UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

B.H., M.A., A.S.D., M.F., H.L., L.M.M.M., B.M., G.K., L.K.G., and D.W. Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. U.S. CITIZENSHIP AND IMMIGRATION SERVICES; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Janet NAPOLITANO, Secretary, Department of Homeland Security; Alejandro MAYORKAS, Director, U.S. Citizenship and Immigration Services; Eric H. HOLDER, Jr., Attorney General of the United States; Juan OSUNA, Director, Executive Office for Immigration Review, Defendants.	No. CV11-2108-RAJ **FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** **CLASS ACTION**

Plaintiffs B.H., M.A., A.S.D., M.F., H.L., L.M.M.M., B.M., G.K., L.K.G. and D.W. bring this action on behalf of themselves and all similarly situated asylum applicants and allege as follows:

INTRODUCTION

1. Plaintiffs and the class members that they seek to represent ("the class") are asylum applicants in removal proceedings who challenge Defendants' policies and practices that unlawfully prevent them from working even though their pending asylum claims have not been adjudicated within the six-month time period prescribed by statute. Plaintiffs and class members have applied for asylum because they have been persecuted or fear persecution in their home countries and seek safe haven in the United States. Most are in dire financial straits. Due to Defendants' unlawful policies and practices preventing them from obtaining employment authorization, they have been forced to rely on the goodwill of others to support themselves and their families while they await decisions on their asylum applications. This process can take many months and sometimes years.

2. By statute, Congress directed Defendants to make a decision on asylum applications within six months. During this 180-day period, an asylum applicant is not eligible to work. Very often, however, asylum applications are not – and at times, cannot be – decided within six months. In recognition of the economic hardship asylum seekers generally face, asylum applicants have a right to obtain an Employment Authorization Document (EAD) if their asylum applications have been pending for more than 180 days and they have met all eligibility requirements. By regulation, the running of the 180-day waiting period for an EAD – referred to herein as "the asylum EAD clock" – may be

suspended, but only for applicant-requested or caused delay of the adjudication of an asylum application.

3. Defendants have adopted uniform nationwide policies and practices to administer the asylum EAD clock. However, these policies and practices are inadequate to ensure that all statutorily eligible asylum applicants are issued work authorization in a meaningful time and manner so as to support themselves and their families while their asylum applications are adjudicated. Numerous systemic problems have plagued the administration of the asylum EAD clock since its inception over a decade ago. In response to ongoing complaints, Defendant Executive Office for Immigration Review (EOIR) recently issued policy guidance that may resolve a limited number of asylum EAD clock problems. However, the systemic issues challenged in this lawsuit have not been resolved.

4. Plaintiffs and the class challenge five of Defendants' policies and practices as violating the U.S. Constitution, the Immigration and Nationality Act (INA), the governing regulations, and the Administrative Procedure Act (APA). First, Plaintiffs and the class challenge the lack of meaningful notice about the status of their asylum EAD clocks. Defendants' decisions to stop or not start or restart the asylum EAD clock are made without adequate notice, whether written or otherwise, to Plaintiffs and the class. There is no mandatory procedure in place to ensure that Plaintiffs and the class are informed that the asylum EAD clock is being stopped or not started or restarted or to inform asylum applicants in all instances of the reasons for taking actions related to the asylum EAD clock. Often, asylum applicants do not learn of Defendants' decisions to stop or not start or restart the asylum EAD clock until their applications for work

authorization have been denied. Such denials generally fail to provide adequate notice of the factual basis for the EAD ineligibility determination and of the derogatory evidence relied upon. Moreover, Plaintiffs and the class do not have a meaningful opportunity to contest or remedy Defendants' improper asylum EAD clock determinations.

5. Plaintiff B.H., and a subclass of similarly situated individuals challenge Defendants' policy of not starting the asylum EAD clock upon the filing of a complete asylum application with the immigration court but instead starting it only at the first hearing before an immigration judge, whenever that might be scheduled.

6. Plaintiffs A.S.D., M.A. and a subclass of similarly situated individuals challenge Defendants' policy and practice of starting or restarting the clock *only* at a hearing before an immigration judge. Due to Defendant EOIR's case management, compounded by the congested immigration court dockets nationwide, hearings often are not scheduled in relation to the exigencies of each case within reasonable or predictable time frames but are staggered across periods of as long as three years.

7. Plaintiffs M.F., H.L., L.M.M.M., B.M. and a subclass of similarly situated individuals challenge Defendants' policy and practice of indefinitely – and often permanently – stopping the asylum EAD clock when an applicant misses an interview with an asylum office of Defendant United States Citizenship and Immigration Services (USCIS) and the asylum application is referred to EOIR for adjudication of the asylum application in a removal hearing in immigration court.

8. Plaintiffs G.K., L.K.G., D.W., and a subclass of similarly situated individuals challenge Defendants' policy and practice of not restarting the asylum EAD

clock after an asylum case has been remanded by a federal court or the Board of Immigration Appeals (BIA) for further consideration of the asylum application.

9. As a direct result of these challenged policies and practices, Plaintiffs and the class have been or will be unlawfully deprived of timely, adequate notice of clock determinations and a meaningful opportunity to remedy these determinations. Plaintiffs and the subclasses have been or will be unlawfully denied work authorization due solely to an improper determination regarding the asylum EAD clock. In all cases, Plaintiffs and the class and subclasses have actively pursued their asylum applications beyond the 180-day waiting period excluding any periods of applicant-caused delay. In some cases, their asylum EAD clocks have been erroneously "permanently stopped."

10. In August 2011, the U.S. Citizenship and Immigration Services' (USCIS) Ombudsman issued recommendations acknowledging the existence of systemic asylum EAD clock problems, including the lack of a mechanism for an applicant to acquire accurate information about his or her asylum EAD clock and the lack of a standard procedure for correcting errors in the asylum EAD clock. *See* U.S. Citizenship and Immigration Services Ombudsman, *Employment Authorization for Asylum Applicants: Recommendations to Improve Coordination and Communication* (Aug. 26, 2011), *available at* http://www.dhs.gov/xlibrary/assets/cisomb-employment-authorization-for-asylum-08262011.pdf [hereinafter USCIS Ombudsman Report]. Undersigned counsel and other organizations throughout the country have repeatedly requested that Defendants remedy their unlawful policies and practices. To date, however, Defendants have failed to do so.

JURISDICTION AND VENUE

11. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331, as a civil action arising under the Constitution and laws of the United States, and 5 U.S.C. § 701, *et seq.*, as an action to set aside unlawful agency action or compel agency action unlawfully withheld or unreasonably delayed. Declaratory judgment is sought pursuant to 28 U.S.C. §§ 2201-02.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1), (2) and (3) because Defendants are U.S. agencies and officers of the United States or agencies thereof acting in their official capacities. A substantial part of the events or omissions giving rise to the claims occurred in this district, Plaintiff B.H. resides in this district, and no real property is involved in this action.

PARTIES

13. Plaintiffs are all noncitizens in the United States who have been placed in removal proceedings, have filed complete Applications for Asylum and Withholding of Removal (Form I-589 or "asylum application"), have filed or will file an application for employment authorization (Form I-765) pursuant to 8 C.F.R. § 274a.12(c)(8), and would be eligible for employment authorization but for Defendants' unlawful policies and practices.

14. Plaintiff B.H. is a citizen of Indonesia who resides in Seattle, Washington.

15. Plaintiff A.S.D. is a citizen of Mauritania who resides in Chicago, Illinois.

16. Plaintiff M.A. is a citizen of Libya who resides in Jersey City, New Jersey.

17. Plaintiff M.F. is a citizen of Guinea who resides in New York, New York.

18. Plaintiff H.L. is a citizen of China who resides in San Gabriel, California.

19. Plaintiff L.M.M.M. is a citizen of Colombia who resides in New York, New York.

20. Plaintiff B.M. is a citizen of Serbia who resides in Elmhurst, New York.

21. Plaintiff G.K. is a citizen of India who resides in Muttontown, New York.

22. Plaintiff L.K.G. is a citizen of Eritrea who resides in Dallas, Texas.

23. Plaintiff D.W. is a citizen of China who resides in Alhambra, California.

24. Defendant U.S. Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security (DHS), is responsible for the timely and accurate processing and adjudication of applications for employment authorization. In making determinations to grant or deny applications for employment authorization, USCIS is responsible for the accurate calculation of the asylum EAD clock and for determining whether there has been delay requested or caused by the applicant for purposes of the asylum EAD clock.

25. Defendant Alejandro Mayorkas is the Director of USCIS and has ultimate responsibility for the timely and accurate processing and adjudication of applications for employment authorization and for the accurate calculation of the asylum EAD clock. He is sued in his official capacity.

26. Defendant Janet Napolitano is the Secretary of DHS and has ultimate responsibility for the administration and enforcement of the INA and all other laws relating to the immigration of noncitizens. She is sued in her official capacity.

27. Defendant Executive Office for Immigration Review (EOIR) is a component agency of the Department of Justice responsible for conducting removal hearings of noncitizens, i.e., proceedings to remove or deport them from the United

States. Asylum applications are filed with EOIR, in the immigration court having jurisdiction over the case, when an applicant has been placed in removal proceedings. With respect to asylum cases over which it has jurisdiction, EOIR has responsibility for the accurate calculation of the asylum EAD clock and for determining whether there has been delay requested or caused by the applicant for purposes of the asylum EAD clock.

28. Defendant Eric H. Holder, Jr. is the Attorney General of the United States and is responsible for the Department of Justice and its component agencies, including EOIR. Under delegated authority from the Attorney General, EOIR administers the U.S. immigration court system. Attorney General Holder is sued in his official capacity.

29. Defendant Juan Osuna is the Director of EOIR and has ultimate responsibility for overseeing immigration court proceedings, appellate reviews, and administrative hearings. He is sued in his official capacity.

LEGAL AND FACTUAL BACKGROUND

Asylum Application Process

30. Any noncitizen who is in the United States or seeking admission at a port of entry may apply for asylum. 8 U.S.C. § 1158(a)(1). An asylum applicant must demonstrate either past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i). With limited exceptions, an asylum application must be filed within one year of an applicant's arrival in the United States. 8 U.S.C. § 1158(a)(2)(B).

31. Generally, an asylum application must be adjudicated within 180 days after it is filed. USCIS and EOIR are jointly responsible for calculating this 180-day

period. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2). Delay requested or caused by the applicant will toll this period. *Id.* For asylum applications heard during removal proceedings, EOIR has adopted an asylum adjudications clock to track the 180-day waiting period.

32. Noncitizens who are not in removal proceedings may file "affirmative" asylum applications with USCIS. They must attend an interview with a USCIS asylum officer, who may grant, deny, refer, or dismiss the application. 8 C.F.R. §§ 208.9(b), 208.14(c), 1208.9(b), and 1208.14(c).

33. In some cases, after a noncitizen files an "affirmative" asylum application, an asylum officer may "refer" the case to EOIR, thus initiating removal proceedings. 8 C.F.R. §§ 208.14(c), 1208.14(c). The asylum application is then considered a "defensive" asylum application. A referral to an immigration judge is not a final decision in the case and does not constitute a denial of the asylum application. *Id.* Instead, an immigration judge reviews the previously filed asylum application *de novo* without the applicant having to file a new asylum application.

34. In other defensive cases, the noncitizen will file the application directly with EOIR. In these cases, the regulations require that the asylum application be filed with the "immigration court." 8 C.F.R. § 1208.4(b)(3). Unlike other applications and pleadings which may be filed with the immigration court at any time, EOIR's sub-regulatory policy and practice permits asylum applications to be filed only at a hearing before an immigration judge. Memorandum from Chief Immigration Judge, Brian O'Leary, Operating Policies and Procedures Memorandum 11-02: The Asylum Clock (Nov, 15, 2011) 5-6, *available at* http://www.justice.gov/eoir/efoia/ocij/oppm11/11-

02.pdf [hereinafter OPPM 11-02]. This precludes the asylum EAD clock from starting until the date of such a hearing even though a complete asylum application has been filed with the immigration court. This policy and practice is inconsistent with the statutory and regulatory framework, under which the waiting period should begin when a complete asylum application is filed with the immigration court.

35. All defensive asylum applications are adjudicated by immigration judges following a staggered series of hearings, which — due to EOIR's case management policies, compounded by congested court calendars — generally span months and often years after the initial hearing. 8 C.F.R. §§ 208.14(a), 1208.14(a). If the immigration judge denies an asylum application, the applicant may appeal to the BIA. 8 U.S.C. § 1158(d)(5)(A)(iv). If the BIA affirms the denial, the applicant may appeal to the relevant federal court of appeals. 8 U.S.C. § 1252(a).

EAD Application Process for Applicants in Removal Proceedings

36. The INA authorizes DHS to adopt regulations authorizing employment for asylum applicants. 8 U.S.C. § 1158(d)(2). While regulations prescribe that USCIS has discretion to grant or deny EAD applications to well over a dozen categories of immigrants and nonimmigrants, the regulations afford USCIS no such discretion with respect to EAD applications filed by asylum applicants. *See* 8 C.F.R. § 274a.13(a)(1) and (2). Thus, an asylum applicant who has met the regulatory requirements has a right to work authorization. *Id.*

37. The only regulatory eligibility requirements for an EAD are that the asylum applicant is not an aggravated felon; that the applicant has filed a complete asylum application; that the asylum application has not been denied at the time the EAD

application is decided; and that, absent exceptional circumstances, the asylum applicant has not failed to appear for an interview or hearing. 8 C.F.R. §§ 208.7(a), 1208.7(a). An asylum application is complete for purposes of the 180-day asylum EAD clock when it contains answers to all of the questions on the application form, is signed, and is accompanied by the materials specified in the regulations and the instructions to the application form. 8 C.F.R. §§ 208.3(c)(3), 1208.3(c)(3). If a defensive asylum application is not adjudicated by an immigration judge within 180 days of its filing (not including periods of applicant-caused delay), an applicant who has satisfied these eligibility requirements has a right to an EAD.

38. USCIS is responsible for deciding all EAD applications for asylum applicants, including those in removal proceedings. An application for employment authorization, Form I-765, may be filed with USCIS at any time after the first 150 days of the waiting period for an EAD. 8 C.F.R. § 208.7.

39. Defendants have adopted regulatory requirements governing USCIS adjudication of EAD applications filed by asylum applicants. 8 C.F.R. §§ 103.2, 103.3, 208.7, 274a.12(c)(8), 274a.13(a), and 1208.7. These regulations require, *inter alia*, that the EAD decision be based on the record of the proceeding that constitutes the basis for the decision; that the information in the record be disclosed to the applicant; that the applicant be advised of derogatory information and offered an opportunity to rebut such information and present information on his or her own behalf prior to the decision; and that, if the application is denied, the applicant be notified in writing of the specific reasons for the denial. 8 C.F.R. §§ 103.2(b)(16) and 103.3(a)(1).

40. When an asylum applicant is in removal proceedings, EOIR's calculations regarding the asylum adjudications clock, which tracks the 180-day statutory timetable for adjudication of asylum cases, are applied by both Defendant agencies to the asylum EAD clock.

41. Once an EAD has been granted, the applicant remains eligible to renew it throughout the adjudication of the asylum application, including administrative and judicial appeals. 8 C.F.R. §§ 208.7(b)(1), 1208.7(b)(1).

The Asylum EAD Clock

42. For both affirmative and defensive asylum applicants, the 180-day asylum EAD clock begins to run on the date the applicant files a complete asylum application. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1), 208.3-4, 1208.3-4.

43. The asylum EAD clock continues to run except for any period of "delay requested or caused by the applicant," 8 C.F.R. § 208.7(a)(2), 8 C.F.R. § 1208.7(a)(2), or unless the asylum application is denied before the EAD application is adjudicated. 8 C.F.R. §§ 208.7(a)(1); 1208.7(a)(1). Applicant-caused delays include an applicant's "failure without good cause to follow the requirements for fingerprint processing," and any period during which an asylum applicant fails to appear to receive and acknowledge receipt of a USCIS asylum officer's decision. 8 C.F.R. §§ 208.7(a)(2), 208.9(d), 1208.7(a)(2), 1208.9(d).

44. Defendants USCIS and EOIR are jointly responsible for calculating the 180-day waiting period for EAD eligibility for asylum applicants. 8 C.F.R. §§ 208.7(a)(2), 1208.7(a)(2). For EAD applications filed in connection with affirmative asylum cases, USCIS tracks the 180-day period and relies upon its own calculations to

decide if this waiting period is satisfied when it decides an EAD application. In contrast, for EAD applications filed in connection with defensive asylum applications – whether referred from USCIS or filed directly with the immigration court – USCIS relies upon EOIR's calculation of the 180-day waiting period.

45. Defendant EOIR purports to administer an asylum clock only to track the statutory 180-day adjudication period and not to track the 180-day period for EAD eligibility for asylum applicants. Contrary to this, in a practice manual published by EOIR for parties who appear before the immigration courts, EOIR explains the "asylum clock" as follows:

> ***(l) Asylum Clock.*** — Certain asylum applicants are eligible to receive employment authorization from the Department of Homeland Security (DHS) 180 days after the application is filed, not including delays in the proceedings caused by the applicant. The "asylum clock" tracks the number of days since the application was filed, not including any such delays. See 8 C.F.R. § 1208.7.

See Immigration Court Practice Manual at § 4.15(l), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf (accessed May 29, 2012).

46. Because the same applicant-requested or caused delay regulation applies to both 180-day periods, EOIR's asylum adjudication clock is, de facto, an asylum EAD clock and is relied upon by Defendant USCIS for this purpose. Moreover, USCIS has stated as much, confirming that its policy is to rely on EOIR's 180-day asylum clock in making determinations about employment authorization and further confirming its position that it has no authority or ability to alter EOIR's asylum clock determinations.

47. Immigration courts across the country are overwhelmed with their caseloads and are under intense pressure to meet their own statutory 180-day adjudication deadline. EOIR evaluates immigration judges based on their ability to meet this case completion requirement and holds them accountable for the length of time asylum applications are pending on their dockets. By creating the applicant-caused delay regulatory and sub-regulatory exemptions to the 180-day statutory adjudication period, EOIR limits its own accountability for adjudication delays. However, since Defendants use EOIR's 180-day clock to make determinations about employment authorization, these exemptions, related solely to EOIR's caseload management, are applied to systematically disqualify applicants from work authorization. *See, e.g.*, paragraphs 55-57 below regarding the challenged Hearing Policy and Practice.

48. When an immigration judge adjourns a case, the reason must be entered into EOIR's database using a specific adjournment code. OPPM 11-02 at 7. Certain adjournment codes are intended to reflect "applicant-caused delay." An immigration judge's entry of an adjournment code that is intended to reflect applicant-caused delay will automatically toll the 180-day EAD waiting period. The asylum EAD clock will remain tolled until Defendant EOIR makes another entry in the EOIR database that indicates that the clock has resumed.

49. EOIR's Operating Policies and Procedures Memoranda (OPPMs) reiterate that only applicant-caused delays prevent the asylum clock from running and that, in such circumstances, the clock is stopped only for the number of days during which the delay continues. OPPM 11-02 at 7-10; Memorandum from Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum (OPPM) 05-07: Definitions and

Use of Adjournment, Call-up and Case Identification Codes, *available at* http://www.justice.gov/eoir/efoia/ocij/oppm05/05-07.pdf.

Defendants' Unlawful Policies and Practices

50. Plaintiffs and class members challenge five specific sets of policies and practices that Defendants have adopted with respect to the asylum EAD clock. For convenience, these are identified as "Notice and Review Policy and Practice," "Missed Asylum Interview Policy and Practice," "Hearing Policy and Practice," "Prolonged Tolling Policy and Practice," and "Remand Policy and Practice." These policies and practices conflict with the U.S. Constitution, the INA, governing regulations, and the Administrative Procedure Act (APA).

51. *Notice and Review Policy and Practice*. Defendants' decisions to stop or not start or restart the asylum EAD clock are made without written notice or explanation and often off the record. While EOIR's most recent operating guidance indicates that an immigration judge should state on the record the reason why a case is being adjourned, OPPM 11-02, the judge is not required to inform the asylum applicant if the adjournment will stop or not start or restart the asylum EAD clock. Applicants often do not learn of asylum EAD clock determinations unless and until they inquire about the status of their asylum EAD clocks or after their applications for work authorization have been denied. They also are not informed of the reasons that the asylum EAD clock was stopped or not started or restarted unless they make a specific inquiry. The written decisions from USCIS denying EAD applications do not include this information on any routine or systematic basis nor do they provide adequate notice of how USCIS calculated the applicant's EAD ineligibility or of derogatory evidence USCIS relied upon for such

purposes. Moreover, Plaintiffs do not have a meaningful opportunity to contest or remedy improper asylum EAD clock determinations nor is there any administrative mechanism to compel Defendants to issue work authorization after the 180-day waiting period has expired.

52. The USCIS Ombudsman recognized that the lack of a mechanism for asylum seekers to acquire accurate information about the amount of time accrued on their asylum EAD clocks creates confusion about employment eligibility. *See* USCIS Ombudsman Report at 1, 5-6.

53. To contest a miscalculation of the asylum EAD clock, applicants must resort to an informal review process that is inadequate to timely remedy legal and factual errors. The USCIS Ombudsman has recognized the problems created by the lack of any standard procedure for correcting errors relating to asylum EAD clock determinations, which prevent Plaintiffs from establishing their eligibility for work authorization:

> Ensuring that a delay is correctly identified as attributable either to the applicant or to the Federal Government is critical. Problems occur when delays are incorrectly attributed to the asylum applicant in circumstances that are actually caused by EOIR or USCIS. Additionally, when a delay that was caused by or requested by the applicant comes to an end, there is no easy way for the applicant to work with the Federal Government to restart the clock.

Id. at 2. The recent OPPM from Defendant EOIR merely reiterates the existing procedure and does not resolve these problems. OPPM 11-02.

54. By failing to provide applicants with legally sufficient notice of decisions on their asylum EAD clocks and an adequate opportunity to challenge improper asylum EAD clock determinations, Defendants violate their rights under the Due Process Clause of the Fifth Amendment and the APA. Additionally, Defendant USCIS relies upon

Defendant EOIR's information about the asylum EAD clock, but does not disclose this information to an asylum applicant when it denies the applicant's EAD application; does not provide the applicant with an opportunity to rebut derogatory information or present information on his or her own behalf; and/or does not provide specific notice to the applicant about the reasons for the denial.

55. *Hearing Policy and Practice.* Defendants have a nationwide policy and practice of starting the asylum EAD clock only at a hearing before an immigration judge. OPPM 11-02 at 11. Consequently, even when an asylum applicant has filed a complete asylum application with the "immigration court," as the regulations require, the asylum EAD clock will not start until the applicant's next court appearance, which – due to EOIR's case management policies and court backlogs – may be many months and often more than a year after the applicant filed the asylum application. In many cases, individuals who would otherwise file a complete asylum application prior to a hearing before an immigration judge are deterred by Defendants' Hearing Policy and Practice.

56. Defendants' Hearing Policy and Practice, articulated in OPPM 11-02 and EOIR's Immigration Court Practice Manual Chapter 3 (2009), at 3.1(b)(iii)(A), is binding on all EOIR personnel, including immigration judges, who must enter an adjournment code in the EOIR database in accord with this policy and practice. Defendant USCIS relies upon these entries by immigration judges in the database when it determines whether the 180-day waiting period for EAD eligibility has been met for purposes of deciding an EAD application.

57. By refusing to start the asylum EAD clocks of applicants who have filed complete asylum applications until the next court hearing, Defendants unlawfully prevent

applicants from accruing time towards the 180-day waiting period for purposes of employment eligibility. This illustrates a conflict in the system by which Defendants have chosen to implement the EOIR adjudication mandate at the expense of applicants' asylum EAD clocks.

58. *Prolonged Tolling Policy and Practice.* Defendants have a nationwide policy and practice of starting or restarting the asylum EAD clock of an applicant in removal proceedings *only* at a hearing before an immigration judge. Due to EOIR's case management policies and congested immigration court dockets nationwide, hearing dates are not scheduled within reasonable or predictable time frames. Instead, hearings can be scheduled up to three years in the future. In cases in which an asylum applicant initially caused a "delay," for example by requesting a continuance to retain an attorney, the attributed delay often will be resolved well before the next hearing. Even when this happens, however, Defendants' Prolonged Tolling Policy and Practice prevents the applicant's asylum EAD clock from restarting until the next hearing, however far in the future that might be. As a consequence, a delay initially caused or requested by the applicant is prolonged due to EOIR's case management practices and congested court dockets, causes unrelated to and beyond the control of the applicant.

59. Because this policy and practice prohibits an asylum EAD clock from starting or restarting between hearings, an applicant's only potential remedy for correcting an improperly stopped asylum EAD clock is to file a motion to advance the hearing date with the immigration court. However, both the EOIR case management practices and the congested court dockets make it unlikely that the immigration court will agree to advance a hearing date. EOIR's policy and practice is to "disfavor" motions to

advance hearing dates. *See* Immigration Court Practice Manual, § 5.10(b). EOIR publicly suggests that such motions are appropriate only in extreme situations. *Id.* As a consequence, a motion to advance a hearing date is not a viable alternative in the vast majority of cases in which hearing dates are set far out in the future.

60. By refusing to start or restart an asylum EAD clock at the time that an applicant cures his or her attributed delay and instead suspending the asylum EAD clock until a hearing can be scheduled, up to three years later, Defendants' Prolonged Tolling Policy and Practice unlawfully prevents applicants from accruing time for purposes of employment eligibility.

61. *Missed Asylum Interview Policy and Practice.* Defendants have a nationwide policy and practice of indefinitely – and often permanently – stopping the asylum EAD clock when an applicant misses an interview with the USCIS asylum office and the case is referred to EOIR immigration court for removal proceedings. Generally, an applicant's failure to appear at an asylum interview will constitute applicant-caused delay which will stop the asylum EAD clock. Under 8 C.F.R. §§ 208.7(a) and 1208.7(a), the asylum EAD clock should restart when, following USCIS' referral of the case to EOIR for removal proceedings, the applicant appears at a hearing before the immigration judge. At that point in time, there no longer is an applicant-caused delay in the case and thus no basis under the regulations for the asylum EAD clock to remain stopped.

62. Contrary to the regulations, Defendants' policies and practices do not allow the asylum EAD clock to restart at the first immigration court hearing following referral. Instead, Defendants' policies and practices confuse the issue of eligibility for an EAD, which is determined at the time that the EAD application is adjudicated, with that

of the calculation of the 180-day waiting period for an EAD. A failure to appear at an asylum interview may cause an applicant to be ineligible for an EAD if he or she cannot demonstrate that exceptional circumstances caused the failure to appear. 8 C.F.R. §§ 208.7(a)(4) and 1208.(7)(a)(4). This is a determination that, ultimately, must be decided at the time that an EAD application is adjudicated. Nothing in the regulations ties this determination to whether an applicant has satisfied the independent requirement that the application have been pending for 180 days.

63. Defendant EOIR's policy and practice is that it has no authority to restart the asylum EAD clock in these referred cases. OPPM 11-02 at 5, 8. Instead, its position is that only USCIS can restart the asylum EAD clock. In turn, USCIS' policy and practice is that it has no authority to restart the clock once a case has been referred to EOIR. As a result, absent termination of removal proceedings by the immigration judge with a remand to USCIS – over which decision the applicant has no control – neither USCIS nor EOIR will restart the applicant's asylum EAD clock. Thus, in the vast majority of these cases, the clock remains stopped throughout the entire time that the applicant's asylum application is pending before the immigration judge.

64. Defendants' Missed Asylum Interview Policy and Practice unlawfully prevents applicants from accruing time for purposes of employment eligibility by failing to allow an applicant's asylum EAD clock to restart at the first immigration court hearing following referral of the case due to a missed asylum office interview.

65. *Remand Policy and Practice*. Defendants have a nationwide policy and practice of not starting or restarting the asylum EAD clock after a previously denied asylum case has been remanded for adjudication. OPPM 11-2 at 16. The asylum EAD

clock stops running when an asylum application is denied before an EAD has been issued. 8 C.F.R. §§ 208.7(a)(1), 1208.7(a)(1). However, when, upon appeal to either the BIA or a federal appeals court, the asylum case is remanded for further adjudication of the asylum application, the denial necessarily is vacated. Because there no longer is a denial of the asylum application when a remand order is entered, there also no longer is a basis under the statute and regulations for the asylum EAD clock to remain stopped. Instead, the asylum EAD clock should start or restart as of the point at which it had previously stopped. In violation of the statute and regulations, however, Defendants' policy and practice is to permanently stop the asylum EAD clock upon the denial of an EAD application and to refuse to start or restart it upon a remand.

66. Defendants' Remand Policy and Practice, articulated in OPPM 11-02, is binding on all EOIR personnel, including immigration judges, and thus adversely impacts asylum EAD clock determinations. Defendant USCIS relies upon EOIR's determinations of the asylum EAD clock, as reflected in the EOIR database, when it determines whether the 180-day waiting period for EAD eligibility has been met for purposes of deciding an EAD application.

67. By refusing to start or restart the asylum EAD clocks of applicants whose asylum cases have been remanded for further adjudication, Defendants' Remand Policy and Practice unlawfully prevents applicants from accruing time for purposes of employment eligibility.

Application of Defendants' Policies and Practices to Plaintiffs

Hearing subclass Plaintiff

68. *B.H.* Plaintiff B.H. first arrived in the United States on March 24, 2011, after fleeing Indonesia to escape past persecution and threats of future persecution due to his Chinese ethnicity and Christian religious beliefs. He applied for asylum within one year of his entry into the United States. The USCIS asylum office denied that application. Because he was in legal status when his application was denied, USCIS did not refer his case to the EOIR immigration court for removal proceedings.

69. Mr. B.H. subsequently fell out of status and was apprehended by DHS and placed in removal proceedings. His prior counsel failed to advise him regarding the time and date for his hearing, so he received an in absentia removal order. On the joint motion of DHS and B.H., the case was reopened and venue was changed to Seattle. B.H.'s first hearing in Seattle was scheduled for September 28, 2011, at which time Mr. B.H. intended to file his asylum application. At the last minute, the Seattle immigration court postponed this hearing to March 22, 2012.

70. Mr. B.H. filed his complete asylum application with the court clerk on September 28, 2011 without waiting for his rescheduled hearing. The immigration court stamped his application as "lodged but not filed." Mr. B.H. did not receive notice from the Defendants that his asylum EAD clock did not start when he filed his asylum application with the immigration court.

71. At the rescheduled hearing on March 22, 2012, the immigration judge asked Mr. B.H., through counsel, whether he wanted an expedited or non-expedited hearing. The immigration judge said nothing about the asylum EAD clock. His attorney responded that Mr. B.H. did not need an expedited hearing. Had counsel been informed

that the asylum EAD clock would stop if he did not accept an expedited hearing date, he would have taken the expedited date.

72. Mr. B.H. applied to USCIS for an EAD on March 5, 2012, by which date his asylum application had been pending for more than 150 days, exclusive of any applicant-caused delay.

73. Due to Defendants' policy and practice of requiring a defensive asylum application to be filed only in open court at a hearing and due to the absence of legally sufficient procedures through which Mr. B.H. can address this issue, his asylum EAD clock never started. Due to the lack of proper notice about the impact of declining an "expedited" hearing, Mr. B.H.'s clock did not start at his first hearing following the filing of his asylum application. Mr. B.H.'s EAD application was improperly denied on May 1, 2012.

74. Without an EAD, Mr. B.H. has suffered physically and mentally as a result of this stress. He fears that he will not be able to send money to his parents, who depend on him for financial help.

75. Under Defendants' policies and practices, Mr. B.H.'s asylum EAD clock will remain stopped until May 16, 2013, the date of the merits hearing on his asylum application. But for Defendant's Hearing Policy and Practice and Notice and Review Policy and Practice, Mr. B.H. would be eligible for an EAD at this time.

Prolonged Tolling subclass Plaintiffs

76. *M.A.* Plaintiff M.A. first arrived in the United States on September 30, 2010, after fleeing Libya to escape past persecution and threats of future persecution as a

member of the minority Toubou tribe who had worked to restore Libyan citizenship to Toubou people born in Libya.

77. Mr. M.A. filed a complete asylum application with the Newark, New Jersey immigration court on September 28, 2011 at his initial master calendar hearing.

78. At the hearing, counsel for Mr. M.A. requested an expedited hearing date as counsel and Mr. M.A. were prepared to more forward with the case quickly. The immigration judge offered Mr. M.A. an expedited hearing date but stated that no additional supporting evidentiary documents could be submitted if Mr. M.A. accepted the expedited hearing date.

79. Mr. M.A. needed to submit evidence documenting the significant changes that recently had occurred in Libya, including a regime change, in support of his asylum application. His counsel would have been able to submit the additional documents within several days following the master calendar hearing. Accepting the expedited hearing date without being afforded an opportunity to submit additional evidence would have compromised Mr. M.A.'s asylum case. Because of the restriction on additional evidence imposed by the immigration judge, Mr. M.A. did not accept the expedited hearing date. Consequently, the immigration judge scheduled Mr. M.A.'s next hearing for February 5, 2013.

80. Mr. M.A.'s counsel asked the immigration judge during the hearing to start Mr. M.A.'s asylum EAD clock because he had a legitimate reason not to accept the expedited hearing date. The judge declined to do so. Subsequently, his counsel did not request that the court administrator or immigration judge correct the asylum clock because she was aware that it was the immigration court's policy to stop the asylum EAD

clock until the next hearing. Any attempt to restart the clock before the next hearing would have been futile.

81. Because counsel knew that Mr. M.A.'s clock had not accumulated any days, she did not have him file an application for an EAD subsequent to filing his complete asylum application. With his asylum EAD clock set at zero days, it would have been futile for Mr. M.A. to apply for an EAD.

82. Without an EAD, Mr. M.A. has had financial difficulties. He is afraid to work without authorization and depends on the generosity of friends who house and feed him. Mr. M.A. suffers from anxiety due to his inability to work and generally feels helpless and trapped. Mr. M.A. does not have medical insurance.

83. Mr. M.A.'s asylum EAD clock is stopped at zero days. Mr. M.A.'s next hearing – on the merits of his asylum application – is scheduled for February 5, 2012. Under Defendants' Prolonged Tolling Policy and Practice, Mr. M.A.'s asylum EAD clock will remain stopped throughout the entire period that his asylum application is pending before the immigration judge. But for Defendant's Prolonged Tolling Policy and Practice, Mr. M.A. would have been eligible for an EAD at this time.

84. *A.S.D.* Plaintiff A.S.D. arrived in the United States on September 8, 2010 with her husband and two-year-old daughter after fleeing persecution and threats of future persecution due to her membership in a particular social group, victims of female genital mutilation who fear that their daughters will be subject to this practice.

85. Ms. A.S.D. filed a complete asylum application with USCIS' Chicago asylum office on June 28, 2011. On August, 10, 2011, the asylum office referred Ms. A.S.D.'s asylum application to the Chicago immigration court. The initial hearing took

place on August 31, 2011 at which time the immigration judge offered a choice of two subsequent hearing dates: an expedited date on September 20, 2011 or a regular hearing date nearly two years later on June 4, 2013.

86. The immigration judge did not explain the asylum EAD consequences of a decision to not accept an expedited hearing date. Not understanding these consequences, Ms. A.S.D. did not choose the expedited hearing date. Had she understood that her asylum EAD clock would be stopped because of this choice, she would have chosen the expedited date. Ms. A.S.D. subsequently authorized her attorney to seek an earlier hearing date.

87. On September 1, 2011, counsel submitted a Motion to Recalendar the Individual Hearing, requesting that the court reschedule the hearing for the originally offered date, September 20, 2011, or any time prior to June 4, 2013. The immigration judge denied this motion without explanation. On January 5, 2012, counsel again submitted a Motion to Recalendar, requesting an earlier court date. The immigration court also denied this motion, finding that although there was good cause for it, there were no earlier available dates.

88. Ms. A.S.D.'s clock is currently stopped at 64 days. But for Defendants' Prolonged Tolling Policy and Practice, Ms. A.S.D. would have accrued more than 180 days on her asylum EAD clock and been eligible for a renewal of her EAD when she applied for one on or about January 20, 2012. Instead, on or about March 30, 2012, USCIS denied Ms. A.S.D.'s EAD application.

89. Without authorization to work, A.S.D. has no ability to support herself or her two children, one of whom lives in the United States. She depends on her cousin to

provide food, clothing, educational opportunities and shelter to her and her family. Her cousin has his own family to support and has difficulty stretching one paycheck to cover the needs of two families.

Missed Asylum Interview subclass Plaintiffs

90. *M.F.* Plaintiff M.F. arrived in the United States on or about December 25, 1999, at the age of thirteen, after fleeing Guinea to escape past persecution and threats of future persecution based upon forced circumcision when she was nine years old and to avoid a forced marriage to an older cousin with two wives.

91. In December 2002, with the help of her uncle, Ms. M.F. filed a complete asylum application with the Newark, New Jersey USCIS asylum office. She was 16 at the time, not yet fluent in English and unable to understand the asylum application process. As a result of these circumstances, she was not aware of the asylum office interview scheduled in November 2003 and thus did not attend.

92. USCIS stopped Ms. M.F.'s asylum EAD clock in 2003 when she missed the asylum office interview. Since then, Ms. M.F.'s asylum EAD clock has never restarted but remains permanently stopped at 87 days.

93. After she missed the interview, the asylum office referred her case to the EOIR immigration court for removal proceedings. Ms. M.F. was not aware that her case had been referred. As a result, she missed the initial master calendar hearing and the immigration judge issued an in absentia order of removal against her on or about January 13, 2004.

94. In 2011, Ms. M.F. retained an attorney who moved to reopen her removal proceedings, explaining the circumstances behind her having missed both the asylum

office interview and the immigration court hearing. In response, DHS notified the immigration court that it did not oppose this motion. The immigration court reopened her removal proceedings on April 15, 2011.

95. At a subsequent master calendar hearing, Ms. M.F. asked the immigration judge to either restart her asylum EAD clock or remand her case to the USCIS asylum office. DHS opposed a remand to the asylum office, and the immigration court denied the remand request and ruled that the rules prohibited EOIR from restarting the clock.

96. In November 2011, Ms. M.F.'s attorney submitted a written request asking the immigration court administrator to restart the clock. When this was unsuccessful, she submitted a written request to USCIS to restart the clock, explaining the exceptional circumstances of the case. She never received a reply from USCIS.

97. Ms. M.F.'s merits hearing on her asylum application is scheduled to take place on June 27, 2013. Under Defendants' Missed Asylum Interview Policy and Practice, Ms. M.F.'s asylum EAD clock will remain permanently stopped until that date.

98. Ms. M.F. applied for an EAD on May 16, 2012. But for Defendants' Missed Asylum Interview Policy and Practice, Ms. M.F. would have accrued more than 180 days on her asylum EAD clock at this time. Because her asylum EAD clock has been permanently stopped at 87 days under the Missed Asylum Interview Policy and Practice, Ms. M.F.'s EAD application will be denied by USCIS.

99. The uncle who first assisted Ms. M.F. with her asylum application has died. She is estranged from the remainder of her family. When she fled Guinea at age 13, her family had planned an arranged marriage for her. Her family has shunned her for avoiding this marriage. She depends on the help of friends and strangers for food and

shelter. Ms. M.F. graduated from high school, speaks fluent English, and hopes to obtain a bachelor's degree. She has not been able to continue her education because she cannot afford the tuition.

100. *H.L.* Plaintiff H.L. arrived in the United States on or about April 16, 2010, after fleeing China to escape past persecution and threats of future persecution due to her practice of Christianity.

101. On February 24, 2011, Ms. H.L. filed a complete asylum application with USCIS. She appeared at the USCIS asylum office in Los Angeles on March 21, 2011 for her asylum interview. Because Ms. H.L. was ill, the asylum officer rescheduled the interview for April 11, 2011. Ms. H.L. was unable to locate a qualified interpreter to accompany her to the rescheduled interview. Consequently, four days prior to the rescheduled interview, her attorney faxed the Los Angeles USCIS asylum office a request to reschedule the interview a second time for this reason.

102. The Los Angeles USCIS asylum office did not reschedule Ms. H.L.'s asylum interview as she requested on April 7, 2011. Instead, on May 24, 2011, it referred her case to the Los Angeles immigration court and issued a Notice to Appear initiating removal proceedings. The Los Angeles USCIS asylum office also stopped Ms. H.L.'s asylum EAD clock on March 21, 2011, the date it initially postponed her interview due to her illness. Since that date, Ms. H.L.'s asylum EAD clock has never restarted but remains permanently stopped at 25 days.

103. The Notice to Appear indicated that her first hearing would be July 7, 2011. For reasons not attributable to Ms. H.L., the immigration court subsequently reset this hearing to November 3, 2011.

104. On September 26, 2011, after learning that her asylum EAD clock had been permanently stopped, Ms. H.L.'s attorney sent a letter to the Court Administrator of the Los Angeles immigration court requesting that her asylum EAD clock be restarted. The Administrator responded by phone, referring him to USCIS. At the next hearing, her attorney asked the immigration judge to start the clock. Although the immigration judge indicated that she could start it as of the hearing date, Ms. H.L.'s asylum EAD clock has never been restarted.

105. On or about December 19, 2011, her attorney filed a request to restart her asylum EAD clock with the USCIS asylum office. After her attorney made two written follow-up requests, a USCIS officer indicated that she would contact EOIR to terminate removal proceedings and remand the case for another asylum interview with USCIS. To Ms. H.L.'s knowledge, no action has been taken by either agency to remand her case. Her removal case remains pending and her asylum EAD clock remains permanently stopped at 25 days.

106. The next hearing on Ms. H.L.'s asylum application is set for February 12, 2014. Under Defendants' Missed Asylum Interview Policy and Practice, Ms. H.L.'s asylum EAD clock will remain permanently stopped throughout this entire period.

107. Ms. H.L applied for an EAD on or about May 17, 2012. But for Defendants' Missed Asylum Interview Policy and Practice, Ms. H.L. would have accrued more than 180 days on her asylum EAD clock at this time and would be eligible for an EAD. Because her asylum EAD clock has been permanently stopped at 25 days under the Missed Asylum Interview Policy and Practice, Ms. H.L.'s EAD application will be denied by USCIS.

108. As a result of not having an EAD, Ms. H.L. has had great difficulty supporting herself. She has little extra money for medical care when she is ill.

109. *L.M.M.M.* Plaintiff L.M.M.M. arrived in the United States on or about May 12, 2008, after fleeing Colombia to escape powerful drug dealers who threatened her entire family with death following her grandson's cooperation with law enforcement against them.

110. Ms. L.M.M.M. filed a complete asylum application on May 1, 2009 with USCIS. The Rosedale, New York asylum office scheduled an interview for her on June 10, 2009. On June 5, 2009, her attorney notified the asylum office in writing, sent by facsimile, that he had a conflict and asked that the interview be rescheduled. When he had not received a response by June 9, 2009, he called the asylum office and was assured that the interview would be postponed. Consequently, neither Ms. L.M.M.M. nor her attorney attended the interview on June 10, 2009.

111. USCIS permanently stopped Ms. L.M.M.M.'s asylum EAD clock at 28 days on June 10, 2009, when she did not appear for the interview. Thereafter, USCIS referred her case to EOIR's New York immigration court for removal proceedings. Since then, there have been several hearings in Ms. L.M.M.M.'s case. At a hearing on February 8, 2011, for reasons not attributable to Ms. L.M.M.M., the immigration court set the case over for another hearing on April 4, 2012. Ms. L.M.M.M.'s asylum EAD clock was not restarted at any of these hearings.

112. Ms. L.M.M.M. has been unsuccessful in getting either USCIS or EOIR to restart her asylum EAD clock despite a letter to the New York asylum office, phone calls to both agencies, and a request to the immigration judge at the April 3, 2012 hearing.

EOIR informed her counsel that it had no authority to restart her clock and that only USCIS' asylum office could do this. In turn, USCIS advised her counsel that because it had no jurisdiction over her case, it could not restart her clock and that she should ask EOIR to do so.

113. The next hearing on Ms. L.M.M.M.'s asylum application is scheduled for April 16, 2015, three years from the date of her most recent hearing and six years from the date of her missed asylum interview. Under Defendants' Missed Asylum Interview Policy and Practice, Ms. L.M.M.M.'s asylum EAD clock will remain permanently stopped from now until then.

114. But for Defendants' Missed Asylum Interview Policy and Practice, Ms. L.M.M.M. would have accrued more than 180 days on her asylum EAD clock at this time. Instead, her asylum EAD clock remains permanently stopped at 28 days. Because her asylum EAD clock is permanently stopped at 28 days, and she has been unsuccessful in getting either Defendant agency to restart it, it would be futile for Ms. L.M.M.M. to apply for an EAD. Were she to do so, the EAD would be denied by USCIS.

115. Ms. L.M.M.M. is eighty-seven years old and will be one month short of ninety at the time of the merits hearing on her asylum application. She suffers from a host of illnesses, including breast cancer, a vertebral body compression deformity, a moderately enlarged heart, high cholesterol, anemia, varicose veins, and gastritis. Because her asylum EAD clock has been stopped and she is unable to obtain an EAD, she is not able to obtain a valid social security number. Without either an EAD or a social security number, it has been difficult for her to verify her eligibility for benefits programs available to people with her health difficulties.

116. *B.M.* Plaintiff B.M. arrived in the United States on or about May 17, 2005, after fleeing Serbia to escape past persecution and threats of future persecution based upon his sexual orientation as a gay man.

117. On July 7, 2008, Mr. B.M. filed a complete asylum application with the USCIS asylum office in Rosedale, New York. His asylum interview was scheduled for August 12, 2008. Mr. B.M. missed this interview through no fault of his own. His attorney requested that it be rescheduled.

118. Although the USCIS asylum office initially agreed to reschedule the interview, it never did so. Instead, it referred Mr. B.M.'s case to the New York immigration court and issued a Notice to Appear initiating removal proceedings. Mr. B.M.'s first hearing was held on March 17, 2009.

119. The New York USCIS asylum office stopped Mr. B.M.'s asylum EAD clock at 36 days on August 12, 2008, the date of his missed interview. EOIR did not restart the clock at Mr. B.M.'s first hearing. Moreover, neither USCIS nor EOIR provided Mr. B.M. with an opportunity to demonstrate that exceptional circumstances caused him to miss his asylum interview. As a result, Mr. B.M.'s asylum EAD clock has remained permanently stopped at 36 days since August 2008.

120. On November 19, 2009, after learning that his asylum EAD clock had been permanently stopped, Mr. B.M.'s attorney sent a letter to EOIR's Chief Immigration Judge requesting that the asylum EAD clock in Mr. B.M.'s case be restarted. On December 18, 2009, EOIR's Office of the Chief Immigration Judge responded in writing by referring Mr. B.M. to USCIS for resolution of his asylum EAD clock issue.

121. Mr. B.M.'s attorney followed up with a letter to the USCIS asylum office, asking that it restart Mr. B.M.'s clock. On May 20, 2011, the USCIS asylum office responded by letter indicating that it could not restart the clock because Mr. B.M. had missed his asylum interview.

122. The merits hearing on Mr. B.M.'s asylum application is set for January 25, 2013. By this date, Mr. B.M.'s asylum EAD clock will have been permanently stopped under Defendants' Missed Asylum Interview Policy and Practice for almost four and one half years.

123. But for Defendants' Missed Asylum Interview Policy and Practice, Mr. B.M. would have accrued more than 180 days on his asylum EAD clock at this time. Thus, but for the Missed Asylum Interview Policy and Practice, Mr. B.M. would be eligible for an EAD.

124. Mr. B.M. was a dentist in Serbia and had been certified as an orthodontist before he fled that country. Because he does not have employment authorization, he has been unable to become certified to practice dentistry in the U.S.

Remand subclass Plaintiffs

125. *G.K.* Plaintiff G.K. arrived in the United States on April 17, 2001, after fleeing India to escape past persecution and threats of future persecution due to her religion and political opinion.

126. She filed a complete asylum application with USCIS on April 18, 2002. USCIS referred her case to the San Francisco immigration court on May 29, 2002. At an October 7, 2002 hearing, the immigration judge denied her application for asylum. At

that time, her asylum EAD clock was at 172 days. On appeal, the BIA and the Ninth Circuit both affirmed the denial of her asylum application.

127. New counsel filed a motion to reopen the case at the BIA, arguing that prior counsel was ineffective and had prejudiced her case. The BIA denied the motion to reopen, but on appeal the Ninth Circuit granted her petition for review. The court found that former counsel's failure to effectively document and present the asylum claim rendered the removal proceedings so fundamentally unfair that Ms. G.K. was prevented from reasonably presenting her case. The court remanded the case to the BIA on August 31, 2009.

128. Pursuant to this Ninth Circuit decision, on February 26, 2010, the BIA vacated its denial of Ms. G.K.'s motion to reopen, reopened the removal proceedings, and remanded the case to the immigration judge for further consideration of the asylum application. The immigration judge then scheduled a hearing in her case for April 29, 2013.

129. Ms. G.K. applied for work authorization on December 16, 2011, by which date her complete asylum application had been pending for more than 180 days, exclusive of any period of applicant-caused delay or period of denial. Due to Defendants' policy of failing to restart an asylum EAD clock following a remand, Ms. G.K.'s asylum EAD clock has remained permanently stopped at 172 days and her EAD application was improperly denied on January 24, 2012.

130. Ms. G.K. never received notice from the immigration court or USCIS that her asylum EAD clock was not restarted following the BIA's decision to reopen her case

and remand it to the immigration court. To date, she has been unable to correct the problems with her asylum EAD clock.

131. Without the ability to work, Ms. G.K. has never been able to use the skills she developed as a fashion merchandiser working for an Indian company with international clients, nor her advanced culinary degree. She has long hoped to use her culinary degree as a chef in the United States. Though she has been offered opportunities to work, she has been unable to pursue these opportunities without work authorization.

132. Ms. G.K. lives with her husband and their twelve-year-old daughter and nine-year-old son. Because she is unable to work, the family relies entirely on her husband to provide for them.

133. Due to Defendants' Remand Policy and Practice, Ms. G.K.'s asylum EAD clock is permanently stopped. But for Defendants' Remand Policy and Practice, Ms. G.K. would be eligible for an EAD at this time.

134. *L.K.G.* Plaintiff L.K.G. first arrived in the United States on January 11, 2007, after fleeing Eritrea to escape past persecution and threats of future persecution due to her political opinion. On January 23, 2007, after determining that Ms. L.K.G. credibly feared persecution in her native Eritrea, USCIS issued her a Notice to Appear.

135. Ms. L.K.G. filed a complete asylum application with the Dallas immigration court at her hearing on September 10, 2007, and was denied asylum on October 19, 2007. At the time of this denial, Ms. L.K.G.'s asylum EAD clock was at 39 days. Ms. L.K.G. appealed this decision to the BIA, which dismissed her appeal on August 19, 2008.

136. On November 19, 2008, after retaining new counsel, Ms. L.K.G. moved to reopen her case before the BIA based on ineffective assistance of former counsel and the existence of previously unavailable material evidence. On May 29, 2009, the BIA granted her motion, reopened her removal proceedings, and remanded the case to the immigration judge for further consideration of the asylum application. She attended her first hearing after remand on August 16, 2010. Her next hearing was then scheduled for April 20, 2011. On March 15, 2011, her attorney sought a continuance of the April 20, 2011 hearing due to a simultaneously scheduled court hearing. The court rescheduled the hearing for October 19, 2011, but later, on its own motion, postponed it until August 20, 2013.

137. Ms. L.K.G. previously applied for and was granted an EAD on December 4, 2008, but this EAD expired on December 11, 2009. Ms. L.K.G. applied to renew her work authorization on or about October 26, 2009. But for Defendants' Remand Policy and Practice, Ms. L.K.G. would have had more than 180 days on her asylum EAD clock at the time of this October 2009 EAD application and thus would have been eligible for an EAD.

138. Ms. L.K.G.'s EAD application was denied on January 19, 2010. Following this denial, she discovered for the first time that her asylum EAD clock was stopped at 39 days and that none of the period since the BIA remand had been applied to her asylum EAD clock.

139. Without the ability to work, Ms. L.K.G. has relied entirely on the generosity of her cousin, her church and friends to meet her basic needs, including a

place to stay, food and clothing. In addition, she has had to rely on the generosity of others to pay for over $1,000 of medical expenses.

140. The emotional strain of her situation has caused her to seek counseling at her church, where she receives emotional support.

141. Ms. L.K.G.'s prior work experience involved taking and developing photographs. She is 33 years old and would like to be able to support herself. Because she does not have work authorization, she cannot apply for jobs where she could use her skills.

142. Due to Defendants' Remand Policy and Practice, Ms. L.K.G.'s asylum EAD clock is permanently stopped at 39 days. But for Defendants' Remand Policy and Practice, Ms. L.K.G. would be eligible for an EAD at this time.

143. *D.W.* Plaintiff D.W. first arrived in the United States on September 21, 2002, after fleeing China to escape past persecution and threats of future persecution due to his religion. On February 10, 2003, Mr. D.W. filed a complete asylum application with the Los Angeles Asylum Office. On June 6, 2003, Mr. D.W.'s case was referred by USCIS to the Los Angeles Immigration Court. At the time Mr. D.W.'s asylum application was referred to the immigration court, his asylum clock was at 122 days.

144. Mr. D.W. attended his initial hearing on July 8, 2003. His asylum EAD clock was set at 148 days on this date. Mr. D.W.'s asylum application was denied by an immigration judge on February 24, 2005. Because scheduling delays between July 8, 2003 and February 24, 2005 were at the request of Mr. D.W.'s attorneys, Mr. D.W.'s asylum EAD clock remained at 148 days at the time of the immigration judge's decision.

145. Mr. D.W. appealed the immigration judge's decision to the BIA and the BIA affirmed the denial on May 4, 2006. On August 17, 2007, following a subsequent appeal, the Ninth Circuit granted a joint motion to remand the case to the BIA to consider whether the immigration judge may have misconstrued some of the record evidence in reaching her adverse credibility determination.

146. On March 7, 2008, the BIA remanded Mr. D.W.'s case to the immigration judge for reconsideration of his eligibility for asylum and entry of a new decision. Following this remand, hearings in Mr. D.W.'s case were postponed by the immigration court numerous times, during the period June 26, 2008 to January 26, 2011. None of these postponements were at the request of Mr. D.W. Consequently, but for Defendants' Remand Policy and Practice, Mr. D.W.'s asylum EAD clock should have exceeded 180 days during this time. His merits hearing is scheduled for September 3, 2013.

147. Mr. D.W. previously applied for and was granted an EAD in 2003. His most recent request to renew his employment authorization, filed on March 28, 2011, was denied on May 24, 2011. Defendants applied their Remand Policy and Practice to Mr. D.W. in reaching this decision and failed to apply any of the time since the remand in his case to his asylum EAD clock.

148. Mr. D.W. had to leave his job after his EAD expired. He initially relied on his savings to pay for food, rent and other expenses. His savings have run out and he now is borrowing money from a friend to pay for all of his living expenses.

149. Mr. D.W. is not sure that he will be able to borrow money to continue to pay for an attorney to represent him in his asylum proceedings.

150. Due to Defendants' Remand Policy and Practice, Mr. D.W.'s asylum EAD clock is permanently stopped at 148 days. But for Defendants' Remand Policy and Practice, Mr. D.W. would be eligible for an EAD at this time.

CLASS ALLEGATIONS

151. Plaintiffs bring this action on behalf of themselves and all other persons who are similarly situated, pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2). A class action is proper because this action involves questions of law and fact common to the class, the class is so numerous that joinder of all members is impractical, the claims of the Plaintiffs are typical of the claims of the class, the Plaintiffs will fairly and adequately protect the interests of the class, and Defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole.

152. All Plaintiffs seek to represent a "Notice and Review class" consisting of:

> All noncitizens in the United States who have filed or will file with Defendants a complete I-589 (Application for Asylum and Withholding of Removal); who have been or will be issued a Notice to Appear or Notice of Referral for removal proceedings; whose applications for employment authorization have been or will be denied; and whose asylum EAD clock determinations have been or will be made without legally sufficient notice or a meaningful opportunity to challenge such determinations.

153. The Notice and Review class is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the exact number of potential class members because Defendants are in the best position to identify such persons. Upon information and belief, there are thousands of asylum applicants to whom Defendants have failed or will fail to provide legally sufficient notice of the status of their asylum EAD clocks and a meaningful opportunity to challenge improper asylum EAD clock determinations.

154. Questions of law common to the Notice and Review class are whether Defendants' Notice and Review Policies and Practices violate the U.S. Constitution, the INA, the governing regulations, and the APA.

Hearing Subclass

155. Plaintiff B.H. seeks to represent a subclass, entitled "Hearing Subclass," consisting of:

> Individuals who have been or will be issued a Notice to Appear or Notice of Referral for removal proceedings; who have filed or sought to file or who will file or seek to file a complete asylum application with the immigration court; but whose asylum EAD clocks did not start or will not start on the date that this application was or will be filed because of Defendants' policy requiring asylum applications to be filed at a hearing before an immigration judge.

156. In accordance with the applicable regulations, Plaintiff filed his complete asylum applications with the immigration court more than 180 days ago, exclusive of any period of applicant-caused delay. Defendants have denied his application for work authorization based on their Hearing Policy and Practice, which dictates that an EAD asylum clock can start or restart only at a hearing before an immigration judge. Consequently, Plaintiff's asylum EAD clock does not reflect the period following the filing or attempted filing of a complete asylum application with the immigration court prior to the next hearing.

157. The Hearing subclass is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the exact number of potential subclass members because Defendants are in the best position to identify such persons. Upon information and belief, there are hundreds of asylum applicants who are unable to obtain employment authorization because Defendants have refused or will refuse to start their

asylum EAD clocks until a hearing before an immigration judge even though they already have filed or will file a complete asylum application with the immigration court prior to that hearing.

158. Questions of law common to the Hearing subclass are whether Defendants' Hearing Policy and Practice violates the U.S. Constitution, the INA, the regulations, and/or the APA.

Prolonged Tolling Subclass

159. Plaintiffs M.A. and A.S.D. seek to represent a subclass entitled "Prolonged Tolling subclass," consisting of:

> Asylum applicants whose asylum EAD clocks are or will be stopped due to delay attributed to them by Defendants; who have resolved or will resolve the delay prior to the next scheduled hearing; but whose asylum EAD clocks remain or will remain stopped until the next hearing date.

160. Plaintiffs filed complete asylum applications with the immigration court and their applications have been pending for more than 180 days exclusive of any period of applicant-caused delay. Defendants have denied or will deny their applications for work authorization based on their Prolonged Tolling Policy and Practice, which dictates that an asylum EAD clock cannot be restarted until the next hearings date even when this tolls the running of the 180-day waiting period beyond the period of applicant-caused delay.

161. The Prolonged Tolling subclass is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the exact number of potential subclass members because Defendants are in the best position to identify such persons. Upon information and belief, there are hundreds of asylum applicants who are unable to obtain employment authorization because Defendants have refused or will refuse to start

or restart their asylum EAD clocks until the next hearing before an immigration judge even though this stops their asylum EAD clocks for a prolonged period beyond that which they caused or requested.

162. Questions of law common to the Prolonged Tolling subclass are whether Defendants' Hearing Policy and Practice violates the U.S. Constitution, the INA, the regulations, and/or the APA.

Missed Asylum Interview Subclass

163. Plaintiffs M.F., H.L., L.M.M.M, and B.M. seek to represent a subclass, entitled "Missed Asylum Interview Subclass," consisting of:

> Asylum applicants who have failed or will fail to appear for an asylum interview with USCIS; whose asylum cases have been or will be referred to EOIR for removal hearings following the missed asylum interview; and whose asylum EAD clocks have been or will be stopped on the date of the missed asylum interview and are not restarted thereafter by either USCIS or EOIR, even though they appear before EOIR and are prepared to move forward with their asylum application.

164. Plaintiffs filed complete asylum applications with the immigration court and their applications have been pending for more than 180 days, exclusive of any period of applicant-caused delay. Defendants have denied or will deny their applications for work authorization based on their Missed Asylum Interview Policy and Practice, which permanently stops the asylum EAD clock of an asylum applicant who has failed to appear at an asylum interview and whose case is referred to EOIR for a removal hearing.

165. The Missed Asylum Interview subclass is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the exact number of potential subclass members because Defendants are in the best position to identify such persons. Upon information and belief, there are hundreds of asylum applicants whose asylum

EAD clocks were or will be stopped following a missed asylum interview and who are or will be unable to obtain employment authorization because Defendants have refused or will refuse to restart their asylum EAD clocks following a referral to EOIR.

166. Questions of law common to the Missed Asylum Interview subclass are whether Defendants' Missed Asylum Interview Policy and Practice violates the U.S. Constitution, the INA, the regulations, and/or the APA.

Remand Subclass

167. Plaintiffs G.K., L.K.G. and D.W. seek to represent a subclass, entitled "Remand subclass," consisting of:

> Asylum applicants whose asylum EAD clocks were or will be stopped following the denial of their asylum applications by the immigration court, and whose asylum EAD clocks are not or will not be started or restarted subsequent to an appeal in which either the BIA or a federal court of appeals remands their case for further adjudication of their asylum claims

168. Plaintiffs filed complete asylum applications with the immigration court and their applications have been pending for more than 180 days, exclusive of any period of applicant-caused delay. Defendants have denied or will deny their applications for work authorization based on their Remand Policy and Practice, which dictates that an asylum EAD clock cannot be started or restarted following remand.

169. The Remand subclass is so numerous that joinder of all members is impracticable. Plaintiffs are not aware of the exact number of potential class members because Defendants are in the best position to identify such persons. However, upon information and belief, there are hundreds of asylum applicants who have been or will be denied employment authorization because Defendants unlawfully failed to start or restart their asylum EAD clocks following remand.

170. Questions of law common to the Remand subclass are whether the Defendants' Remand Policy and Practice violates the U.S. Constitution, the INA, the immigration regulations, and/or the APA.

171. The claims of all the named Plaintiffs are typical of the Notice and Review class. The claims of Plaintiffs seeking to represent each proposed subclass are typical of the members of each respective proposed subclass.

172. The Plaintiffs will fairly and adequately represent and protect the interests of the members of the proposed Notice and Review class. The Plaintiffs seeking to represent each proposed subclass will fairly and adequately represent the interests of each respective proposed subclass.

173. Plaintiffs are represented by competent counsel with extensive experience in complex class actions and immigration law.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

174. Defendants have acted on grounds generally applicable to the proposed class and subclasses, thereby making appropriate final declaratory and injunctive relief with respect to the class and each subclass.

175. An actual and substantial controversy exists between the class and each subclass and the Defendants as to their respective legal rights and duties. Plaintiffs contend that Defendants' actions violate Plaintiffs' rights and the rights of proposed class and subclass members.

176. Defendants' miscalculations of Plaintiffs and proposed class and subclass members' asylum EAD clocks based upon their policies and practices has caused and

will continue to cause irreparable injury to Plaintiffs and proposed class and subclass members. Plaintiffs have no plain, speedy, and adequate remedy at law.

177. The EAD applications of Plaintiffs and the class and subclasses have been or will be denied due to Defendants' policies and practices challenged herein. Defendants' actions constitute final agency action for the purpose of the APA, 5 U.S.C. § 701, *et seq.*

178. The INA and applicable regulations provide for no administrative appeal from a denial of an EAD application. Accordingly, Plaintiffs have exhausted their administrative remedies.

179. Under 5 U.S.C. §§ 702 and 704, Plaintiffs and proposed class and subclass members have suffered a "legal wrong" and have been "adversely affected or aggrieved" by agency action for which there is no other adequate remedy in a court of law.

180. Based on the foregoing, the Court should grant declaratory and injunctive relief under 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. § 702.

First Cause of Action
Violation of the Immigration and Nationality Act and Regulations and the Due Process Clause of Fifth Amendment: Lack of Notice and Meaningful Opportunity to Contest (on Behalf of All Plaintiffs and the Notice and Review Class)

181. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

182. Defendants have a nationwide Notice and Review Policy and Practice of not providing legally sufficient notice to asylum applicants when their asylum EAD clocks are stopped or not started or restarted during removal proceedings and when their EAD applications are denied, and of failing to provide a meaningful opportunity to

contest asylum EAD clock determinations and EAD application denials. This policy and practice deprives Plaintiffs and the class of the opportunity to make informed decisions concerning whether to request a rescheduled hearing, continuance or delay in the adjudication of their asylum applications; the opportunity to address or cure any applicant-caused delay; and the opportunity to respond to and contest an incorrect decision concerning their asylum EAD clocks and EAD applications, including whether a rescheduled hearing, continuance, or delay was caused by the applicant.

183. Through this policy and practice, Defendants violate the INA and regulations governing the issuance of employment authorization documents, including *inter alia*, 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a), 208.7, 1208.7, and 103.2 and 103.3, and deprive Plaintiffs and the Notice and Review class of an opportunity to apply for a benefit provided under law without due process, in violation of the Fifth Amendment of the Constitution.

Second Cause of Action
Violation of Administrative Procedure Act: Lack of Notice and Meaningful Opportunity to Contest (on Behalf of All Plaintiffs and the Notice and Review Class)

184. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

185. Defendants' failure to provide asylum applicants with legally sufficient notice of or an opportunity to contest asylum EAD clock determinations and EAD denials is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. As such, it violates the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Third Cause of Action
Violation of the Immigration and Nationality Act, Regulations and Due Process Clause of Fifth Amendment: Refusal to Start Asylum

EAD Clock except at Hearing (on Behalf of Plaintiff B.H. and the Hearing Subclass)

186. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

187. Defendants have a nationwide Hearing Policy and Practice dictating that asylum EAD clocks can start only at a hearing. This policy and practice prevents some asylum applicants from filing an application with the immigration court at a time other than a scheduled hearing before an immigration judge. For those applicants who are able to file an asylum application with the immigration court prior to a hearing, this policy and practice prevents Defendants from immediately starting the asylum EAD clock upon the filing of the application. The clock does not start before the next scheduled hearing.

188. Through this policy and practice, which has prevented or will prevent Plaintiff B.H. and the Hearing subclass from receiving work authorization during the legally permitted timeframe, Defendants violate the INA, including, *inter alia,* 8 U.S.C. §1158(d)(2), and its implementing regulations, including, *inter alia*, 8 C.F.R. §§ 208.3(c), 208.4(b), 208.7(a), 274a.12(c)(8), 274a.13(a), 1208.3(c), 1208.4(b), and 1208.7(a), and deprive the Plaintiff and Hearing subclass of an opportunity to apply for a benefit provided under law without due process, in violation of the Fifth Amendment of the Constitution.

<u>Fourth Cause of Action</u>
Violation of Administrative Procedure Act: Refusal to Start Asylum EAD Clock except at Hearing (on Behalf of Plaintiffs B.H and the Hearing Subclass)

189. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

190. Defendants' refusal to start the asylum EAD clocks of Plaintiff B.H. and the Hearing subclass members prior to their next scheduled hearings despite the filing of a complete asylum application with the immigration court is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. As such, it violates the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Fifth Cause of Action
Violation of the Immigration and Nationality Act, Regulations and Due Process Clause of Fifth Amendment: Refusal to Start or Restart Asylum EAD Clock between Hearings (on Behalf of Plaintiffs M.A., A.S.D. and the Prolonged Tolling Subclass)

191. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

192. Defendants have a nationwide Hearing Policy and Practice of refusing to start or restart the asylum EAD clocks of Plaintiffs M.A. and A.S.D. and members of the Prolonged Tolling subclass when their applicant-caused delay has been resolved and instead continuing to toll the 180-day waiting period for an EAD until the next scheduled hearing date. This policy and practice impermissibly tolls the running of the 180-day waiting period for an EAD beyond the period of applicant-caused delay for reasons related to EOIR's case management and the congested dockets of the immigration courts.

193. Through this policy and practice, which has prevented or will prevent Plaintiffs M.A., A.S.D., and the Prolonged Tolling subclass from receiving work authorization during the legally permitted timeframe, Defendants violate the INA, including, *inter alia,* 8 U.S.C. §1158(d)(2), and its implementing regulations, including, *inter alia*, 8 C.F.R. §§ 208.7(a)(2) and 1208.7(a), and deprive the Plaintiffs and the

Prolonged Tolling subclass of an opportunity to apply for a benefit provided under law without due process, in violation of the Fifth Amendment of the Constitution.

Sixth Cause of Action
Violation of Administrative Procedure Act: Refusal to Start or Restart Asylum EAD Clock between Hearings (on Behalf of Plaintiffs M.A., A.S.D. and the Prolonged Tolling Subclass)

194. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

195. Defendants' refusal to start or restart the asylum EAD clocks of Plaintiffs M.A. and A.S.D. and members of the Prolonged Tolling subclass when their applicant-caused delay has been resolved and instead to continue to toll the 180-day waiting period for an EAD until the next scheduled hearing is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. As such, it violates the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Seventh Cause of Action
Violation of the Immigration and Nationality Act, Regulations and Due Process Clause of the Fifth Amendment: Failure to Restart the Asylum EAD Clock at the First Immigration Court Hearing Following a Referral for a Missed Asylum Interview (on Behalf of Plaintiffs M.F., H.L., L.M.M.M., and B.M. and the Missed Asylum Interview Subclass)

196. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

197. Defendants have a nationwide Missed Asylum Interview Policy and Practice pursuant to which an asylum EAD clock that is stopped following a missed asylum interview before USCIS cannot be restarted after the case is referred to EOIR for removal proceedings. This policy and practice prevents members of this proposed

subclass from having their asylum EAD clocks restarted for the entire time that their asylum application is pending before an immigration judge.

198. Through this policy and practice, which has prevented or will prevent Plaintiffs M.F., H.L., L.M.M.M., B.M. and the Missed Asylum Interview Subclass from receiving work authorization during the legally permitted timeframe, Defendants violate the INA, including, *inter alia,* 8 U.S.C. §1158(d)(2), and its implementing regulations, including, *inter alia*, 8 C.F.R. §§ 103.2(b)(16), 208.7(a), 274a.12(c)(8), 274a.13(a), and 1208.7(a), and deprive the Plaintiffs and Missed Asylum Interview Subclass of an opportunity to apply for a benefit provided under law without due process, in violation of the Fifth Amendment of the Constitution.

Eighth Cause of Action
Violation of Administrative Procedure Act: Failure to Restart the Asylum EAD Clock at the First Immigration Court Hearing Following a Referral for a Missed Asylum Interview (on Behalf of Plaintiffs M.F., H.L., L.M.M.M., and B.M. and the Missed Asylum Interview Subclass)

199. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

200. Defendants' refusal to restart the asylum EAD clocks of Plaintiffs M.F., H.L., L.M.M.M., and B.M. and the Missed Asylum Interview subclass members at their first master calendar hearing following the referral of their cases to immigration court and Defendants' failure to provide an adequate opportunity for these plaintiffs and class members to demonstrate that exceptional circumstances justified their failures to appear at an asylum interview are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. As such, they violate the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Ninth Cause of Action

Violation of the Immigration and Nationality Act and Regulations and Due Process Clause of the Fifth Amendment: Failure to Restart the Asylum EAD Clock after Remand (on Behalf of Plaintiffs G.K., L.K.G., D.W. and the Remand Subclass)

201. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

202. Defendants have a nationwide Remand Policy and Practice dictating that an asylum EAD clock cannot be started or restarted after the BIA or a federal appeals court has remanded an asylum case for adjudication.

203. Through this policy and practice, which has prevented or will prevent Plaintiffs G.K., L.K.G. and D.W. and the Remand subclass from receiving work authorization during a legally permitted timeframe, Defendants violate the INA, including, *inter alia,* 8 U.S.C. §1158(d)(2), and its implementing regulations governing the issuance of employment authorization documents, including *inter alia*, 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a), 208.7(a)(2), and 1208.7(a)(2).

Tenth Cause of Action

Violation of Administrative Procedure Act: Failure to Restart Asylum EAD Clock on Remand (on Behalf of Plaintiffs G.K., L.K.G. and D.W. and the Remand Subclass)

204. Plaintiffs incorporate by reference the allegations of fact set forth in the previous paragraphs.

205. Defendants' refusal to start the asylum EAD clocks of the Plaintiffs G.K., L.K.G. and D.W. and the Remand subclass following remand by the BIA or a federal appeals court is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. As such, it violates the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*.

Prayer for Relief

Wherefore:

A. Plaintiffs respectfully request that this Court:

1. Assume jurisdiction over this matter;

2. Certify this case as a class action, and certify a Notice and Review class, Hearing subclass, Prolonged Tolling subclass, Missed Asylum Interview subclass and Remand subclass;

3. Appoint all Plaintiffs as representatives of the Notice and Review class;

4. Appoint Plaintiff B.H. as representative of the Hearing subclass; Plaintiffs M.A. and A.S.D. as representatives of the Prolonged Tolling subclass; Plaintiffs M.F., B.M., L.M.M.M. and H.L. as representatives of the Missed Asylum Interview subclass; and Plaintiffs L.K.G., G.K., and D.W. as representatives of the Remand subclass;

5. Appoint Matt Adams, Chris Strawn, Melissa Crow, Mary Kenney, Emily Creighton, Robert Pauw, Robert Gibbs and Iris Gomez as class counsel pursuant to Federal Rule of Civil Procedure 23(g).

B. As remedies for each of the causes of action asserted above, Plaintiffs and class members request judgment as follows:

1. A declaratory judgment finding Defendants' failure to provide legally sufficient notice to applicants whose asylum EAD clocks are stopped or not started or restarted during removal proceedings and a meaningful opportunity to correct errors to be arbitrary and capricious, an

abuse of discretion, and in violation of the statute and regulations and a violation of due process;

2. A declaratory judgment finding Defendants' Hearing Policy and Practice, Prolonged Tolling Policy and Practice, Missed Asylum Interview Policy and Practice, and Remand Policy and Practice to be arbitrary and capricious, an abuse of discretion, in violation of the statute and regulations, and a violation of due process;

3. A permanent injunction ordering that if an asylum applicant is in removal proceedings before an immigration judge, then any decision to stop or not start or restart the asylum EAD clock must be made on the record, and only after the applicant has been notified of the consequences of requesting or causing a delay and given an opportunity to respond;

4. A permanent injunction ordering Defendants to establish an adequate process for an asylum applicant to contest an asylum EAD clock or EAD decision that is considered erroneous;

5. A permanent injunction ordering Defendants to start the asylum EAD clock when an asylum applicant files a complete asylum application with EOIR;

6. A permanent injunction ordering Defendants to start or restart the asylum EAD clock between immigration court hearings when an applicant resolves any delay he or she may have caused;

7. A permanent injunction ordering Defendants to start or restart the asylum EAD clock at the first hearing following a referral to immigration

court of any case in which the applicant missed an interview before the asylum office;

8. A permanent injunction ordering Defendants to start or restart the asylum EAD clock following a remand of an asylum case by either the Board of Immigration Appeals or a federal court of appeals;

9. A permanent injunction ordering Defendant USCIS to readjudicate Plaintiffs' EAD applications in accordance with the above-referenced guidelines;

10. Reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and

11. Such other and further relief as this Court deems just and appropriate.

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Dated: June 4, 2012 By: /s/ Matt Adams

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, I electronically filed the foregoing motion and proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Dated: June 5, 2012

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