

## USCIS Response to Coronavirus (COVID-19)



U.S. Citizenship  
and Immigration  
Services

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## Chapter 5 - Bona Fide Determination Process

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By statute, USCIS has discretion to provide employment authorization to [noncitizens](#) with pending, bona fide U nonimmigrant status petitions.<sup>[1]</sup> Consequently, USCIS implemented the Bona Fide Determination (BFD) process.

During the BFD process, USCIS first determines whether a pending petition is bona fide. Second, USCIS, in its discretion, determines whether the petitioner poses a risk to national security or public safety, and otherwise merits a favorable exercise of discretion. If USCIS grants a noncitizen a Bona Fide Determination Employment Authorization Document (BFD EAD) as a result of the BFD process, USCIS then also exercises its discretion to grant that noncitizen deferred action for the period of the BFD EAD. USCIS generally does not conduct waiting list adjudications for noncitizens who USCIS grants BFD EADs and deferred action to; these petitioners' next adjudicative step is final adjudication when space is available under the statutory cap.<sup>[2]</sup>

As a matter of policy, USCIS interprets “bona fide” as part of its administrative authority to implement the statute as outlined below. Bona fide generally means “made in good faith; without fraud or deceit.”<sup>[3]</sup> Accordingly, when interpreting the statutory term within the context of U nonimmigrant status, USCIS determines whether a petition is bona fide based on the petitioner’s compliance with initial evidence requirements and successful completion of background checks. If USCIS determines a petition is bona fide, USCIS then considers any national security and public safety risks, as well as any other relevant considerations, as part of the discretionary adjudication.<sup>[4]</sup>

As a primary goal, USCIS seeks to adequately evaluate and adjudicate petitions as efficiently as possible. The BFD process provides an opportunity for certain petitioners to receive BFD EADs and deferred action while their petitions are pending, consistent with the William Wilberforce Trafficking Victims Reauthorization Act of 2008 (TVPRA 2008).<sup>[5]</sup>

Only petitioners living in the United States may receive BFD EADs, since those outside the United States cannot as a practical matter work in the United States.<sup>[6]</sup> Likewise, deferred action can only be accorded to petitioners in the United States since those outside the United States have no potential removal to be deferred.

## A. Bona Fide Determination

### 1. Principal Petitioners

USCIS determines a principal petition is bona fide if:

- The principal petitioner has properly filed a complete Petition for U Nonimmigrant Status ([Form I-918](#)), including all required initial evidence,<sup>[7]</sup> except for the Application for Advance Permission to Enter as a Nonimmigrant ([Form I-192](#)).<sup>[8]</sup> Required initial evidence includes:
  - A complete and properly filed U Nonimmigrant Status Certification ([Form I-918, Supplement B](#)) submitted within 6 months of the certifier's signature; and
  - A personal statement from the petitioner describing the facts of the victimization; and
- USCIS has received the result of the principal petitioner's background and security checks based upon biometrics.<sup>[9]</sup>

### 2. Qualifying Family Members

A qualifying family member is not guaranteed a BFD EAD solely because the principal petitioner receives a BFD EAD.<sup>[10]</sup> The record must independently demonstrate the [Form I-918, Supplement A](#) is bona fide. USCIS determines a qualifying family member's petition is bona fide when:

- The principal petitioner receives a BFD EAD;
- The petitioner has properly filed a complete Petition for Qualifying Family Member of U-1 Recipient ([Form I-918, Supplement A](#));
- The petition includes credible evidence of the qualifying family relationship;<sup>[11]</sup> and
- USCIS has received the results of the qualifying family member's background and security checks based upon biometrics.<sup>[12]</sup>

## B. Exercise of Discretion, Including Risk to National Security or Public Safety and Other Factors

Once USCIS has determined a petition is bona fide, USCIS determines whether the petitioner poses a risk to national security<sup>[13]</sup> or public safety by reviewing the results of background checks, and considers other relevant discretionary factors.<sup>[14]</sup> USCIS then determines whether to exercise its discretion to issue a BFD EAD and grant deferred action to a petitioner.

Section 214(p)(6) of the Immigration and Nationality Act (INA) gives the Secretary of Homeland Security, and USCIS as his or her designee, discretionary authority over the issuance of employment authorization to noncitizens with pending, bona fide U nonimmigrant status petitions.<sup>[15]</sup> A principal petitioner or qualifying family member who poses a risk to national security or public safety, or has other adverse discretionary factors, may not merit the favorable exercise of discretion necessary to grant deferred action.

Moreover, at the final adjudication, such individuals may require a waiver for any grounds of inadmissibility, and may be ineligible for U nonimmigrant status if they do not merit a favorable exercise of discretion. Therefore, in exercising the discretion granted by the INA, USCIS grants BFD EADs to principal petitioners and qualifying family members with pending bona fide petitions who it determines merit a favorable exercise of discretion, considering any risk to national security or public safety, as well as other relevant discretionary factors.

USCIS may choose not to exercise its discretion to grant a BFD EAD and deferred action where a petitioner appears to pose a risk to national security or public safety. For example, where a principal petitioner or qualifying family member has been convicted of or arrested for any of the following acts, USCIS generally does not issue a BFD EAD and deferred action and instead proceeds to a full adjudication to assess eligibility for waiting list placement. The following categories generally overlap with inadmissibility grounds<sup>[16]</sup> and may include:

- National security concerns;<sup>[17]</sup> and
- Public safety concerns, which include but are not limited to:
  - Murder, rape, or sexual abuse;
  - Offenses involving firearms, explosive materials, or destructive devices;<sup>[18]</sup>
  - Offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons;<sup>[19]</sup>
  - Aggravated assault;
  - An offense relating to child pornography; and
  - Manufacturing, distributing, or selling of drugs or narcotics.<sup>[20]</sup>

Violent and dangerous crimes, such as those listed above, embody the very activities law enforcement seeks to deter and prevent through cooperation facilitated by the U nonimmigrant status program.

Additionally, USCIS may determine on a case-by-case basis that other adverse factors weigh against a favorable exercise of discretion. USCIS may also exercise discretion favorably notwithstanding the above concerns if case-specific circumstances warrant it.

Recognizing that many factors may influence whether criminal activity is prosecuted and results in a conviction, an arrest for a serious crime is relevant to whether USCIS should exercise its discretion favorably. A determination about whether to favorably exercise discretion when there are indicators of national security or public safety concerns requires a comprehensive review of the available evidence.

For example, officers may need to request additional evidence or information in certain cases where security checks indicate that a petitioner has an arrest record.<sup>[21]</sup> Therefore, USCIS does not conduct this

in-depth, discretionary review during the BFD process. Instead, if USCIS determines that a petitioner may pose a risk to national security or public safety, or has other relevant adverse factors that would require further review, and therefore will not receive a BFD EAD, USCIS initiates a waiting list adjudication and conducts a comprehensive discretionary review as part of the evaluation of [Form I-192](#) if one is submitted.

USCIS evaluates all evidence provided by petitioners regarding their arrest records before making determinations for waiting list placement.<sup>[22]</sup>

## C. Adjudicative Process

USCIS evaluates all petitions for U nonimmigrant status filed by noncitizens living in the United States as described above.<sup>[23]</sup> If USCIS determines a principal petitioner and any other qualifying family members have a bona fide petition and warrant a favorable exercise of discretion, USCIS issues them BFD EADs and grants deferred action.

USCIS initiates waiting list adjudication for petitioners who do not receive BFD EADs. When USCIS determines a principal petitioner will not receive a BFD EAD, USCIS proceeds to a full adjudication for waiting list placement for the principal petitioner and his or her qualifying family members.

A determination that a petitioner will not receive a BFD EAD and deferred action is not a denial of [Form I-918](#) or the Application for Employment Authorization ([Form I-765](#)). A petitioner who does not receive a BFD EAD and deferred action is evaluated for waiting list eligibility and still has the opportunity to obtain employment authorization and a grant of deferred action if deemed eligible for waiting list placement. Consequently, non-issuance of a BFD EAD is not a final agency action. Correspondingly, USCIS does not accept or process motions to reopen or reconsider,<sup>[24]</sup> or requests to re-apply for a BFD EAD.

For any qualifying family member who will not receive a BFD EAD, USCIS completes a full adjudication for that qualifying family member. The full adjudication includes the issuance of Requests for Evidence (RFEs) to address any deficiencies or concerns identified in the qualifying family member's record but it is not an adjudication for waiting list placement. Because qualifying family members are "accompanying or following to join" the principal petitioner, they will not be placed on the waiting list unless the principal petitioner was placed on the waiting list.<sup>[25]</sup>

If the qualifying family member resolves the deficiencies or concerns in the record, USCIS issues a BFD EAD and grants deferred action to the qualifying family member. If additional evidence provided by the qualifying family member does not resolve the deficiencies or concerns identified, then USCIS does not issue a BFD EAD and generally places the qualifying family member's petition with the principal petition back in line to await a final statutory cap adjudication.

When USCIS issues a final decision to the principal petitioner, USCIS also issues a final decision for any qualifying family member who did not receive a BFD EAD. USCIS retains the authority to deny any petition when, after full adjudication, USCIS determines the qualifying family member is ineligible for the underlying benefit.

For example, USCIS may deny the petition where the record establishes that the claimed family member does not have a qualifying family relationship with the petitioner, or where USCIS determines a favorable exercise of discretion is not warranted to waive the qualifying family member's grounds of inadmissibility.

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

To efficiently determine whether to issue BFD EADs and grant deferred action, USCIS conducts background and security checks to identify petitioners who may pose risks to national security and public safety, or other adverse discretionary factors. USCIS relies on a variety of databases that collect information from law enforcement agencies and other federal, state, local, and tribal agencies, including information regarding arrests and convictions.

USCIS uses this information to determine whether a petitioner is admissible for the purposes of receiving a grant of U nonimmigrant status or merits a favorable exercise of discretion to waive any grounds of inadmissibility. USCIS' consideration of national security and public safety risks at the BFD EAD stage aligns with inadmissibility grounds evaluated during the adjudication of a petition for U nonimmigrant status and is therefore a consistent exercise of discretion within the authority afforded by [INA 214\(p\)\(6\)](#) to grant BFD EADs.

A petitioner who is not issued a BFD EAD due to the risk the petitioner appears to pose to national security or public safety receives a full adjudication for waiting list placement. During the adjudication for waiting list placement, petitioners have the opportunity to provide USCIS with potentially mitigating information or other evidence pertaining to arrests or convictions.

USCIS issues petitioners a BFD EAD and grants deferred action in order to promote victim stability and continued cooperation with law enforcement. However, USCIS updates and reviews background and security checks at regular intervals during the validity period of a principal petitioner or a qualifying family member's BFD EAD.

Additionally, USCIS retains discretion to update background and security checks at any time when case-specific circumstances warrant. During those reviews, USCIS evaluates whether the petitioner and qualifying family members who have been granted BFD EADs and deferred action continue to warrant the BFD EAD and merit a favorable exercise of discretion while their petitions for U nonimmigrant status are pending with USCIS.

USCIS reserves the right to revoke the BFD EAD<sup>[26]</sup> and terminate the grant of deferred action at any time if it determines the BFD EAD or favorable exercise of discretion are no longer warranted, or the prior BFD EAD and deferred action were granted in error.

For example, USCIS may revoke the BFD EAD and terminate deferred action if USCIS identifies any adverse information, such as new information pertaining to the risks the petitioner poses to national security or public safety, or the withdrawal of a petitioner's Form I-918, Supplement B. At that time, USCIS initiates a waiting list adjudication to gather additional information and evidence to determine if the petitioner is eligible for a waiver of inadmissibility for any relevant inadmissibility grounds and placement on the waiting list.

## 2. Previously Filed Form I-765 for Bona Fide Determination Process

USCIS uses all Applications for Employment Authorization ([Form I-765](#)) already filed by principal petitioners under [8 CFR 274a.12\(a\)\(19\) and \(c\)\(14\)](#), to issue a BFD EAD. USCIS also uses Form I-765 applications previously filed under [8 CFR 274a.12\(a\)\(20\) and \(c\)\(14\)](#) for a qualifying family member to issue



a BFD EAD to qualifying family members. Using previously filed applications limits the burden on petitioners to file additional paperwork.

Where a petitioner has filed a Form I-918 but has not filed an accompanying application for employment authorization under [8 CFR 274a.12\(a\)\(19\)](#), [\(a\)\(20\)](#) or [\(c\)\(14\)](#), USCIS issues a notice indicating that the petitioner has received a BFD and may receive a BFD EAD. To obtain an EAD, the petitioner must file a [Form I-765](#) after receiving this notice.

### 3. Bona Fide Determination Employment Authorization Document Issuance

Once USCIS has determined that a petitioner present in the United States has a bona fide petition and merits a favorable exercise of discretion, and therefore may receive a BFD EAD, USCIS issues a notice to inform the petitioner of the decision.

Such petitioners who have already filed a [Form I-765](#) under either of the EAD classifications noted above then receive an EAD and a grant of deferred action valid for 4 years. Petitioners who must file a new Form I-765 after receiving the BFD notice from USCIS receive employment authorization and deferred action valid for 4 years once USCIS finishes adjudicating the Form I-765.

### 4. Prima Facie Case for Approval

Where USCIS issues a BFD EAD to a petitioner, the petitioner is also considered to have established a prima facie case for approval within the meaning of [INA 237\(d\)\(1\)](#). The term “prima facie” refers to a petition appearing sufficient on its face.

The evaluation performed by USCIS to determine whether a petition is bona fide and whether a petitioner receives a BFD EAD is a more complex evaluation than looking at the petition on its face alone. The BFD process satisfies the prima facie standard that U.S. Immigration and Customs Enforcement (ICE) previously requested in specific circumstances<sup>[27]</sup> since the steps taken to determine whether a petition is bona fide and a petitioner receives a BFD EAD rely on the initial evidence submitted with a petition for U nonimmigrant status, as well as the results of background checks.

### 5. Waiting List Adjudication for Petitioners Not Issued a Bona Fide Determination Employment Authorization Document

Once an officer has determined that a petitioner will not receive a BFD EAD, the officer reviews the complete filing and identifies any deficiencies or concerns that need to be addressed for waiting list adjudication. The officer then issues an RFE or Notice of Intent to Deny (NOID), which includes:<sup>[28]</sup>

- A notice explaining that USCIS will not be issuing a BFD EAD; and
- An RFE to address any deficiencies or concerns associated with waiting list adjudication.

If USCIS determines that a petitioner will not receive a BFD EAD, but can be placed on the waiting list, that decision generally does not affect the timeline in which the petition for U nonimmigrant status is adjudicated for final determination of U nonimmigrant status. If USCIS determines that a petitioner will not receive a BFD EAD and cannot be placed on the waiting list, USCIS will deny the petition.

## 6. Request to Renew Bona Fide Determination Employment Authorization Document and Deferred Action

Generally, USCIS does not charge a fee for the filing of certain victim-based and humanitarian benefit requests, including [Form I-918](#) and [Form I-918, Supplement A](#).<sup>[29]</sup> Consequently, petitioners who receive BFD EADs do not need to submit a filing fee for the initial [Form I-765](#) associated with the BFD EAD. Petitioners who choose to renew their BFD EADs may do so under existing procedures.<sup>[30]</sup> Once a BFD EAD is renewed, the accompanying grant of deferred action is also renewed.

TVPR 2008 requires USCIS to permit petitioners for U nonimmigrant status to apply for fee waivers for “any fees associated with filing an application for relief through final adjudication of the adjustment of status.”<sup>[31]</sup> USCIS has interpreted this to mean that, in addition to the main benefit request, applicants and petitioners must have the opportunity to request a fee waiver for any form associated with the main benefit, including applications for waivers of inadmissibility or employment authorization. Principal petitioners and qualifying family members who are seeking to renew a BFD EAD must either submit a filing fee or submit a Request for Fee Waiver ([Form I-912](#)).

An initial BFD EAD grant does not guarantee future renewals. Principal petitioners and qualifying family members are evaluated independently for each EAD and deferred action renewal to ensure that the BFD EAD and grant of deferred action are still warranted as a matter of discretion.

>Additionally, USCIS may identify principal petitioners and qualifying family members who pose a risk to national security and public safety during the validity period of the BFD EAD and deferred action, until final adjudication of U nonimmigrant status.

At any point during the validity period, USCIS has the right to revoke employment authorization or terminate deferred action if USCIS determines a national security or public safety concern is present, if USCIS determines the BFD EAD and deferred action is no longer warranted, the Form I-918 Supplement B law enforcement certification is withdrawn, or USCIS determines the prior BFD EAD was issued in error.<sup>[32]</sup>

If USCIS determines that adverse information may impact a principal petitioner’s ability to maintain a BFD EAD and deferred action, USCIS will initiate a waiting list review for the principal petition. Similarly, if USCIS determines that adverse information may impact a qualifying family member’s ability to maintain a BFD EAD and deferred action, USCIS will conduct a full adjudication of the qualifying family member’s petition as described above to determine whether the qualifying family member can maintain a BFD EAD and deferred action.

An initial grant or renewal of a BFD EAD and deferred action does not guarantee that USCIS will approve the principal petitioner or his or her qualifying family members for U nonimmigrant status. Generally, USCIS adjudicates petitions for U nonimmigrant status in the order in which they are received, subject to limited exceptions. When the principal petitioner’s filing is next in line for final adjudication, an officer assesses eligibility requirements for U nonimmigrant status. This adjudication does not include consideration of prior grants or renewals of BFD EAD or deferred action.

## 7. Petitioners Residing Outside of the United States

USCIS only issues BFD EADs and deferred action to petitioners living in the United States as it cannot provide deferred action or employment authorization to petitioners outside the United States. Deferred action, as an exercise of prosecutorial discretion to make a noncitizen a lower priority for removal from

the United States, is only applicable to noncitizens in the United States. Additionally, [INA 274A](#) gives the Secretary of Homeland Security, and USCIS as his or her designee, authority over noncitizen employment authorization in the United States.

Because the BFD EAD is only for petitioners living in the United States, principal petitioners (and their qualifying family members) who live outside of the United States proceed directly to waiting list adjudication.

Generally, USCIS adjudicates cases in the order in which they were received to determine waiting list placement. If USCIS determines a principal petitioner residing outside the United States is eligible for waiting list placement, the principal petitioner and his or her qualifying family members should submit a [Form I-765](#) upon admission to the United States to receive an EAD.

## Footnotes

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[<sup>1</sup>] See [INA 214\(p\)\(6\)](#) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

[<sup>2</sup>] See Appendix: Bona Fide Determination Process Flowchart [[3 USCIS-PM C.5, Appendices Tab](#)].

[<sup>3</sup>] See Black’s Law Dictionary (11th ed. 2019).

[<sup>4</sup>] Submission of biometrics is a requirement for principal petitioners as well as derivatives. See [8 CFR 214.14\(c\)\(3\)](#) and [8 CFR 214.14\(f\)\(5\)](#).

[<sup>5</sup>] See [Pub. L. 110-457 \(PDF\)](#) (December 23, 2008). See [INA 214\(p\)\(6\)](#) (“The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

[<sup>6</sup>] See [INA 274A](#). See [8 CFR 274a.12\(a\)](#), [\(b\)](#), [\(c\)](#) (referring to employment in the United States).

[<sup>7</sup>] See [8 CFR 214.14\(c\)\(2\)](#).

[<sup>8</sup>] 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 [Form I-192](#) for purposes of the EAD would delay the EAD adjudication and undermine efficiency. Instead of adjudicating the Form I-192 at this stage, USCIS relies on criminal history checks.

[<sup>9</sup>] See instructions for the Petition for U Nonimmigrant Status ([Form I-918](#)).

[<sup>10</sup>] The principal petitioner enables access to the benefits associated with U nonimmigrant status for the qualifying family member. Therefore, USCIS does not consider a qualifying family member for a BFD unless the principal petitioner receives a BFD EAD.

[<sup>11</sup>] Under [INA 214\(p\)\(4\)](#), USCIS considers any credible evidence relevant to the petition.

[<sup>12</sup>] See instructions for Petition for Qualifying Family Member of U-1 Recipient ([Form I-918, Supplement A](#)).



[^ 13] See [INA 212\(a\)\(3\)](#).

[^ 14] See Section C, Adjudicative Process, Subsection 1, Criminal History Check for BFD EADs [[3 USCIS-PM C.5\(C\)\(1\)](#)].

[^ 15] See [INA 214\(p\)\(6\)](#) (“The Secretary *may* grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”) (emphasis added).

[^ 16] See [INA 212\(a\)](#).

[^ 17] As listed in [INA 212\(a\)\(3\)](#).

[^ 18] Such as those defined in [INA 101\(a\)\(43\)\(C\) and \(E\)](#).

[^ 19] As defined in [INA 101\(a\)\(43\)\(K\)\(iii\)](#).

[^ 20] This includes acts defined in [INA 101\(a\)\(43\)\(B\)](#).

[^ 21] See *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995) (considering but hesitating to give “substantial weight” to an uncorroborated arrest report). See *Garces v. U.S. Att’y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) (“Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence that there is reason to believe Garces engaged in drug trafficking.”).

[^ 22] See *Henry v. I.N.S.*, 74 F.3d 1, 6 (1st Cir. 1996) (noting “while an arrest, without more, is simply an unproven charge, the fact of the arrest, and its attendant circumstances, often have probative value in immigration proceedings.”).

[^ 23] See Section A, Principal Petitioners [[3 USCIS-PM C.5\(A\)](#)] and Section B, Qualifying Family Members [[3 USCIS-PM C.5\(B\)](#)].

[^ 24] Appeals are not available to applicants who have been denied employment authorization under [8 CFR 274a.13\(c\)](#). Therefore, even if the BFD EAD issuance was considered a final agency action, the lack of an appeals process for BFD EADs aligns with regulatory practice pertaining to employment authorization generally.

[^ 25] See [INA 101\(a\)\(15\)\(U\)\(ii\)](#).

[^ 26] See [8 CFR 274a.14\(b\)](#).

[^ 27] See ICE’s [Revision of Stay of Removal Request Reviews for U Visa Petitioners](#) webpage.

[^ 28] See Chapter 6, Waiting List [[3 USCIS-PM C.6](#)].

[^ 29] See [8 CFR 103.7\(b\)\(1\)\(i\)\(VV\)](#).

[^ 30] See [8 CFR 274a.13\(d\)](#). See [Instructions for Form I-765](#).

[^ 31] See [INA 245\(l\)\(7\)](#).

[^ 32] See [8 CFR 274a.14\(b\)](#).

