; (3) advise the alien of the privilege of being represented by counsel at no expense to the government; and of the consequences, pursuant to INA § 208(d)(6), of knowingly filing a frivolous application for asylum[3]; and (4) provide to the alien the List of Free Legal Service Providers ("pro bono list"). 8 C.F.R. § 1240.11(c)(1).

An alien in immigration proceedings who files an asylum application with EOIR files a defensive asylum application. An EOIR regulation, 8 C.F.R. § 1208.3(a), requires all asylum applicants to file Form I-589 (Application for Asylum or Withholding of Removal).[4] This form is available at each immigration court and is also readily available online. The most recent revised version of the Form I-589 is the only asylum application that will be accepted for submission. Each Court Administrator will ensure that an ample supply of copies of Form I-589, the Immigration Court Warning Notice for Knowingly Filing a Frivolous Asylum Application, and the pro bono list are maintained at each immigration court and made available upon request.

EOIR policy remains that no asylum application is required to be filed in person during a hearing. *See* PM 21-02, Cancellation of Certain Operating Policies and Procedures Memoranda (Nov. 6, 2020) ("Relatedly, EOIR now allows the filing of an asylum application by mail, at the window, in court, or, where available, electronically, through either the EOIR Courts & Appeals System

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the Immigration Judge or USCIS has initial jurisdiction over the application, regardless of any prior classification of the applicant as a UAC. *See, e.g.*, *Matter of M-A-C-O-*, 27 I&N Dec. 477, 480 (BIA 2018) ("Although the respondent was determined to be a UAC upon his apprehension by the DHS, the Immigration Judge properly exercised initial jurisdiction to adjudicate his asylum application because the respondent was no longer a UAC by virtue of having turned 18 before he filed his applications with the USCIS and the Immigration Judge."); *accord Garcia v. Barr*, 960 F.3d 893, 895 (6th Cir. 2020) ("Nowhere does the statute ask whether an immigration official previously found the applicant to be an 'unaccompanied alien child.' Rather, it asks only whether the alien meets the statutory criteria at the time of his application. And like other judges, immigration judges have the power to determine their own jurisdiction. . .Thus, the immigration judge properly exercised jurisdiction once he found that [the respondent] did not meet the statutory criteria at the time of his asylum application.").

[3] Once an alien files an asylum application, he or she is also on notice of the penalty for knowingly filing a frivolous asylum application in INA § 208(d)(6), and no further advisal after filing is required by an Immigration Judge. *See Niang v. Holder*, 762 F.3d 251, 254 (2d Cir. 2014) (collecting cases).

[4] Although asylum is a form of relief from removal, whereas withholding of removal under INA § 241(b)(3) and withholding or deferral of removal under the United Nations Convention Against Torture (CAT) are forms of protection from removal, the Form I-589 functions as an application for all three.

(ECAS) or email, and it will continue to accept the filing of an asylum application through those methods until further notice."). Nothing in this PM alters or supersedes PM 21-02.

A defensive asylum application must be filed in accordance with applicable regulations, principally 8 C.F.R. § 1208.3.[5] In particular, "[a]n asylum application that does not include a response to each of the questions contained in the Form I-589, is unsigned, or is unaccompanied by the required materials. . .is incomplete" and subject to return to the applicant for correction. 8 C.F.R. § 1208.3(c). EOIR will continue to reject incomplete applications and return them to applicants for correction and re-submission. For asylum applications submitted in open court at a hearing, the Immigration Judge presiding over that hearing is responsible for determining whether the application is complete. For asylum applications submitted outside of a hearing—*e.g*. by mail, at the window, or electronically—an Assistant Chief Immigration Judge (ACIJ), through oversight and delegation as appropriate, will ensure that the application is complete. All asylum applications should be reviewed for completeness within 30 calendar days of submission. To the maximum extent practicable, an application that is incomplete should be returned to the applicant within five business days of that determination. An application that is complete is considered filed as of the date it was received by the immigration court.[6]

IV. Asylum Clock

It remains "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." PM 19-05, *Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii)* (Nov. 19, 2018) at 4. Nothing in this PM alters or supersedes PM 19-05.

As noted previously, "EOIR has not always clearly and carefully distinguished between INA § 208(d)(5)(A)(iii) [relating to a 180-day deadline for adjudicating asylum applications absent exceptional circumstances] and INA § 208(d)(2) [providing that employment authorization based on an asylum application shall not be granted prior to 180 days after the filing of the application] in its operational guidance." PM 19-05 at 3. For example, EOIR maintained only a single "asylum clock" purporting to capture the running of both 180-day periods, even though the standards for tolling each of those periods differ. *Id*. In November 2018, EOIR indicated that it intended to "develop a more precise mechanism for differentiating and tracking the 180-day period prescribed

[5] EOIR has proposed amending 8 C.F.R. § 1208.3, but the proposed changes do not eliminate the longstanding requirement that an asylum application be complete in order to be filed. *See Procedures for Asylum and Withholding of Removal*, 85 *Fed. Reg*. 59692, 59694 (Sept. 23, 2020). Upon publication of the final rule based on that proposed rule, EOIR will issue additional guidance as appropriate.

[6] A Form I-589 that is submitted as part of a motion to reopen or other motion filed out of court is not considered filed until (1) the motion has been granted and (2) the asylum application is determined to be complete. The Immigration Judge—or Appellate Immigration Judge, if the motion is filed with the Board of Immigration Appeals (Board)—adjudicating the motion will determine whether the application is complete. To the maximum extent practicable, in cases in which the motion has been granted but the application is determined to be incomplete, the incomplete application will be returned to the applicant within five business days of that determination.

by INA § 208(d)(5)(A)(iii)." *Id*. at 3 n.1. EOIR subsequently developed a new asylum adjudication clock (Asylum Clock)[7] to better monitor the 180-day period prescribed in INA § 208(d)(5)(A)(iii).

The Asylum Clock begins running when the alien files an application for asylum.[8] The Asylum Clock runs during the proceedings before EOIR,[9] except during any delay attributable to exceptional circumstances.[10] Consistent with INA § 208(d)(5)(A)(iii) and PM 19-05, an Immigration Judge should not delay the 180-day period for adjudicating an asylum application absent exceptional circumstances.

Following each hearing, the Asylum Clock runs or stops depending on whether the hearing was adjourned due to exceptional circumstances. If the hearing was adjourned due to exceptional circumstances, the clock will stop and then restart at the next hearing.[11] Otherwise, the clock will run.

The Asylum Clock will stop permanently when (1) the applicant concedes that the asylum application was not timely filed and that no exceptions to the deadline apply; (2) the Immigration Judge has determined that the asylum application was not timely filed and that no exceptions to the deadline apply; (3) the alien has withdrawn the application; (4) the Immigration Judge finds that the application has been abandoned; or, (5) the Immigration Judge has otherwise adjudicated the asylum application by granting or denying it.

Immigration Judges may issue a decision after the completion of an individual merits hearing on an asylum application, but they may not exceed the 180-day adjudication standard in INA § 208(d)(5)(A)(iii) when doing so absent exceptional circumstances.

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[7] As discussed in section V, *infra*, what EOIR has previously labeled as the "Asylum Clock" has been renamed the "EAD Clock" to more accurately capture its function and appropriately differentiate it from the monitoring necessary to ensure adherence to INA § 208(d)(5)(A)(iii).

[8] Only an application that is filed starts the Asylum Clock. Thus, an application that is submitted but rejected as incomplete does not start the Asylum Clock.

[9] USCIS determines the application of INA § 208(d)(5)(A)(iii) to affirmative asylum applications. If such an application is referred to EOIR, an Immigration Judge will determine the appropriate amount of time on the Asylum Clock, including whether any tolling due to exceptional circumstances is appropriate.

[10] There is no current definition of exceptional circumstances for purposes of INA § 208(d)(5)(A)(iii). EOIR has proposed to supply a regulatory definition similar to the statutory definition in INA § 240(e)(1). *See* 85 *Fed. Reg*. at 59696. Until a final rule adopting a definition is published, however, Immigration Judges will continue to make their own determinations of exceptional circumstances. For purposes of non-detained hearings for cases with a pending asylum application that are adjourned *en masse* after the effective date of this PM due to disruptions caused by COVID-19, the Chief Immigration Judge has determined that such adjournments will fall within the ambit of exceptional circumstances for purposes of INA § 208(d)(5)(A)(iii). Similarly, the Chief Immigration Judge has determined that any adjournments after the effective date of this PM attributable to an unscheduled court closure—*e.g.* due to weather, safety issues, or environmental factors—fall within the ambit of exceptional circumstances for purposes of INA § 208(d)(5)(A)(iii).

[11] A current regulatory provision, 8 C.F.R. § 1208.7, limits exceptional circumstance delays that would toll the 180-day deadline in INA § 208(d)(5)(A)(iii) to those that are caused or requested by the alien. EOIR has proposed removing and reserving 8 C.F.R. § 1208.7, though a final rule has not yet been published. *See* 85 *Fed. Reg*. at 59695-97. The presence or removal of 8 C.F.R. § 1208.7, however, does not affect this PM, PM 19-05, or the statutory language of INA § 208(d)(5)(A)(iii) that asylum applications should be adjudicated within 180 days of filing absent exceptional circumstances.

If an Immigration Judge grants a motion to reopen in a case involving a new asylum application, that application is subject to the provisions of INA § 208(d)(5)(A)(iii) and monitoring through the Asylum Clock.

In any situation not explicitly referenced in this PM, an Immigration Judge retains authority to modify the Asylum Clock as appropriate and consistent with applicable law.

V. EAD Clock

EOIR has no authority over and does not adjudicate applications for alien employment authorization, including applications based on a pending asylum application. Rather, such applications are adjudicated by USCIS. *See* 8 C.F.R. §§ 274a.12, 274a.13.

EOIR houses a "clock" (EAD Clock) within its case management system for the convenience of USCIS to assist it with adjudicating applications for alien employment authorization based on a pending asylum application.[12] The EAD Clock is updated[13] automatically according to adjournment codes entered by Immigration Judges.[14] EOIR will continue to house the EAD Clock, which operates according to longstanding guidance that is not altered by this PM. *See* PM 20-08, *Definitions and Use of Adjournment, Call-Up, and Case Identification Codes* (Feb. 13, 2020) (identifying adjournment codes that stop the EAD Clock). However, EOIR houses the EAD Clock solely as a convenience for USCIS and does not represent the EAD Clock as a dispositive determination of time for purposes of INA § 208(d)(2). EOIR does not interpret the EAD Clock, and USCIS remains the sole adjudicator of whether an alien is eligible for employment authorization based on a pending asylum application.[15]

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[12] Neither asylum applications filed before January 4, 1995, nor asylum applications filed pursuant to the settlement agreement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) are subject to the EAD Clock.

[13] The EAD Clock begins running when the alien files an application for asylum, either affirmatively or defensively. Only an application that is filed starts the EAD Clock. Thus, an application that is submitted but rejected as incomplete does not start the EAD Clock. For affirmative applications, if the application is referred after the applicant appeared at an interview with a USCIS asylum officer, the EAD Clock is running when the case is referred to EOIR. If an applicant fails to appear at an interview before USCIS, the EAD Clock may be stopped by USCIS. If the case is then referred after the clock is stopped by USCIS, the EAD Clock will restart at the first master calendar hearing before the immigration court. If an applicant fails to appear at his or her appointment with USCIS to receive the asylum officer's decision and the charging document, the EAD Clock is stopped on the date the applicant failed to appear. The EAD Clock will restart at the first master calendar hearing before the immigration court. When an asylum applicant files a motion to change venue from one immigration court to another immigration court, and the Immigration Judge grants the motion, the EAD Clock is stopped from the date the motion is granted until the next hearing. On the date of the next hearing, the EAD Clock may restart or remain stopped, depending on the reason for the adjournment.

[14] The EAD Clock is programmed to run or stop based on adjournment codes entered into EOIR's electronic database. When a code indicating an applicant-caused delay is entered, the EAD Clock is stopped until the next hearing. When a code indicating a DHS or EOIR-related delay is entered, the EAD Clock runs until the next hearing. Neutral adjournment codes are codes that do not affect the EAD Clock.

[15] Because the EAD Clock is an administrative function, and decisions regarding the EAD Clock are not adjudications, immigration courts will reject any motion related to the EAD Clock, and Immigration Judges will not issue orders

Additionally, because adherence to INA § 208(d)(5)(A)(iii) makes differentiated scheduling unnecessary[16] and because EOIR does not adjudicate alien employment authorization applications and houses the EAD Clock solely for the convenience of USCIS, EOIR is eliminating the practice of differentiated scheduling for purposes of the EAD Clock. The EAD Clock has no bearing on the scheduling of cases at EOIR and should not be relied on by a Court Administrator or Immigration Judge as a basis for a scheduling determination. Accordingly, Immigration Judges will no longer inquire as to whether an alien wants an expedited asylum hearing date for purposes of the EAD Clock.

VI. Annotating Adjournment Codes and Exceptional Circumstances

As in all cases, when an Immigration Judge continues an asylum case or gives a call-up date, the Immigration 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 Immigration Judge should annotate the case worksheet on the left side of the Record of Proceedings (ROP)[17] with the corresponding adjournment code or call-up code. The Court Administrator is responsible for ensuring that each adjournment code and call-up code is accurately entered into the Case Access System for EOIR (CASE).[18] The Office of the Chief Immigration Judge (OCIJ) will ensure that Immigration Judges and court personnel receive appropriate training on adjournment codes.

Similarly, Immigration Judges must be careful to ensure that adjournments which also qualify as exceptional circumstances are appropriately annotated in the ROP or eROP. The Court Administrator and court staff are responsible for ensuring that an adjournment based on exceptional circumstances is correctly noted in CASE. OCIJ will also ensure that Immigration Judges and court personnel receive appropriate training on documenting adjournments which qualify as exceptional circumstances.

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. Consistent with PM 20-08 and any successor PM, 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.

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regarding the EAD Clock. If an asylum applicant believes the EAD Clock in his or her case is incorrect, he or she should address the matter to the Court Administrator—or the Board Clerk's Office if the case is pending before the Board—in writing. However, USCIS remains the appropriate adjudicator of alien employment authorization applications. Thus, an asylum applicant who—after contacting EOIR—continues to believe the EAD Clock in his or her case is incorrect should contact USCIS regarding his or her application.

[16] Former OPPM 00-01 designated all asylum cases as "expedited" for purposes of INA § 208(d)(5)(A)(iii). Nevertheless, asylum cases are subject to the provisions of INA § 208(d)(5)(A)(iii) regardless of whether they are labeled as "expedited" or "non-expedited" cases.

[17] For cases with an electronic ROP (eROP), the Immigration Judge will annotate the adjournment code through the Judicial Tools function.

[18] Any references to CASE in this PM or any other document shall also apply to any successor EOIR case management database regardless of its name.

VII. Identity, Law Enforcement, or Security Checks

Applications for asylum, withholding of removal under the INA, and protection under the CAT are each subject to 8 C.F.R. § 1003.47, which precludes any of those applications from being granted without the completion of identity, law enforcement, or security examinations or investigations. A similar statutory provision, INA § 208(d)(5)(A)(i), expressly prohibits the granting of asylum until the applicant's identity has been checked against various government records or databases. These checks are effectuated by the applicant's provision of biometric and other biographical information.

Immigration Judge shall ensure that the procedures outlined in 8 C.F.R. § 1003.47 regarding the completion of these checks are followed, including specifying for the record—either orally or through a written order—when the respondent receives the biometrics notice and instructions provided by DHS and the consequences for failing to comply with the requirements of 8 C.F.R. § 1003.47. *See also* OPPM 05-03, *Background and Security Investigations in proceedings Before Immigration Judges and the Board of Immigration Appeals* (Mar. 28, 2005) (summarizing these procedures).

Prior to starting the individual hearing the Immigration Judge will inquire as to whether DHS has received results from the records and database checks. A failure to provide biometrics and other biographical information may result in a finding that the application has been abandoned unless the respondent demonstrates that the failure was due to good cause. 8 C.F.R. § 1003.47(d). Even where a respondent demonstrates good cause, however, nothing in the applicable regulations requires an Immigration Judge to postpone an individual hearing solely because a respondent failed to provide biometrics and other biographical information. *See* 8 C.F.R. § 1003.47(f) (if DHS has not reported on the completion and results of all relevant identity, law enforcement, or security investigations or examinations by the time of an individual hearing, an Immigration Judge may grant a continuance for DHS to do so or may "hear the case on the merits"). Rather, where a respondent demonstrates good cause for failing to provide biometrics and other biographical information or DHS has otherwise not reported on the completion and results of relevant investigations and examinations, Immigration Judges may nevertheless proceed with adjudicating the merits of an application, though they cannot grant the application until DHS has reported on the results. *See* 8 C.F.R. § 1003.47(f), (g); *see also* OPPM 05-03 at 4 ("If an Immigration Judge chooses to conduct the merits hearing, he or she cannot render a decision granting any covered form of relief; however, he or she can deny the relief."); *cf.* 8 C.F.R. § 1003.1(d)(6)(iv) (the Board is not required to hold or remand a case on appeal because of incomplete or outdated investigations and examinations if the Board decides to dismiss the appeal or deny the relief sought). Consistent with OPPM 05-03, the Immigration Judge is not authorized to make a conditional grant of these forms of relief or protection pending receipt of the biometric checks.

VIII. Confidentiality of Applications for Asylum

The provisions of 8 C.F.R. § 1208.6 govern the disclosure of information in an application for asylum. It remains EOIR policy that the prohibition on disclosure of the application for asylum is extended to the entire ROP if it contains an application for asylum. Accordingly, the Court

Administrator must ensure that all ROPs containing applications for asylum are stamped "WARNING: DO NOT DISCLOSE THE CONTENTS OF THIS FILE. PLEASE SEE YOUR COURT ADMINISTRATOR" and that a similar warning accompanies the case in CASE.

An attorney or other representative for an alien who has filed an application for asylum with an immigration court may view the ROP with the application only when the attorney/representative has a current Form EOIR-28 filed with the immigration court having administrative control over the ROP.

The asylum applicant may submit a written, signed request to the immigration court having administrative control of the ROP to permit any person(s) named in the request to view an ROP with an application for asylum.

IX. Docketing and Scheduling

DHS has had access to EOIR's electronic scheduling system since December 2018 and may utilize that system to obtain a hearing date and time to place on a charging document for any case in which it issues a charging document.[19] *See* PM 19-08, *Acceptance of Notices to Appear and Use of the Interactive Scheduling System* (Dec. 21, 2018).[20]

For cases involving affirmative asylum applications referred by USCIS, if the charging document is not filed with the immigration court as of the time and date of the hearing, EOIR will classify that case as a "failure to prosecute." It will also reject the charging document if there is an attempt to file it after the time and date of the hearing listed on the charging document. In such cases, DHS must re-serve the subject of the charging document and file the charging document with the immigration court in order to initiate proceedings. The Chief Immigration Judge has determined that for these "failure to prosecute" cases, the time between the USCIS decision and the filing of the charging document will fall within the ambit of "exceptional circumstances" for purposes of INA § 208(d)(5)(A)(iii).

For any affirmative asylum case in which the charging document is filed with the immigration court fewer than 10 calendar days prior to the scheduled hearing—but not later than the time and date of the hearing—the Immigration Judge retains discretion to proceed with the hearing as scheduled or to reschedule the case. If the Immigration Judge chooses to reschedule the case, the immigration court will endeavor to notify the respondent as quickly as possible of that decision.[21] If the case is rescheduled, the Immigration Judge will also determine whether any time should be excluded as an exceptional circumstance.

[19] Currently, DHS and EOIR coordinate locally regarding hearing dates and times for cases of detained aliens, except those in DHS's Migrant Protection Protocols. For all other cases, EOIR's electronic scheduling system is available for DHS's use.

[20] All individuals who have been served a charging document with a hearing date and time on it are encouraged to contact EOIR's Automated Case Hotline using the numbers below to confirm the time and date of any hearing listed on an NTA. If no information is found concerning a correctly-entered alien registration number and the scheduled hearing is less than 10 calendar days away, the individual is encouraged to contact the DHS office that issued the NTA or the relevant Immigration Court.

[21] Depending on the timing of the filing of the charging document, however, written notification of rescheduling prior to the time and date of the hearing may not be possible in all instances.

EOIR will not monitor the Asylum Clock until a charging document for an affirmative asylum case is filed by DHS with an immigration court. Generally, affirmative asylum cases will be calendared for a master calendar hearing no later than 30 days from the date of the filing of the charging document.

The Court Administrator will ensure that all charging documents satisfy the filing requirements set forth in the UDSM. It is imperative that Court Administrators ensure that ROPs are created within three to five business days from the date of receipt of the charging document, depending on whether the case involves an alien who is detained. *See* PM 20-07, *Case Management and Docketing Practices* (Jan. 31, 2020).

Consistent with longstanding policy, unless a shorter period is requested by an alien, Immigration Judges should generally allow at least 45 days between the filing of a defensive asylum application and an individual merits hearing for a non-detained case and at least 14 days between the filing of a defensive asylum application and an individual merits hearing for detained cases.

When scheduling hearings in asylum cases, Immigration Judges and immigration court personnel should remain cognizant of the Asylum Clock and the statutory language of INA § 208(d)(5)(A)(iii), if applicable.

To ensure adherence to INA § 208(d)(5)(A)(iii), EOIR will continue its practice of monitoring the status of asylum cases. ACIJs are responsible for reviewing relevant data on a regular basis in order to adjust calendars as needed. Consistent with former OPPM 00-01, such adjustments may include, but are not limited to: (1) increasing master calendar slots; (2) requesting assistance from the Immigration Adjudication Centers; (3) converting administrative time to hearing time; or (4) the rescheduling of cases not subject to a statutory deadline.

X. Department of State Comments

Immigration Judges may request, in their discretion, specific comments from the Department of State (DOS) regarding individual cases or types of claims under consideration in an asylum application, or other information the Immigration Judge deems appropriate. 8 C.F.R. § 1208.11(a). Any comments received from the DOS shall be made part of the record. *Id.* § 1208.11(c). Unless the comments are classified under an applicable Executive Order, the applicant shall be provided an opportunity to review and respond to such comments prior to the issuance of any decision to deny the application. *Id.*

At the request of an Immigration Judge, immigration court personnel will prepare a transmittal letter to DOS seeking comments. A properly created transmittal letter attached to a complete and legible asylum application (Form I-589 and any attachments) remains the appropriate method for requesting DOS comments. Immigration court personnel will only prepare the standard transmittal letter to DOS requesting comments for defensive asylum applications.[22] Immigration court

[22] Affirmative asylum applications will not be forwarded to DOS absent special circumstances because USCIS will already have had the opportunity to do so prior to adjudicating the application which was ultimately referred to the immigration court.

personnel will ensure that the future hearing date that must appear on the transmittal letter. The standard transmittal letter must also indicate if the alien is detained or non-detained and any other pertinent information.

Immigration court personnel will submit the letter and attachments to a central contact in the Office of the Chief Immigration Judge (OCIJ) who will then send the packet to DOS at the following address (or any other address designated by DOS) using overnight mail or through any other means established between DOS and OCIJ:

U.S. Department of State
Bureau of Democracy, Human Rights, and Labor
Office of Country Reports and Asylum Affairs
2401 E Street, N.W.,
Room H 242
Washington, DC 20037

DOS will forward all responses to requests for comments directly to OCIJ, which will, in turn, forward each response to the appropriate immigration court. Immigration court personnel will then process the response, including updating CASE, filing the response in the ROP, and forwarding copies to both parties in the case. If DOS returns a request to OCIJ as deficient, OCIJ will work with the relevant ACIJ to determine the appropriate course of action.

Each ACIJ should ensure that at least one staff member at each immigration court is responsible for tracking any requests submitted to DOS. If a response from DOS has not been received by 10 days prior to the scheduled hearing, then the ACIJ will notify OCIJ Headquarters to determine the appropriate course of action. Consistent with the policy in former OPPM 00-01, however, if no DOS response is received by the date of a scheduled hearing, the hearing should proceed as scheduled.

Although comparatively few cases with asylum applications involve unrepresented aliens, Immigration Judges should continue to provide copies of any relevant DOS reports, including the most recent DOS Country Report on Human Rights Practices for the applicant's country of nationality, to *pro se* aliens unless copies of such reports are already in the record. Immigration Judges may also issue standing orders regarding the submission of DOS reports as appropriate.

XI. Withholding of Removal

The Form I-589 can be used by the alien when requesting withholding of removal under INA § 241(b)(3) or protection under the CAT. The filing of a Form I-589 to apply solely for either withholding of removal under INA § 241(b)(3) or protection under the CAT does not start either the Asylum Clock or the EAD Clock.

If an alien files a Form I-589 and indicates that he or she intends to file only for withholding of removal under INA § 241(b)(3) or protection under the CAT—and not for asylum—then the immigration court will not treat the filing as an asylum application and will not start either the

Asylum Clock or the EAD Clock.[23] In such situations, an Immigration Judge may deem an alien's opportunity to file for asylum to be waived. If an Immigration Judge subsequently determines that an alien intended to file for asylum notwithstanding the alien's previous indication, then the Immigration Judge may retroactively establish and update an Asylum Clock as appropriate.

XII. The Board of Immigration Appeals

The Asylum Clock permanently stops when the Immigration Judge issues a decision granting or denying the asylum application, as the decision constitutes "final administrative adjudication of the asylum application, not including administrative appeal" under INA § 208(d)(5)(A)(iii). Therefore, the Asylum Clock does not run during any appeal of the decision to the Board, during judicial review before the federal courts, or if the case is remanded to the immigration court.[24]

Further, although administrative appeals are excluded from the provisions of INA § 208(d)(5)(A)(iii), the 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). The Board is expected to adhere to those guidelines for all appeals, including appeals of asylum cases.

XIII. Conclusion

As warranted, the ICPM and UDSM may be updated to reflect this PM. 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. Nothing herein should be construed as mandating a particular outcome in any specific case. Nothing in this PM limits an Immigration Judge's independent judgment and discretion in adjudicating cases or an Immigration Judge's authority under applicable law.

Please contact your supervisor if you have any questions.

[23] If the Form I-589 is unclear whether the alien does not indicate that he or she intends to file only for withholding of removal under INA § 241(b)(3) or protection under the CAT, then then the immigration court will treat the filing as an asylum application and will start both the Asylum Clock and the EAD Clock.

[24] The filing of a new asylum application following a remand would start a new Asylum Clock.