U.S. Citizenship and Immigration Services



# Part C - Victims of Crimes



## Appendices

### Appendix: Bona Fide Determination Process and Administrative Procedure Act Considerations

## A. Background

A **noncitizen** granted U-1 nonimmigrant status as a principal petitioner is employment authorized incident to status. USCIS automatically issues an Employment Authorization Document (EAD) to principal petitioners upon the approval of the U nonimmigrant status petition.[1]

The statute only allows 10,000 U nonimmigrant visas to be issued every fiscal year.[2] If the number of approvable petitions exceeds 10,000, USCIS places the approvable petitions on a waiting list. Once they are on the waiting list, USCIS grants deferred action or, in limited circumstances, parole to U-1 principal petitioners and qualifying family members and, as a matter of discretion, may authorize employment for such petitioners and qualifying family members.[3] USCIS generally provides such employment authorization under **8 CFR 274a.12(c)(14)**. Under the existing regulatory structure, noncitizens with pending petitions are currently unable to apply for employment authorization before waiting list placement.

The William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA 2008), signed into law on December 23, 2008, amended Section 214(p)(6) of the Immigration and Nationality Act (INA) to provide DHS with discretion to grant employment authorization to a noncitizen who has a

pending, bona fide petition for U nonimmigrant status.[4] Though permitted by statute, DHS had not previously implemented a process for providing such employment authorization, separate from the existing regulatory waiting list, before June 14, 2021.

The permissive language of INA 214(p)(6) does not require the agency to create a separate employment authorization process. However, because of drastic increases in the volume of U nonimmigrant petitions and a growing backlog, USCIS decided to exercise its discretion to conduct bona fide determinations (BFD) and provide EADs and deferred action to noncitizens with pending, bona fide petitions who meet certain discretionary standards, beginning on June 14, 2021.

INA 103(a) grants the Secretary of Homeland Security the authority to enforce the immigration laws and provides general authority for deferred action. The U.S. Supreme Court has clarified that decisions made to either initiate or terminate enforcement proceedings are under the purview of the Executive Branch,[5] and therefore fall within DHS's authority. The Executive Branch has exercised its discretion to grant deferred action, and the federal courts have consistently recognized the existence of this authority, since the mid-1970s.[6]

While USCIS has approved the statutory maximum of petitions each year since Fiscal Year 2010, the increasing number of petitions and complexity of the adjudication resulted in increased processing times. USCIS attempted to keep up with this increase by shifting resources as well as hiring and training new officers; yet, despite these attempts, the burden quickly outpaced resources given competing demands and priorities across the agency.

Consequently, the number of remaining pending petitions after the annual cap was reached grew dramatically. Though the waiting list was initially conceived to address the gap between petitions filed and available visas, USCIS' ability to adjudicate pending petitions for placement on the waiting list has been and continues to be outmatched by the steady number of new filings.

To illustrate, in 2009, USCIS received 6,850 principal petitions; in 2020, 22,358 principal petitions were filed. From 2015-2018, over 30,000 principal petitions were filed annually.[7] The pending backlog, and the corresponding delay in adjudication time, is due to the increase in U visa filings overall, the complexity of the adjudication, the statutory cap mandated by Congress, and the agency's priorities and limited resources.

As of June 14, 2021, USCIS is unable to adjudicate the tens of thousands of petitions for the waiting list, as well as completing full adjudication for the 10,000 principal visas available under the statutory cap, in a single fiscal year without incurring a negative impact in other humanitarian programs and fee-based applications or petitions.

Taking into consideration the overall filings increase and the numerous adjudications USCIS is responsible for, USCIS must allocate resources among the competing adjudicative priorities and balance the number of resources that can be assigned to the U visa program.

Additionally, as of June 14, 2021, USCIS is facing substantial litigation fueled by the years-long wait times for petitioners to be placed on the waiting list and obtain U nonimmigrant status due to the number of new petitions filed each year exceeding the statutory cap. Case review has revealed that most U nonimmigrant petitioners do not have lawful immigration status and are not otherwise authorized to work, so they may be vulnerable during the lengthy adjudication period.

USCIS recognizes concerns regarding such vulnerability raised by stakeholders and believes implementing the statute's authorization to provide EADs to those with pending, bona fide petitions better aligns the U program with its dual purpose as envisioned by Congress: stabilizing victims of crime and serving as a tool for law enforcement.[8]

In addition, the BFD process enables USCIS to review petitions more efficiently, and provide the benefits of employment authorization and deferred action to more petitioners in a shorter time period than the waiting list process alone, which requires a full adjudicative review of eligibility for nonimmigrant status. USCIS notes that from FY 2009 through FY 2020, over 75 percent of fully adjudicated Petition for U Nonimmigrant Status (**Form I-918**) have been approved.[9]

Therefore, under this policy, USCIS deems a petition "bona fide" when USCIS determines that the Form I-918 is complete and properly filed[10] and has received the result of the petitioner's biometrics. Because INA 214(p)(6) gives the Secretary of Homeland Security, and USCIS as the Secretary's designee, discretion to issue employment authorization to pending, bona fide principal petitioners and qualifying family members, USCIS also considers whether the principal petitioners or qualifying family members appear to pose a risk to national security[11] or public safety, and otherwise merit a favorable exercise of discretion.

The EAD and deferred action that USCIS issues for these cases is valid for 4 years, subject to termination if USCIS determines a national security or public safety concern has arisen, or a determination that the BFD EAD is no longer warranted, or that the prior BFD EAD and deferred action was issued in error.

USCIS issues BFD EADs under **8 CFR 274a.12(c)(14)** because recipients of BFD EADs also receive deferred action. Furthermore, there is currently no other EAD category specifically designated for principal petitioners and qualifying family members with pending, bona fide petitions. INA 214(p)(6) provides the statutory foundation for the implementation of the BFD process, and explicitly speaks to the granting of employment authorization. As such, petitioners granted BFD EADs receive employment authorization documents under **8 CFR 274a.12(c)(14)**.

## B. Administrative Procedure Act Considerations

The Administrative Procedure Act (APA) excepts interpretive rules; general statements of policy; and rules of agency organization, procedure, or practice from notice and comment requirements.[12]

On June 14, 2021, USCIS updated the Policy Manual to notify the public of its interpretation of "bona fide application" at **INA 214(p)(6)**, its exercise of discretion under that provision, and explain its policy for issuing such EADs and granting deferred action. USCIS' interpretation is reasonable because "bona fide" generally means "made in good faith; without fraud or deceit."[13]

In this context, USCIS interprets the bona fide standard[14] as being met once the entire petition (including the required certification on **Form I-918, Supplement B**) is properly filed and biometrics are submitted and received. The completion of the Supplement B by a law enforcement official or judge provides an appropriate assurance of the bona fide nature of the petition in this context.

Likewise, because INA 214(p)(6) gives USCIS discretionary authority to issue such employment authorization, it is reasonable, in the exercise of such discretion, to assess security checks to

determine whether petitioners may pose a threat to national security or public safety before according benefits under this section.

The Policy Manual guidance explains and provides clarification to officers but does not add to the substantive regulations, create legally binding rights or obligations, or change the substantive standards by which USCIS evaluates applications for immigration benefit requests.

## 1. Unfair Surprise and Reliance Interests

An agency changing its interpretation of a regulation should consider, among other factors, whether the interpretative change creates unfair surprise.[15] USCIS is issuing this guidance to clarify what the law and regulations permit or require. USCIS is not restricting the program for pending petitioners; rather, USCIS is using its statutory authority to provide an additional pathway to employment authorization and deferred action. Pending petitioners will not be treated in a disparate or unfair manner, as the evaluation for an EAD is based on the initial evidence petitioners must submit when filing a Petition for U Nonimmigrant Status (**Form I-918**).

This process does not create an undue burden on pending or future petitioners, as it does not change any evidentiary requirement. Rather, it utilizes the filing system already in place to issue benefits to Form I-918 petitioners and mitigate any vulnerabilities they may face due to the lengthy adjudicatory wait times.

Additionally, those who are not granted BFD EADs and deferred action under the first phase of review proceed to the full waiting list adjudication, thereby receiving the same adjudicative review they would have had before this policy implementation. Consequently, the new policy only has an adverse impact on overseas derivatives where the principal petitioner resides in the U.S.

USCIS notes that overseas principal petitioners and qualifying family members would not benefit from this EAD and deferred action process because they are not physically located in the United States. Neither deferred action nor employment authorization are accorded to noncitizens outside the United States.

USCIS considered the potential impact to such petitioners and determined that offering employment authorization and deferred action to the majority of petitioners (as a majority of Form I-918 petitioners are physically located in the United States), coupled with the statutory authority to provide employment to pending, bona fide petitioners, provides numerous benefits.

Additionally, USCIS does not anticipate that overseas principal petitioners and qualifying family members would be harmed by this process, since the agency continues to conduct full waiting list adjudications for overseas principal petitioners and qualifying family members, as the agency has previously done. Consequently, this policy has no adverse impact upon overseas principal petitioners and qualifying family members.

USCIS notes that there will be adverse impacts to overseas qualifying family members where the principal petitioner is in the United States; if the principal petitioner receives the BFD EAD and deferred action, there is not a sufficient basis to conduct a waiting list adjudication for the qualifying family member.

However, USCIS believes the overall benefits of this policy change outweigh the adverse impacts. The BFD process only provides a basic review of the principal petition for U nonimmigrant status, and does not require the petitioner to establish eligibility for U nonimmigrant status but for visa availability in a given fiscal year under the statutory cap.

USCIS cannot provide different levels of adjudication to a principal petitioner and the petitioner's qualifying family members. Advancing qualifying family members to an adjudicative phase beyond that of the principal petitioner would conflict with the INA's requirement that the qualifying family members be "accompanying or following to join" the principal petitioner, and in addition would be confusing and difficult to administer.[16]

USCIS also considered providing petitioners in the United States who have overseas beneficiaries the option of forgoing the BFD process for a waiting list adjudication; however, this would create multiple adjudicatory tracks and result in operational inefficiencies that this policy change was meant to eliminate.

USCIS recognizes that **8 CFR 214.14(d)(2)** states, "After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed." Historically, USCIS has interpreted and applied this provision to mean that it will grant visas to those on the waiting list, based on the date the petition was filed, before granting visas to those not on the waiting list. Yet the regulation also clearly states "the oldest petitions receiving the highest priority" for such cap numbers.

Under this policy, as part of the first phase of review, USCIS issues EADs and deferred action to noncitizens in the United States with a bona fide petition, instead of placing them in the queue for a waiting list adjudication. Those who do not receive an EAD under the first phase proceed to the full waiting list adjudication.

That is, if their petitions are approvable, they are placed on the waiting list to receive an EAD and deferred action. As these two tracks receive the same benefits (EAD and deferred action), the most equitable path is to continue to issue visas based on the date a petition is filed, regardless of whether a petitioner is placed on the waiting list or not. USCIS believes this approach best implements the regulatory provision and statute, and provides the greatest benefit to all petitioners, without adversely impacting any petitioner.

USCIS considered the alternative of continuing to adjudicate petitions on the waiting list first, before those with BFD EADs, but believes that would be inequitable and in conflict with the regulatory language directing that the oldest petitions receive the highest priority. Most of those with BFD EADs will never be placed on the waiting list.

To make them wait behind all petitioners on the current waiting list regardless of filing date, and to prioritize those placed on the waiting list in the future, would effectively penalize those who were able to receive BFD EADs because they had properly filed a complete Form I-918 that did not raise any public safety or national security risks. Accordingly, USCIS will adjudicate petitions for U nonimmigrant status in date-filed order, drawing from both BFD EAD recipients and petitioners on the waiting list.

### 2. Criminal History Check for Bona Fide Determination Employment Authorization Documents

Before June 14, 2021, USCIS officers considered criminal history background checks when adjudicating a Form I-918 petition: first, for waiting list placement and second, for the final adjudication when a visa has become available.

USCIS continues to evaluate whether a principal petitioner or a qualifying family member may maintain a BFD EAD and grant of deferred action throughout the 4-year validity period until final adjudication for U nonimmigrant status; however, as of June 14, 2021, USCIS will review and update background and security checks at regular intervals during the validity period of a principal petitioner or qualifying family member's BFD EAD and deferred action. USCIS also retains discretion to update background and security checks at any time when case-specific circumstances warrant.

By reviewing updated background and security checks at regular intervals during the validity period, USCIS will ensure the petitioner continues to pose no risk to public safety and national security. USCIS does not believe this review would adversely impact any petitioner's reliance interests or raise retroactivity concerns, as the checks are already run regularly.

Additionally, implementing these checks allows USCIS to maintain a balance between providing employment authorization to eligible immigrant victims of crime and ensuring the security of the United States. Finally, any public safety and national security issues raised anew after a BFD EAD and deferred action have been granted will be fully evaluated during the waiting list adjudication, under the same adjudicative review as would have occurred before this policy implementation.

## C. Implementation

USCIS began implementing this policy on June 14, 2021. This policy applies to all Form I-918 petitions pending on June 14, 2021, as well as Form I-918 petitions filed on or after that date. The guidance contained in the Policy Manual is controlling and supersedes any related prior guidance.

## Footnotes

[^ 1] See 8 CFR 214.14(c)(7). See Petition for U Nonimmigrant Status (Form I-918).

[^ 2] See INA 214(p)(2).

[^ 3] See 8 CFR 214.14(d)(2).

[^ 4] See Section 201(c) of Pub. L. 110-457 (PDF), 122 Stat. 5044, 5053 (December 23, 2008) (amending INA 214(p)(6)).

[^ 5] See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that "an agency's decision not to prosecute or enforce. . . is a decision generally committed to an agency's absolute discretion" and noting that enforcement decisions involve a "complicated balancing of a number of factors which are peculiarly within [the agency's expertise, including] whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular

enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.").

[^ 6] See, for example, *Soon Bok Yoon v. INS*, 538 F.2d 1211, 1213 (5th Cir. 1976); *Vergel v. INS*, 536 F.2d 755, 757-58 (8th Cir. 1976); and *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979), *superseded by rule on other grounds*, as stated in *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985).

[^ 7] See **Number of Form I-918, Petition for U Nonimmigrant Status Statistics by Fiscal Year, Quarter, and Case Status (Fiscal Years 2009-2020) (PDF, 112.43 KB)**.

[^ 8] See Section 1502 and 1513(a)(2) of the Victims of Trafficking and Violence Protection Act of 2000, **Pub. L. 106-386 (PDF)**, 114 Stat. 1464, 1518 (October 28, 2000) ("[P]roviding battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children . . . .").

[^ 9] See **Number of Form I-918, Petition for U Nonimmigrant Status By Fiscal Year, Quarter, and Case Status (Fiscal Years 2009-2020) (PDF, 112.43 KB)**.

[^ 10] This includes all required initial evidence, except the Application for Advance Permission to Enter as a Nonimmigrant (**Form I-192**). One of the main purposes for issuing employment authorization to those with pending, bona fide petitions is to provide EADs to good faith petitioners who are vulnerable due to lengthy wait times. Requiring and adjudicating the Form I-192 for purposes of the EAD would delay the EAD adjudication and undermine the efficiency goals of this change. Instead of adjudicating the Form I-192 at this stage, USCIS relies on criminal history checks.

[^ 11] See **INA 212(a)(3)**.

[^ 12] See **5 U.S.C. 553(b)(A)**.

[^ 13] See Black's Law Dictionary (11th ed. 2019).

[^ 14] USCIS considered different potential definitions of "bona fide" and ultimately determined that this definition was best suited to this context. USCIS specifically considered the criteria for the "bona fide determination" at 8 CFR 214.11(e), regarding noncitizen victims of severe forms of trafficking, but ultimately decided not to adopt those criteria because of the differences between the U and T visa requirements, such as the law enforcement certification requirement for U nonimmigrant petitioners. See **INA 214(p)(1)**; **8 CFR 214.14(c)(2)(i)**. The completion of the Supplement B by a law enforcement official or judge provides an appropriate assurance of the bona fide nature of the petition in this context. Additionally, the T regulation requires consideration of waivers of inadmissibility, for which an RFE is often required. This would significantly delay the U BFD adjudication, contrary to Congress' likely intent in authorizing the issuance of this interim benefit. It would also undermine the procedural efficiencies this policy was intended to create in comparison with the waiting list process.

[^ 15] See *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007). See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

[^ 16] See **INA 101(a)(15)(U)(ii)**.

## Appendix: Bona Fide Determination Process Flowchart



Current as of June 14, 2021