UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[redacted]	*	
Plaintiff	*	
v.	*	Case No.: 1:20-mi-99999
LOREN K. MILLER, DIRECTOR, NEBRASKA SERVICE CENTER, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES	*	
Defendant	*	

COMPLAINT

COMES NOW [redacted], through undersigned counsel, and requests relief under the Administrative Procedure Act ("APA") following the immigration agency's denial of her application for employment authorization. Plaintiff seeks a declaration that the agency's action violated the APA, and an order directing the agency (herein "Defendant") to reopen her application and adjudicate it in accordance with the law.

INTRODUCTION

Noncitizens fleeing persecution have a statutory right to seek asylum in the United States. But asylum cases often take years to resolve, so that right means little if the asylum seeker cannot work lawfully to support herself while awaiting a decision. Recognizing this, regulations issued by Defendant's predecessor agency provide for employment authorization a certain number of days after the asylum application is filed. The wait period was fixed at the time beyond which, according to the agency, an asylum seeker should not go without a work-permit card: 150 days, excluding "any delay requested or caused by the applicant."

Plaintiff has waited 740 days and counting. Defendant contends Plaintiff has not reached the 150-day mark because the "delay" in the underlying asylum case is her fault. It is not. True, in January of 2020, the Houston Immigration Judge granted Plaintiff's motion to change venue to the Atlanta Immigration Court. Assume that the Houston judge's order stopped the so-called "asylum clock" at 117 days. Even so, the fact that twenty months later it remains frozen at 117 days cannot be attributed to Plaintiff.

The COVID-19 pandemic has prevented the only thing that will re-start the clock: Plaintiff's first hearing at the Atlanta Immigration Court. But for the pandemic, that hearing would have taken place, and the asylum clock would have

restarted, long ago. Defendant cannot blame Plaintiff for this delay. (Nor can he explain why the agency that actually controls the clock—the Executive Office for Immigration Review—counts 533 days from when the asylum application was filed.)

Depriving Plaintiff of a work permit violates not only the APA, but also our country's long tradition of giving asylum seekers a fighting chance to survive while awaiting a decision on their fate. Defendant's decision must be set aside.

CAUSE OF ACTION, JURISDICTION, AND VENUE

1. This action arises under section 208(d)(2) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158(d)(2), and under sections 6, 10(a), and 10(e) of the APA, 5 U.S.C. §§ 555, 701 – 702, and 706(1) – (2)(A).[1]

2. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

3. Venue is proper under 28 U.S.C. § 1391(b)(2), because this is the district in which "a substantial part of the events or omissions giving rise to the

[1] The APA waives sovereign immunity in suits against the government for injunctive relief. 5 U.S.C. § 702. No statute precludes APA review of the agency action in this case. *See Hamby v. Janer*, 808 F.2d 1433, 1434 (11th Cir. 1987)(APA section 701(a)(1) bars review where statute precludes relief requested); *Gjondrekaj v. Napolitano*, 801 F. Supp. 2d 1344, 1348 n.3 (M.D. Fla. 2011)("After careful review of the [INA] as well as other portions of the U. S. Code, the Court has found no statute precluding [APA] review of denials of an [employment-authorization] application made by an asylum applicant.").

claim occurred." Plaintiff's eligibility for employment authorization is based on her status as an asylum seeker, and her asylum application is pending at the Atlanta Immigration Court, located in Fulton County, Georgia.

PARTIES

4. Plaintiff, a citizen of Guatemala, resides in Acworth, Georgia. Plaintiff is in removal proceedings at the Atlanta Immigration Court, a unit of the Executive Office for Immigration Review ("EOIR"). EOIR is an administrative agency housed within the U.S. Department of Justice.[2]

5. Defendant Loren K. Miller, sued in his official capacity, is the Director of the Nebraska Service Center, a component of the United States Citizenship and Immigration Services ("USCIS"). The Nebraska Service Center oversees filing, data entry, and adjudication of certain applications for immigration benefits, including applications for employment authorization.

STANDING

6. The APA affords a right of review to one "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Defendant's action harmed Plaintiff, a noncitizen, because it deprived her of the opportunity to receive employment

[2] EOIR includes the U.S. Immigration Courts and the Board of Immigration Appeals. *See* https://www.justice.gov/eoir/eoir-organization-chart (last visited Oct. 5, 2021).

authorization and the attendant work-permit card, which is required for issuance of a Social Security number.[3]

ALLEGATIONS

I. HISTORICAL CONTEXT FOR AND RECENT DEVELOPMENTS IN ASYLUM SEEKER EMPLOYMENT AUTHORIZATION.

A. 1994: Introduction of the 150-day wait period.

7. In 1994, Defendant's predecessor agency, the Immigration and Naturalization Service ("INS"), issued regulations that, for the first time, prohibited filing for asylum and employment authorization simultaneously. *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization*, 59 Fed. Reg. 62284 (Dec. 5, 1994)(herein "1994 Final Rule")(codified at 8 C.F.R. § 208.7 (1994)).

8. Asylum seekers were now ineligible for employment authorization until 150 days after the asylum application was filed. *Id*. at 62290-92.

9. INS determined that 150 days is the "period beyond which it would not be appropriate to deny work authorization to a person whose [asylum] claim has not been adjudicated." *Rules and Procedures for Adjudication of Applications*

[3] *See* https://www.ssa.gov/pubs/EN-05-10096.pdf (last visited Oct. 5, 2021).

for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14779, 14780 (Mar. 30, 1994)(herein "1994 Proposed Rule").

10. INS had "30 days from the date of filing of an initial application for employment authorization to grant or deny that application." 8 C.F.R. § 208.7(a)(1) (1994). *See also Casa de Maryland, Inc., et al. v. Wolf,* 486 F. Supp. 3d 928, 937 (D. Md. 2020)(describing the 30-day adjudication deadline as a "backstop" to the 150-day waiting period).

11. Importantly, the regulations provided that "[a]ny delay requested or caused by the applicant shall not be counted as part of these time periods [that is, the 150-day wait period and the 30-day adjudication deadline]." *Id*. at § 208.7(a)(3).

12. What constitutes a "delay requested or caused by the applicant" was not defined or otherwise explained.

B. 1996: Congress adopts INS 180-day processing timeline.

13. On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, 110 Stat. 3009, Division C (herein "IIRIRA").

14. Prior to IIRIRA, the only statutory provision addressing asylum seeker work authorization was INA § 208(e)("Employment authorization"), 8

U.S.C. § 1158(e) (1994), which provided that an "applicant for asylum is not entitled to employment authorization except as may be provided by regulation in the discretion of the Attorney General."

15. IIRIRA moved this provision, slightly reworded, to subsection (d)(2) of amended 8 U.S.C. § 1158. IIRIRA, § 604.

16. Post-IIRAIRA, 8 U.S.C. § 1158(d), re-titled "Asylum procedure," provides in relevant part as follows:

> (1) Applications
>
> The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a) [of 8 U.S.C. § 1158.] The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.
>
> (2) Employment
>
> 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*.
>
> …
>
> (5) Consideration of asylum applications
>
> (A) Procedures
>
> The procedure established under paragraph (1) shall provide that—
>
> …

> (iii) 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*;…

(Emphasis supplied.)

17. IIRAIRA thus codified INS's 180-day timeline for processing asylum seeker requests for employment authorization. *See Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38532, 38545 (June 26, 2020)(DHS final rule acknowledging that IIRIRA "codified INS's regulatory prohibition on asylum seekers being granted discretionary employment authorization before a minimum of 180 days has passed from the date of filing of the asylum application"); *Casa de Maryland*, 486 F. Supp. 3d at 937 ("[Via IIRIRA,] Congress later codified the 180-day waiting period for filing [work-permit] applications to mirror [the INS] regulations.")

18. In March of 1997, INS issued regulations implementing the IIRAIRA asylum provisions. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (Mar. 6, 1997).

19. The regulations for the first time referred to a work-permit card as an "employment authorization document" ("EAD"), but otherwise made no

substantive changes, as relevant here, to the employment-authorization requirements for asylum seekers.

20. Post-IIRIRA, asylum seekers still had to wait 150 days to apply for an EAD; INS still had 30 days to adjudicate the application; and "[a]ny delay requested or caused by the applicant [would still] not be counted as part of these time periods." 8 C.F.R. § 208.7(a)(1), (2) (1997).

21. Since IIRIRA, Congress has made no further substantive changes to the INA's employment-authorization requirements for asylum seekers.

C. 1996-present: Problems with the "asylum clock."

22. Since 1995, when the 150-day wait period and 30-day adjudication period took effect, determining whether an asylum seeker is eligible to work lawfully has required USCIS to count the days elapsed from when the asylum application was filed, excluding "any delay requested or caused by the applicant."

23. This has proven no mean feat, in large part because of a breakdown in communication between USCIS and EOIR, the two agencies that keep track of the time elapsed.

24. USCIS now adjudicates asylum seeker EAD applications.[4]

[4] INS ceased to exist on March 1, 2003. *See Mu Ying Wu v. U.S. Atty. Gen.*, 745 F.3d 1140, 1143 n.1 (11th Cir. 2014). Pursuant to the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135 (Nov. 25, 2002), Congress abolished

25. Currently, for those noncitizens seeking asylum "affirmatively"—that is, those not in removal proceedings at one of the U.S. immigration courts—USCIS adjudicates both the Form I-589 (asylum application) and the Form I-765 (EAD application).

26. When USCIS has jurisdiction over the asylum application, as is the case when the applicant is not in removal proceedings, it controls the so-called "asylum clock." *See* Dep't of Homeland Security, Citizenship and Immigration Services Ombudsman, *Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication* (Aug. 26, 2011)(herein "2011 USCIS Ombudsman Report") at 2 ("While a case is being adjudicated by [USCIS], USCIS controls the asylum clock.").[5]

27. USCIS does *not* control the clock, however, when the asylum seeker applies for asylum "defensively" at one of the U.S. immigration courts housed within EOIR.

INS and transferred its functions to three agencies within the newly-created Department of Homeland Security: USCIS; U.S. Immigration and Customs Enforcement; and U.S. Customs and Border Protection. *See* 6 U.S.C. §§ 211, 271, 291. Section 451 of the Homeland Security Act transferred from INS to USCIS all "[a]djudications performed at service centers," including applications for employment authorization. 6 U.S.C. § 271(b)(4).

[5] A copy of the 2011 USCIS Ombudsman Report is attached as Exhibit A.

28. In such case, the immigration judge (IJ) stops and starts the asylum clock, but USCIS retains jurisdiction over the Form I-765. Exh. A at 4.

29. This bifurcation of responsibilities results in USCIS clock calculations inconsistent with EOIR's.

30. In 2011, the USCIS Ombudsman issued a report detailing problems with the functioning of the asylum clock. *See* Exh. A.

31. The USCIS Ombudsman declared that she had received "reports that many asylum applicants are experiencing difficulties related to the asylum clock," and that "[s]takeholders and USCIS personnel attribute many of these difficulties to a lack of interagency information sharing and other communication problems involving USCIS and the Immigration Courts." *Id*. at 3.

32. The problem was "compounded by the fact that USCIS does not solely control the asylum clock when an asylum case is pending before EOIR." *Id*.

33. Other issues included USCIS's failure to provide asylum seekers with access to its asylum clock or to notify them when the clock has been stopped. *Id*. at 3, 7-8.

34. The USCIS Ombudsman made several recommendations, including "ongoing interagency dialogue to clearly define the roles of USCIS and EOIR regarding the asylum clock." *Id*. at 6.

35. Ten years later, and continuing up to the date of this Complaint, the problems identified by the USCIS Ombudsman persist.

36. The Department of Homeland Security ("DHS"), of which USCIS is a component part, has acknowledged as much.

37. In June of last year, in a final rule intended to overhaul the asylum seeker EAD requirements, DHS decided to eliminate the asylum clock altogether. *Asylum Application, Interview, and Employment Authorization for Applicants*, 85 Fed. Reg. 38532, 38549 (June 26, 2020)(herein "New EAD Rules").[6]

38. Citing the 2011 USCIS Ombudsman Report, DHS explained its decision as follows:

> The elimination of the 180-day EAD clock will resolve some of the difficulties adjudicators face in processing asylum EAD applications. Calculating the current 180-day EAD Clock is one of the most complex and time-consuming aspects of EAD adjudications. It requires multipart calculations and the tracking of the start and stop dates for each individual applicant's case. *It also requires coordination with DOJ–EOIR for defensively-filed cases that are not under USCIS' jurisdiction*.

(Emphasis supplied.) *Id*.

[6] This is one of several substantive changes DHS made in 2020 to the requirements for asylum seeker employment authorization. *See* New EAD Rules at 38548-38533. As discussed herein, many of the new rules currently are enjoined.

39. DHS's solution was to replace the asylum clock with a new rule extending from 150 to 365 days the time an asylum seeker must wait before applying for work authorization. *Id.*

40. According to DHS,

> USCIS EAD adjudicators will no longer have to calculate the number of days that must be excluded to account for applicant-caused delays or coordinate with DOJ-EOIR to do so, and will instead simply rely on 365 calendar days from the asylum application receipt date to determine when an alien can request employment authorization.

Id.[7]

41. The new rule extending the wait period from 150 to "365 calendar days" became effective on August 25, 2020. 8 C.F.R. § 208.7(a)(1)(ii) (2020).

42. Less than one month later, on September 11, 2020, it was preliminarily enjoined by a Maryland district judge. *See Casa de Maryland*, 486 F. Supp. 3d at 973 (new rule not the product of reasoned decision-making insofar as it inflicts substantial hardship upon bona fide asylum seekers).

[7] DHS overstates how easy it would be to apply the new rule, which requires denial of initial EAD applications if there is "[a]ny delay requested or caused by the applicant in the adjudication of the asylum application that is still outstanding or has not been remedied" when the Form I-765 is filed. 8 C.F.R. § 208.7(a)(1)(iv) (2020). Determining whether such a "delay" exists at the time the Form I-765 is filed would seem to require the same problematic "tracking of the start and stop dates for each individual applicant's case" needed for asylum clock calculations.

43. For the time being, the preliminary injunction in *Casa de Maryland* has thwarted DHS's plans to eliminate the asylum clock and to extend the wait period from 150 to 365 days.

44. USCIS has posted to its website an "alert" notice regarding the preliminary injunction in *Casa de Maryland*.[8]

45. At the same URL, however, USCIS links to a .pdf file titled "Applicant-Caused Delays in Adjudication of the 'Form I-589, Application for Asylum and for Withholding of Removal' and Impact on Employment Authorization" (herein "USCIS Applicant-Caused Delay Notice"), which states at the top: "THIS NOTICE REPLACES THE '180 DAY ASYLUM EAD CLOCK' NOTICE," and which provides guidance on the now-enjoined 365-day rule.[9]

46. The *Casa de Maryland* injunction applies to EAD applications filed by members of the Asylum Seeker Advocacy Project ("ASAP"), one of the plaintiffs in *Casa de Maryland*. *See* USCIS "alert" notice, *supra* at footnote 8.

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[8] *See* https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum (last visited Oct. 5, 2021).

[9] *See* https://www.uscis.gov/sites/default/files/document/notices/Applicant-Caused-Delays-in-Adjudications-of-Asylum-Applications-and-Impact-on-Employment-Authorization.pdf (last visited Oct. 5, 2021). A copy of the USCIS Applicant-Caused Delay Notice is attached as Exhibit B. *See* Exhibit C for a copy of the referenced "180 Day Asylum EAD Clock Notice."

47. Plaintiff has been a member of ASAP at all relevant times herein. *See* Exh. H at 44; Exh. J at 35.

48. DHS's 2020 revisions to the asylum seeker EAD requirements, coupled with the *Casa de Maryland* injunction as to some, but not all, of the new rules, *see Casa de Maryland*, 486 F. Supp. 3d at 973-74, has created confusion about which version of the regulations govern.

49. The following section identifies all authority currently applicable to asylum seeker EAD applications submitted by those who, like Plaintiff, are members of ASAP.

II. THE LAW AT PRESENT GOVERNING ASYLUM SEEKER EMPLOYMENT AUTHORIZATION.

50. The INA and certain DHS regulations set the requirements for employment authorization based on a pending asylum application. *See* INA § 208(d)(2), 8 U.S.C. § 1158(d)(2); 8 C.F.R. §§ 208.7 (2011), 274a.12 (2017), and 274a.13 (2016).

51. An asylum applicant may apply for an EAD, using Form I-765, once 150 days have elapsed from the date of the asylum application's filing. 8 C.F.R. §§ 208.7(a)(1), 274a.12(c)(8)(i), 274a.13(a).

52. USCIS "shall have 30 days from the date of filing of the request [for] employment authorization to grant or deny that application, except that 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. § 208.7(a)(1). *See also* 8 U.S.C. § 1158(d)(2)("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.").

53. "Any delay requested or caused by the applicant shall not be counted as part of these time periods, including delays caused by failure without good cause to follow the requirements for fingerprint processing." 8 C.F.R. § 208.7(a)(2).

54. Time begins to run "when the alien has filed a complete asylum application in accordance with [8 C.F.R.] §§ 208.3 and 208.4." 8 C.F.R. § 208.7(a)(2).[10]

55. Noncitizens authorized to accept employment are categorized by class, with asylum applicants listed at 8 CFR § 274a.12(c)(8).

[10] USCIS-EOIR practice has been to start the clock not only when an asylum application is filed with USCIS or the IJ, but also when it is submitted at the immigration court's filing window and stamped "lodged not filed" by the clerk. This is known as "lodging" the asylum application.

56. "The approval of [employment-authorization] applications filed under 8 CFR 274a.12(c), *except for 8 CFR 274a.12(c)(8)*, are within the discretion of USCIS." (Emphasis supplied.) 8 C.F.R. § 274a.13(a)(1).[11]

57. Accordingly, once the asylum application has been pending for 150 days—and so long as the applicant is not an aggravated felon (as defined at 8 U.S.C. § 1101(a)(43)), *see* 8 C.F.R. § 208.7(a)(1)—USCIS *shall* grant employment authorization within 30 days of the filing of the Form I-765. *See Gjondrekaj*, 801 F. Supp. 2d at 1346 ("If an asylum application remains unadjudicated by the USCIS or the Immigration Court after 150 days, the applicant may apply for employment authorization, *which the United States must grant after 30 days unless the asylum application is denied in the interim*.")(emphasis supplied).[12]

[11] The preliminary injunction in *Casa de Maryland* blocks a DHS rule that would have allowed discretionary denials of asylum seeker EAD applications. *Casa de Maryland*, 486 F. Supp. 3d at 974. *See* New EAD Rules, 85 Fed. Reg. at 38536.
[12] The preliminary injunction in *Casa de Maryland* blocks a DHS rule that repealed the 30-day deadline for processing asylum seeker EAD applications. *Casa de Maryland*, 486 F. Supp. 3d at 973. *See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications*, 85 FR 37502, 37545 (June 22, 2020).

58. "If the [Form I-765] is granted, the alien shall be notified of the decision and issued an employment authorization document valid for a specific period and subject to any terms and conditions as noted." 8 C.F.R. § 274a.13(b).

59. "There shall be no appeal from the denial of the [Form I-765]." 8 C.F.R. §274a.13(c).

60. "Final agency action" is subject to judicial review under the APA. 5 U.S.C. § 704.

III. DEFENDANT'S DENIAL OF PLAINTIFF'S EAD APPLICATION.

61. Defendant has denied three separate EAD applications (that is, Forms I-765) submitted by Plaintiff.

A. Plaintiff's first EAD application.

62. On September 26, 2019, Plaintiff attempted to lodge her asylum application (Form I-589), *supra* footnote 10, at the Houston Immigration Court's filing window.

63. On the application's first page, the clerk stamped "LODGED NOT FILED," but did not note the date.

64. One hundred and seventeen days later, on January 21, 2020, the Houston Immigration Judge granted Plaintiff's motion to transfer venue to the Atlanta Immigration Court. *See* Exh. D.

65. USCIS and EOIR consider that, starting from the date on which the IJ grants the noncitizen's motion to change venue, the asylum clock stops and will not re-start until the first hearing at the new court.

66. On February 25, 2020, Plaintiff submitted to USCIS her first application for employment authorization, enclosing a copy of her asylum application with the "LODGED NOT FILED" stamp ("EAD Application #1"). *See* Exh. E at 16.

67. On March 11, 2020, while EAD Application #1 was pending with USCIS, the World Health Organization declared COVID-19 a pandemic. Jamey Keaton, et al, *WHO declares coronavirus a pandemic, urges aggressive action*, Associated Press (Mar. 12, 2020), https://apnews.com/article/united-nations-michael-pence-religion-travel-virus-outbreak-52e12ca90c55b6e0c398d134a2cc286e (last visited Oct. 5, 2021).

68. On March 13, 2020, President Trump declared a nationwide emergency. Lisa Mascaro, et al, *Trump declares virus emergency; House passes aid package*, Associated Press (Mar. 14, 2020), https://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-politics-health-83b0c8e168548fd453b0c177dd1f203a (last visited Oct. 5, 2021).

69. On March 17, 2020, EOIR advised that, effective March 18, 2020, all non-detained hearings were "postponed" and that the Atlanta Immigration Court was "closed." EOIR (@DOJ_EOIR), Twitter (Mar. 17, 2020, 11:55 p.m.), https://twitter.com/DOJ_EOIR/status/1240124718298038273 (last visited Oct. 5, 2021).

70. The following month, via written decision dated April 13, 2020, USCIS denied EAD Application #1 (herein "USCIS Denial #1"). *See* Exh. F.

71. USCIS denied EAD Application #1 because it found the asylum application presented at the Houston Immigration Court's filing window on September 26, 2019, had not been "properly lodged." *Id*. at 3.

72. USCIS Denial #1 states in relevant part:

> The evidence you submitted indicates a copy of your Form I-589, Application for Asylum and for Withholding of Removal, that is stamped Lodged [*sic*.] but not dated by the Houston Immigration Court… There is no electronic record showing that either the Houston or Atlanta Immigration Court have accepted your Form I-589 and updated the electronic record. *The I-589 is not considered properly lodged or filed unless it has been accepted by [EOIR]*. USCIS must rely on electronic records to determine eligibility for employment authorization[,] and USCIS or EOIR records do not indicate that the I-589 has been lodged or filed. These records are entered and/or changed by the Immigration Court only. If you feel these records are incorrect, please contact the court having jurisdiction over your proceedings for further information regarding the filing of the Form I-589.

(Emphasis supplied.) *Id*.

73. On April 20, 2020, Plaintiff filed her asylum application at the Atlanta Immigration Court's filing window. *See* Exh. G.

74. The clerk at the Atlanta Immigration Court filing window placed on the application's first page a red-ink stamp reflecting that EOIR "received" the application on April 20, 2020. *Id*. at 2, 7.

75. On September 21, 2020, EOIR announced that the Atlanta Immigration Court would "resume hearings in non-detained cases" on October 13, 2020. EOIR (@DOJ_EOIR), Twitter (Sept. 21, 2020, 1:12 p.m.), https://twitter.com/DOJ_EOIR/status/1308091869583245318 (last visited Oct. 5, 2021).

76. EOIR suspended hearings at the Atlanta Immigration Court for a total of 209 days, a period during which Plaintiff's first hearing could not have been held.

B. Plaintiff's second EAD application.

77. On November 4, 2020, Plaintiff submitted to USCIS her second application for employment authorization ("EAD Application #2"). *See* Exh. H.

78. Plaintiff's cover letter to USCIS advised she was enclosing a copy of the asylum application submitted at the Atlanta Immigration Court's filing window on April 20, 2020. *Id*. at 3.

79. Via written decision dated April 29, 2021, USCIS denied EAD Application #2 (herein "USCIS Denial #2"). *See* Exh. I.

80. USCIS Denial #2 states in relevant part:

> A review of your file and records from USCIS and [EOIR] indicates that you *lodged or filed* an Application for Asylum and Withholding of Removal (Form I-589) pursuant to 8 CFR § 208 and subsequently filed Form I-765 prior to reaching 150 clock days. You must have 150 clock days before you can file an application for employment authorization. You will not accrue time towards the 150 day clock when you cause or request delays during the I-589 process, or when the proceedings are suspended or completed at an asylum office or immigration court. *At the time that Form I-765 was filed, less than 150 days had elapsed on the clock used to calculate employment eligibility*. You are not eligible for employment authorization under the (c)(8) category.

(Emphasis supplied.) *Id.* at 3.

81. USCIS Denial #2 does not disclose the days USCIS considers to have elapsed on the asylum clock.

82. Because USCIS, unlike EOIR, does not provide public access to its asylum clock, it is impossible to know which event USCIS considers to have started the clock: the attempted lodging of the asylum application in Houston on September 26, 2019, or the application's filing in Atlanta on April 20, 2020.

83. If the former, USCIS Denial #2 does not explain what happened since USCIS Denial #1 to convert the asylum application into one "properly lodged" for clock-starting purposes.

84. On the date USCIS Denial #2 was issued, it had been 581 days since Plaintiff attempted to lodge her asylum application at the Houston Immigration Court, and 374 days since she filed her asylum application at the Atlanta Immigration Court.

85. On the date USCIS Denial #2 was issued, well more than a year following the Houston IJ's venue-change order, Plaintiff's first hearing at the Atlanta Immigration Court had yet to be scheduled.

C. Plaintiff's third EAD application.

86. On May 5, 2021, Plaintiff submitted to USCIS her third application for employment authorization, enclosing a copy of the Form I-589 stamp-filed by the Atlanta Immigration Court on April 20, 2020 ("EAD Application #3"). *See* Exh. J.

87. Via written decision dated June 2, 2021, USCIS denied EAD Application #3 (herein "USCIS Denial #3"). *See* Exh. K.

88. In USCIS Denial #3, USCIS finds, for the first time, that Plaintiff lodged her asylum application at the Houston Immigration Court on September 26, 2019. *Id*.

89. USCIS Denial #3 states in relevant part:

> A review of your file and USCIS and [EOIR] records indicates that you *lodged* Form I-589, Application for Asylum and for Withholding of Removal, pursuant to 8 CFR § 208 *on September 26, 2019*,…
>
> The number of days a completed application is considered pending does not include any delays requested or caused by you while your application is pending with an immigration judge. See 8 CFR § 208.7.
>
> At the time of filing this Form I-765, you had not accrued the required 180 Asylum EAD clock days. Since this is less than 180 days have elapsed [*sic*.] on the 180 Day Asylum EAD Clock, you are not eligible to receive employment authorization under 8 CFR 274a.12(c)(8).

(Emphasis supplied.) *Id*. at 2.

90. USCIS Denial #3 does not explain what happened since USCIS Denial #1 to convert the referenced Form I-589 into one "properly lodged" for clock-starting purposes.

91. USCIS Denial #3 does not explain why EOIR's clock count differs from that of USCIS.

92. USCIS Denial #3 does not explain why the number of days elapsed on EOIR's clock reflects that EOIR is counting from April 20, 2020, the date on which Plaintiff filed her asylum application, post-venue change, at the Atlanta Immigration Court.[13]

[13] As of the date of this Complaint, EOIR's asylum clock is at 533 days. EOIR's clock is accessible to the public through its automated case information hotline (800-898-7180). Upon entry of the noncitizen's "alien registration number," the hotline provides general information, including the asylum clock, for cases

93. USCIS Denial #3 does not explain why the ongoing "delay" at the Atlanta Immigration Court is Plaintiff's fault and not the result of an intervening cause, that is, the COVID-19 pandemic.

94. USCIS Denial #3 does not explain why the 209 days when hearings were "postponed" are considered a delay requested or caused by Plaintiff, even though this finding represents a departure from previous USCIS policy. *See, e.g.*, Exh. B (USCIS Applicant-Caused Delay Notice) at 4 ("court closure" considered an "operational adjournment" as opposed to "alien-related adjournment"); Exh. C (USCIS 180 Day Asylum EAD Clock Notice) at 5 ("October 2013 Government Shutdown" considered "operational adjournment" as opposed to "alien-related adjournment").

95. Since October 13, 2020, the date on which EOIR ordered hearings resumed, there has been a significant decrease in the number of hearings held at the Atlanta Immigration Court.

96. According to the Transactional Records Access Clearinghouse, a research center at Syracuse University ("TRAC"), in fiscal year 2020 (Oct. 1, 2019-Sept. 30, 2020) immigration judges presiding over the Atlanta Immigration

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pending at EOIR. *See* https://www.justice.gov/opa/pr/executive-office-immigration-review-expands-automated-case-information-channels (last visited Oct. 5, 2021). Undersigned counsel last called the hotline on Oct. 5, 2021.

Court's non-detained docket required 203 days to reach an "outcome"—resolution of a given case via grant of relief, order of removal, or other dispositive ruling—as compared with 546 days through August of fiscal year 2021 (Oct. 1, 2020-Sept. 30, 2021).[14]

97. Plaintiff's first hearing at the Atlanta Immigration Court, according to USCIS, is the only event that will un-freeze the USCIS asylum clock. *See* Exh. B at 2.

98. That hearing is nowhere on the horizon. *See* TRAC, *Immigration Court Cases Jump in June 2021; Delays Double This Year*, July 28, 2021, https://trac.syr.edu/immigration/reports/654/ (last visited Oct. 5, 2021)("The total backlog as of the end of June 2021 [for all immigration courts] had reached its highest level ever at 1,357,820 cases waiting to be heard."). *See also Casa de Maryland*, 486 F. Supp. 3d at 936 n.2 ("Asylum hearings cancelled because of the COVID-19 pandemic have been reset for as late as fall of 2023.").

99. Congress enshrined in law the right to apply for asylum in the United States. 8 U.S.C. § 1158(a)(1)("Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of

[14] TRAC, *Immigration Court Processing Time by Outcome*, https://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last visited Oct. 5, 2021). A copy of the TRAC report is included as Exh. L.

arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section[.]").

100. Defendant's denial of EAD Application #3 infringes upon that right. *See Casa de Maryland*, 486 F. Supp. 3d at 969 (referring to DHS's proposed extension of the wait period from 150 to 365 days: "[W]ithout any ability to work for at least a year and likely far longer, it is plain that legitimate asylum claims may be abandoned altogether.").

COUNT ONE
Administrative Procedure Act
[Defendant erred by failing to start asylum clock on April 20, 2020]

101. Plaintiff incorporates each of the foregoing paragraphs as if fully set forth herein.

102. Defendant denied EAD Application #3 because, according to his written decision, "[a]t the time of filing [her] Form I-765, [Plaintiff] had not accrued the required 180 Asylum EAD clock days." Exh. K at 3.

103. Defendant denied EAD Application #3 despite the fact that EOIR, according to its case information hotline (*see* footnote 13, *supra*), calculates 533 days since Plaintiff applied for asylum.

104. EOIR, not USCIS, controls the asylum clock where, as here, the noncitizen applies for asylum "defensively" in one of the U.S. immigration courts.

105. EOIR considers the operative event for clock-starting purposes not the putative lodging of the asylum application at the Houston Immigration Court on September 26, 2019, but instead its filing at the Atlanta Immigration Court on April 20, 2020.

106. Defendant's refusal to defer to EOIR's clock count is nonsensical in light of the following excerpt from the USCIS website: "For questions regarding applicant-caused delays in cases before EOIR, asylum applicants should address questions to the immigration judge during the hearing, or in writing to the court administrator." Exh. B at 3. *See also* Exh. C at 4 ("For cases before EOIR, asylum applicants should address questions [about the asylum clock] to the immigration judge during the hearing, or to the court administrator, in writing, after the hearing.").

107. Directing noncitizens to address clock questions to the agency that controls the clock makes good sense—unless Defendant chooses to disregard the EOIR clock when adjudicating employment-authorization applications.

108. Even assuming without conceding he can disregard EOIR's clock count, Defendant denied EAD Application #3 despite having previously declared not "properly lodged" the asylum application he now contends started the clock.

109. According to USCIS Denial #1, the asylum application Plaintiff attempted to lodge on September 26, 2019, was not "properly lodged," in part because it was "not dated by the Houston Immigration Court." Exh. F at 2.

110. If not including a date along with the "lodged" stamp means the application was not "properly lodged," then Defendant cannot later find otherwise just because he wants the clock to have started before venue was changed.

111. Because the September 26, 2019, asylum application was not "properly lodged," Defendant erred by not starting the clock on April 20, 2020, the date on which Plaintiff filed for asylum at the Atlanta Immigration Court.

112. Had the USCIS clock properly been started on April 20, 2020, it would have run unimpeded by the Houston IJ's venue-change order, and would now be at 533 days and counting, consistent with EOIR's clock.

113. The Houston IJ's venue-change order, issued three months prior, did not prevent the clock from starting on April 20, 2020.

114. To find otherwise would be inconsistent with prior agency practice and would not be a reasonable or rational interpretation of a "delay requested or

caused" by Plaintiff, *see* 8 C.F.R. § 208.7(a)(2), given that the venue-change order was issued before Plaintiff filed for asylum.

115. But even assuming without conceding that a venue-change order issued prior to the filing of an asylum application prevents the clock from starting, such a rule would not apply here, because Plaintiff filed her application during the period within which EOIR had ordered non-detained hearings canceled (March 18, 2020 – October 13, 2020).

116. A "delay requested or caused" by Plaintiff cannot reasonably or rationally be considered to include the 209 days during which hearings were postponed.

117. The clock, therefore, would have run from April 20, 2020, until at least October 13, 2020, a total of 176 days.

118. Because the EOIR-ordered postponement of Plaintiff's hearing has in fact continued beyond October 13, 2020 (*see* paras. 95-98, *supra*), at least four days should be added to those 176.

119. A "delay requested or caused" by Plaintiff cannot reasonably or rationally be considered to include the time following October 13, 2020, and continuing up to the present, given that the Atlanta Immigration Court has not yet returned to anything close to resembling its pre-pandemic operating capacity.

120. Defendant's denial of EAD Application #3 constitutes final agency action under the APA. *See* 5 U.S.C. §§ 701, 704.

121. Defendant's denial of EAD Application #3 was arbitrary, capricious, contrary to the law, and not supported by substantial evidence in the record. *See* 5 U.S.C. §§ 706(2).

122. Because of Defendant's wrongful denial of her application for employment authorization, Plaintiff has suffered, and will continue to suffer, substantial and irreparable harm to her welfare, for which there is no adequate remedy at law.

COUNT TWO
Administrative Procedure Act
[Assuming clock started on Sept. 26, 2019, and stopped on Jan. 21, 2020, Defendant erred by not re-starting it on March 18, 2020]

123. Plaintiff incorporates each of the foregoing paragraphs as if fully set forth herein.

124. Even assuming without conceding that he can (1) disregard EOIR's clock count and (2) find the September 26, 2019, asylum application "properly lodged," Defendant cannot lawfully find that any delay in the underlying asylum case "requested" or "caused" by Plaintiff extends beyond March 18, 2020, the date on which EOIR postponed hearings and closed the Atlanta Immigration Court.

125. If the clock stopped at 117 days on January 21, 2020—when the Houston IJ granted Plaintiff's motion to change venue—then it should have re-started on March 18th and continued running at least until October 13, 2020, when EOIR ordered non-detained hearings resumed at the Atlanta Immigration Court.

126. A "delay requested or caused" by Plaintiff cannot reasonably or rationally be considered to include the 209 days during which hearings were postponed.

127. Adding the 209 days during which hearings were postponed puts Plaintiff's asylum clock at 326 days, well beyond the 180 required for Defendant to grant her employment-authorization application.

128. Defendant's denial of EAD Application #3 constitutes final agency action under the APA. *See* 5 U.S.C. §§ 701, 704.

129. Defendant's denial of EAD Application #3 was arbitrary, capricious, contrary to the law, and not supported by substantial evidence in the record. *See* 5 U.S.C. §§ 706(2).

130. Because of Defendant's wrongful denial of her application for employment authorization, Plaintiff has suffered, and will continue to suffer, substantial and irreparable harm to her welfare, for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court grant the following relief:

1. Under the Declaratory Judgment Act, 28 U.S.C. § 2201, declare that Defendant's actions and omissions complained of herein violated 8 U.S.C. § 1158(d)(2); 5 U.S.C. §§ 555(b) and 706(2)(A); and 8 C.F.R. §§ 208.7, 274a.12(c)(8), and 274a.13.

2. Enjoin Defendant—and each of his officers, agents, servants, employees, successors in office, and anyone acting in privity or concert with him—and enter an order compelling Defendant to reopen Plaintiff's employment-authorization application and adjudicate it in accordance with the law.

3. Award to Plaintiff attorneys' fees and costs of this litigation under 28 U.S.C. § 2412 and other authority.

4. Grant any and all further relief that the Court deems just and proper.

Dated: October 5, 2021

Respectfully submitted,
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EXHIBITS

Exh.	Document	Pages
A	2011 USCIS Ombudsman Report	1-9
B	USCIS Applicant-Caused Delay Notice	1-4
C	USCIS 180 Day Asylum EAD Clock Notice	1-5
D	Houston IJ order granting Plaintiff's motion to change venue	1-2
E	EAD Application #1	1-27
F	USCIS Denial #1	1-3
G	Form I-589 filed at ATL Immigration Court on April 20, 2020	1-18
H	EAD Application #2	1-46
I	USCIS Denial #2	1-3
J	EAD Application #3	1-47
K	USCIS Denial #3	1-3
L	TRAC, *Immigration Court Processing Time by Outcome*	1-2