

## **USCIS Issues Guidance on Refiled I-589s Following EOIR Dismissal or Termination—FAQs<sup>1</sup>**

On October 16, 2023, United States Citizenship and Immigration Services (USCIS) will implement new Guidance<sup>2</sup> explaining how it will treat issues raised by the filing of affirmative applications for asylum (I-589s) following dismissal by the immigration court, also known as Executive Office for Immigration Review (EOIR). This Guidance comes roughly a year and a half after Immigration and Customs Enforcement’s (ICE) Office of the Principal Legal Advisor (OPLA) began implementing prosecutorial discretion (PD) that strongly favored dismissing removal proceedings in non-priority cases.<sup>3</sup> Asylum seekers wishing to refile their I-589s have been left with myriad unanswered questions,<sup>4</sup> many of which have finally received a response. This Practice Alert is based on information available as of October 16, 2023. This is an evolving area of the law so practitioners should check the cited USCIS webpages for updates before filing their applications.

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<sup>2</sup> This practice alert uses the term “Guidance” to refer to several overlapping webpages describing the new procedures. These include: USCIS, USCIS Issues New Instructions for Filing Asylum Applications with USCIS After EOIR Dismissal or Termination of Removal Proceedings (Oct. 13, 2023), <https://www.uscis.gov/newsroom/alerts/uscis-issues-new-instructions-for-filing-asylum-applications-with-uscis-after-eoir-dismissal-or-termination-of-removal-proceedings>; USCIS, How USCIS Processes a Form I-589 Filed After Removal Proceedings are Dismissed or Terminated (Oct. 13, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/how-uscis-processes-a-form-i-589-filed-after-removal-proceedings-are-dismissed-or-terminated>; and the Special Instructions section of USCIS, I-765, Application for Employment Authorization (Oct. 13, 2023), <https://www.uscis.gov/i-765>.

<sup>3</sup> Memorandum from Kerry A. Doyle, ICE Principal Legal Advisor, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (Apr. 3, 2022), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_guidanceApr2022.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf). See also NIPNLG, *Practice Advisory: Advocating for Prosecutorial Discretion Under the Biden Administration’s Prosecutorial Discretion Guidance* (Sep. 15, 2023), <https://nipnl.org/work/resources/practice-advisory-advocating-prosecutorial-discretion-under-biden-administrations>.

<sup>4</sup> Over the past year and a half, advocates, including NIPNLG and the American Immigration Lawyers Association (AILA), have been asking for answers to these questions. See, AILA, *AILA’s Asylum & Refugee Committee Sends Follow-Up Letter to USCIS Requesting Guidance on the Doyle Memo* (May 9, 2023), AILA Doc. No. 23051106, [aila.org](https://aila.org). See also, Congressman Bonamici, *Bonamici Leads Call for Guidance to Help Asylum Seekers* (Nov. 3, 2022), <https://bonamici.house.gov/media/press-releases/bonamici-leads-call-guidance-help-asylum-seekers>.

## MAJOR TAKEAWAYS OF THE NEW GUIDANCE

### **Must asylum seekers file a new application with USCIS after dismissal or termination<sup>5</sup> from immigration court if they wish to pursue asylum?**

The Guidance clarifies that if an asylum seeker filed for asylum with EOIR and their removal proceedings have been dismissed or terminated, they must refile their I-589 with USCIS.<sup>6</sup>

*Practice Pointer: If the asylum seeker does not refile with USCIS, they will be in the United States without lawful status and when any EAD that they may have had through their EOIR-filed asylum application expires, (see below), they will no longer have work authorization. Practitioners should carefully explore the legal ramifications of refiling or not refiling for asylum with their clients. If there are future anti-immigrant administrations, DHS may place undocumented former asylum seekers back into removal proceedings and they may not be able to meet an exception to the one year filing deadline.<sup>7</sup>*

### **What date will USCIS list on the receipts it issues for refilled I-589s?**

The most significant aspect of the Guidance states that if the asylum seeker filed an I-589 with EOIR, and the proceedings are terminated or dismissed, USCIS will issue a receipt with the EOIR filing date. The receipt date is significant because having the earlier date preserved will address concerns raised by refiling the I-589 regarding the one year filing deadline, derivatives who have aged out while the application has been pending, and employment authorization.

If the noncitizen did not file an I-589 with immigration court, they will receive a receipt from USCIS with the current filing date, as any affirmative asylum applicant would.

### **How does USCIS plan to treat I-589s previously filed with USCIS (even if USCIS never accepted the I-589 or conducted a merits interview with the asylum seeker)?**

Disturbingly, the Guidance indicates that if an asylum seeker originally filed their I-589 with USCIS and USCIS “referred, forwarded, or transferred” the case to EOIR, USCIS intends to issue a

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<sup>5</sup> In general, both “termination” and “dismissal” refer to the IJ ending removal proceedings without a removal order. See *Matter of Coronado Acevedo*, 28 I&N Dec. 648 (A.G. 2022), (clarifying at footnote 1 that except in some specific circumstances, the words can generally be used interchangeably).

<sup>6</sup> There have continued to be some question by practitioners whether EOIR or OPLA can simply transfer the I-589 to USCIS, as it does in adjustment of status cases. See USCIS, Immigration Benefits in EOIR Removal Proceedings (last updated May 4, 2023), <https://www.uscis.gov/laws-and-policy/other-resources/immigration-benefits-in-eoir-removal-proceedings> (explaining that ICE can transfer an adjustment of status application to USCIS for adjudication following termination of removal proceedings.) Although anecdotally these transfers had not been happening with I-589s, this question has now been definitively answered.

<sup>7</sup> If there is a future policy to place these asylum seekers back into removal proceedings, they may be at particular risk for receiving *in absentia* removal orders. Practitioners should counsel them of this risk and the importance of keeping in contact with counsel and keeping their address updated with USCIS.

new, discretionary Notice to Appear (NTA) to send the asylum application back to EOIR. While there is some logic to USCIS sending “referred” cases to EOIR, since cases are “referred” after the asylum office conducts an asylum interview and determines that the asylum seeker does not meet the office’s criteria for an asylum grant,<sup>8</sup> the Guidance also sweeps in asylum seekers whose I-589s were “forwarded or transferred” to immigration court.

USCIS’s overbroad inclusion of I-589s that were “forwarded or transferred” to immigration court will prejudice many vulnerable asylum seekers who have been waiting to present their asylum cases. For the past several years, some asylum seekers who are apprehended near the border and placed into removal proceedings have been served NTAs which have not been timely filed with the immigration court. To comply with the one year filing deadline while the asylum seeker waits for Department of Homeland Security (DHS) to file the NTA, DHS implemented a system whereby asylum seekers are required to determine whether their NTA has been filed with the immigration court, and if not, they must file with USCIS, which will then issue an NTA and “forward or transfer” the I-589 to EOIR.<sup>9</sup>

The new Guidance seems to penalize some asylum seekers based arbitrarily on whether or not DHS timely filed their NTA with the immigration court. That is, if the NTA was filed within a year of the noncitizen’s entry, such that the asylum seeker filed their I-589 with the court to meet the one year filing deadline, they may now (eventually) have their asylum application heard by the asylum office after refiling their I-589 with USCIS. If, however, DHS did not file the NTA with EOIR timely, and the asylum seeker was forced to file the I-589 with USCIS to comply with the one year filing deadline and trigger filing of the NTA, pursuant to the Guidance, it seems that USCIS will issue a new NTA, putting the asylum seeker back into immigration court after the asylum seeker refiles the I-589 with USCIS.

It is unclear why USCIS has taken this position cases in which the I-589s were “forwarded or transferred” to immigration court. However, this practice will relieve USCIS of having to adjudicate thousands of cases in this posture. Indeed, USCIS has stated during a stakeholder call that the asylum backlog at USCIS has reached over one million cases.

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<sup>8</sup> Nonetheless, an argument could be made for asylum seekers having the ability to have a second asylum interview if there are changed circumstances since their initial interview. The USCIS Affirmative Asylum Procedures Manual (AAPM) permits asylum seekers to refile with the asylum office even after the asylum office previously denied the application on the merits, though they must generally demonstrate a change in circumstances to be successful. See AAPM at 195-198 (2023)

<https://www.uscis.gov/sites/default/files/document/foia/AffirmativeAsylumProceduresManual.pdf>. It is anomalous that an asylum seeker could have a second asylum application heard by the asylum office but not have a first asylum application heard based solely on DHS’s bureaucratic docketing choices.

<sup>9</sup> See USCIS, Form I-589 Filing Instructions Tool (last updated May 4, 2023), <https://www.uscis.gov/humanitarian/form-i-589-filing-instructions-tool>. Note: because this page was last updated in May, it erroneously instructs asylum seekers to refile their I-589 with the Asylum Vetting Center rather than the appropriate lockbox. Likewise, USCIS, What Happens After You File Form I-589 With USCIS (last updated Jan. 26, 2021) <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/what-happens-after-you-file-form-i-589-with-uscis>, also still includes erroneous information.

*Practice Pointer: Practitioners should generally not accept dismissal in cases where the I-589 was previously filed with USCIS if the client intends to continue to pursue asylum. Practitioners whose clients want to pursue asylum should consider opposing OPLA efforts to dismiss removal proceedings, since doing so will apparently lead to a bureaucratic ping ponging of the case to USCIS and back to EOIR.<sup>10</sup> Practitioners should examine the case history before accepting dismissal in these cases and carefully discuss with their clients their intention to pursue asylum. NIPNLG will engage in advocacy on this issue which arbitrarily seems to allow some asylum seekers the opportunity to have an affirmative interview and not others based solely on when DHS filed their NTA.*

## **DETAILED FILING INSTRUCTIONS**

### **Where do asylum seekers file new I-589s following EOIR dismissal?**

According to the Guidance, asylum seekers refiling with USCIS after removal proceedings have been dismissed must file with the appropriate Lockbox. *These filing instructions are a change;* previously those filing I-589s after immigration court dismissal had been instructed to file with the Asylum Vetting Center.<sup>11</sup> As with any USCIS filing, practitioners should submit I-589s in a manner that results in independent proof of filing such as certified mail or overnight delivery. Asylum seekers cannot refile their I-589 online with USCIS.

### **Should the asylum seeker refile the same I-589 with USCIS that they filed with EOIR?**

The Guidance requires the asylum seeker to refile the application using the current version of form I-589. The most recent version of the form is dated March 1, 2023, so if the prior application was submitted on an earlier version of the form, the asylum seeker will need to complete a new form.

### **What if the asylum seeker wants to add additional information to the newly filed I-589?**

Since the asylum seeker must complete a new application form, they could add new information to it.

*Practice Pointer: Asylum seekers should be aware, however, that both I-589s will be in the file that the adjudicator(s) will ultimately review so it is important that there is no contradiction between the two applications unless the asylum seeker provides a detailed*

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<sup>10</sup> Practitioners can cite to the David Neal memo on prosecutorial discretion to argue that the immigration court should be hearing cases where the respondent wishes to pursue relief. David Neal, EOIR, Department of Homeland Security Enforcement Priorities and Prosecutorial Discretion Initiatives, at 4 (Sep. 28, 2023), [https://www.justice.gov/d9/2023-10/dm-23-04\\_0.pdf](https://www.justice.gov/d9/2023-10/dm-23-04_0.pdf). (“Immigration judges should bear in mind that resolutions other than dismissal can also be appropriate in cases involving respondents who are not civil immigration enforcement priorities.”). See also, NIPNLG, Template Opposition to Unilateral DHS Motion to Dismiss (May 2, 2022), <https://nipnlg.org/work/resources/template-opposition-unilateral-dhs-motion-dismiss>.

<sup>11</sup> There is still erroneous filing information on the USCIS website. See note 8 above.

*explanation about the differences in applications. If practitioners do not have access to prior I-589s, practitioners should seek the Record of Proceedings (ROP) from the Immigration Court where the asylum seeker filed the prior I-589(s).<sup>12</sup> Further, practitioners should be aware of Matter of M-A-F-, 26 I&N Dec. 651 (BIA 2015), which held that a subsequent asylum application that is based on a wholly new basis for asylum can be viewed as a new asylum application for one year filing deadline purposes.*

### **What else should asylum seeker submit with the I-589 application?**

Whether or not the asylum seeker filed a prior I-589, the Guidance suggests that asylum seekers include proof that their EOIR proceedings were dismissed or terminated, such as a copy of the immigration judge's order. If the asylum seeker filed the I-589 with the immigration court, they must also submit a copy of the previously filed I-589 with proof that it was submitted, such as a stamp from the court. If practitioners do not have access to the stamped I-589, practitioners should submit a request for the ROP.

### **What if the asylum seeker already filed an I-589 with USCIS after EOIR dismissal or termination and they were issued a receipt with the then current filing date rather than the date of the EOIR-filed I-589?**

If the asylum seeker received a receipt from USCIS with the newly filed I-589 date, they should send a detailed cover letter *to the local asylum office* where the I-589 is pending, requesting that it issue a receipt with the initial EOIR filing date because the proceedings were dismissed or terminated. The letter should also include proof of the filing date of the I-589 with EOIR as well as proof that the removal proceedings were dismissed or terminated. The instructions also indicate that the asylum seeker "may also submit any additional or updated information related to your claim for asylum."<sup>13</sup>

*Practice Pointer: Given the likelihood that the asylum interview will not be scheduled for years, it may not be advisable to submit further substantive evidence with the letter since there will likely be a further need to submit more evidence closer to the interview date.*

### **How does the Guidance affect the One Year Filing Deadline?**

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<sup>12</sup> For instructions on seeking the ROP, see DOJ, Request a Record of Proceeding (ROP) (last updated Oct. 13, 2023), <https://www.justice.gov/eoir/ROPrequest>. Note that this webpage seems to indicate that it is possible to seek an ROP, rather than a FOIA, even when the respondent is not actively in removal proceedings. ("If you are or were in proceedings... and your Request for ROP is not fulfilled, please be sure to double check the information you submitted.").

<sup>13</sup> See USCIS, How USCIS Processes a Form I-589 Filed After Removal Proceedings are Dismissed or Terminated (Oct. 13, 2023), <https://www.uscis.gov/humanitarian/refugees-and-asylum/how-uscis-processes-a-form-i-589-filed-after-removal-proceedings-are-dismissed-or-terminated>.

Since the original EOIR receipt date will be used on the newly filed I-589 with USCIS, if the I-589 filed with the court was timely filed, the asylum seeker should be considered to have timely filed.

*Practice Pointer: The Guidance does not give a deadline by which asylum seekers must refile affirmatively in order to receive a receipt with the original EOIR filing date. If asylum seekers wish to pursue their cases before USCIS, it would likely be prudent to file within “a reasonable period of time” following EOIR dismissal.<sup>14</sup> What constitutes a reasonable period of time will depend upon the facts of the case. For example, an asylum seeker who is currently pro se and does not speak English will require more time to refile their I-589 than a represented asylum seeker. Furthermore, given the current legal representation crisis where the demand for legal representation is greater than the number of authorized representatives,<sup>15</sup> pro se asylum seekers will likely face delays in finding competent legal representation. Without legal representation, it is unlikely that asylum seekers will be able to successfully navigate the refiling process on their own.<sup>16</sup>*

### **How does the Guidance affect dependents?**

A primary concern of advocates following large-scale asylum dismissals was that derivative children could have aged out while the asylum application was pending before EOIR, and if refiling with USCIS was seen as a new application with a later filing date, the derivative could lose their protection under the Child Status Protection Act. By preserving the initial filing date, dependent children will continue to qualify for derivative asylum even if they have aged out. They must remain unmarried, however, to qualify for derivative status.<sup>17</sup>

### **When will USCIS schedule an interview for the asylum seeker?**

The Guidance also specifies that the original receipt date will be used for “asylum interview scheduling priority.” Since the asylum offices use a “Last In, First Out” scheduling system, that

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<sup>14</sup> See 8 CFR §208.4(a)(4)(ii).

<sup>15</sup> See Annie McDonough, *Migrants Seeking Asylum in New York City Are Struggling to Find Lawyers*, City and State NY (Feb. 23, 2023), <https://www.cityandstateny.com/policy/2023/02/migrants-seeking-asylum-new-york-city-are-struggling-find-lawyers/383241/>.

<sup>16</sup> See Samantha Balaban et al, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes*, NPR (Feb. 25, 2018), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>.

<sup>17</sup> See USCIS, Child Status Protection Act (CSPA) (last updated Feb. 14, 2023), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/child-status-protection-act-cspa#:~:text=If%20you%20are%20a%20derivative%20asylee%2C%20your%20CSPA%20age%20is,you%20will%20not%20age%20out>. (“If you are a derivative asylee, your CSPA age is your age on the date your principal asylee parent or Form I-730 petitioner filed his or her Form I-589. If you were under the age of 21 at the time your parent filed Form I-589, your age is frozen as of that date and you will not age out. Unlike derivative refugees, you must be unmarried in order to qualify for a grant of derivative asylum and to qualify for a Green Card under INA section 209.”).



means that having an earlier receipt date will put the asylum seeker further back in the backlog, resulting in a longer wait than if they received a current receipt date.<sup>18</sup>

## **EFFECT OF GUIDANCE ON EMPLOYMENT AUTHORIZATION DOCUMENTS**

### **Can the asylum seeker still use an EAD based on an I-589 filed with the court if the removal proceedings are dismissed or terminated?**

Yes, according to the USCIS EAD webpage,<sup>19</sup> the EAD remains valid until its expiration date. This interpretation is consistent with 8 CFR § 208.7(b)(2) which states that even if an asylum application is denied by an immigration judge, it remains valid through its expiration date.

### **If an asylum seeker received an EAD based on an EOIR-filed asylum application, would they file a new initial EAD application with USCIS or a renewal based on the USCIS-filed I-589?**

If the asylum seeker received a (c)8 EAD, they would file a *renewal* EAD application after refiling with USCIS, even though it is based on a newly filed I-589. That means they must pay the I-765 fee or file a fee waiver. Additionally, the instructions state that the EAD renewal application should be filed before the current EAD expires and should include evidence that a current I-589 is pending before USCIS. This evidence could include: a USCIS receipt; notice of interview; a biometrics appointment notice; or other evidence. Additionally, the instructions recommend including proof that the I-589 was previously filed with EOIR and proof that the case was dismissed or terminated.

*Practice Pointer: the instructions say that the applicant must include evidence that they filed “an updated asylum application on a current version of Form I-589,”<sup>20</sup> so it may be prudent to include the first three pages of the I-589 form as well to prove to USCIS that the refiled I-589 was on the current version of the form.*

### **What should the asylum seeker do if they currently have a pending I-765 renewal filed with USCIS and the EOIR proceedings have been dismissed or terminated?**

USCIS may still renew the EAD, but the asylum seeker must file additional evidence with USCIS. That evidence is the same that is described in the answer above. The submitted evidence must show that the asylum seeker has refiled the I-589 on the current version of the form with USCIS,

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<sup>18</sup> According to asylum office liaison calls, the asylum offices have been reserving some affirmative interview slots for the oldest filed applications, those from 2016 or before, so if the EOIR-filed receipt is from many years ago, the interview could be scheduled relatively quickly. Even so, the asylum offices are prioritizing credible fear interviews and Afghan OAW cases, which means that very few affirmative asylum interviews are currently taking place and the affirmative backlog now stands at over one million cases.

<sup>19</sup> See USCIS, Special Instructions section of USCIS, I-765, Application for Employment Authorization (Oct. 13, 2023), <https://www.uscis.gov/i-765>

<sup>20</sup> *Id.*

as well as that the I-589 was previously filed with EOIR and that removal proceedings were dismissed or terminated.

**How does refiling the I-589 affect EAD eligibility for an asylum seeker who has never filed a (c)(8) EAD application but was eligible to file while before EOIR?**

If the asylum seeker has never filed a (c)(8) EAD application and they had an I-589 pending before EOIR in removal proceedings that have been dismissed, they may file an initial I-765 with USCIS. The EAD webpage again<sup>21</sup> explains that the asylum seeker must submit evidence that shows the asylum seeker has refiled the I-589 on the current version of the form with USCIS, as well as that the I-589 was previously filed with EOIR and that removal proceedings were dismissed or terminated.

The EAD webpage also states that the asylum seeker may follow these instructions if they “are eligible to file Form I-765 for an initial (c)(8)-based EAD.” It does not specify that the receipt date from the refiled USCIS I-589 must show that the asylum seeker has accrued at least 150 days before filing, but that must be the intended process.

**How does refiling affect the clock for an asylum seeker who had not accrued 180 days before the removal proceedings were dismissed or terminated?**

The EAD webpage specifies that the asylum seeker continues to accrue time on the EAD clock after refiling the I-589 with USCIS. Since the Guidance indicates that the receipt is backdated to the EOIR-filed date for EAD purposes, the asylum seeker should reach the 150 day filing date based on the initial I-589 filing date with EOIR.

*Practice Pointer: This section of the I-765 webpage specifically states that this category of I-765 must be paper filed. It is not clear whether EADs filed in the other postures described in this Practice Alert can be filed online or must also be filed on paper.*

**What should an asylum seeker do if USCIS denied an I-765 based on the EOIR termination or dismissal of proceedings before USCIS issued this Guidance?**

The webpage explains that if USCIS denied a prior (c)(8) EAD application, the asylum seeker can refile now along with evidence that shows the asylum seeker has refiled the I-589 on the current version of the form with USCIS, as well as that the I-589 was previously filed with EOIR and that removal proceedings were dismissed or terminated.

*Practice Pointer: While the EAD webpage does not require this, it would be advisable to send a detailed cover letter and the prior USCIS I-765 denial letter, explaining that under the new Guidance the asylum seeker is now eligible for an EAD.*

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<sup>21</sup> *Id.*



**What if the asylum seeker had a prior EAD under a different category, such as parole?**

The EAD webpage specifies that “If you are reapplying for employment authorization under the (c)(8) category, and this is not your initial employment authorization, the appropriate filing fee must accompany your application.” Thus, even though initial (c)(8) EADs are generally free, USCIS requires a fee for the first (c)(8) EAD if it is not the first EAD for which the asylum seeker is applying. In other words, USCIS determines if an EAD application requires a fee based on whether the asylum seeker already received an EAD rather than the category under which USCIS issued the EAD.