



OVERVIEW OF THE NEW U NONIMMIGRANT (“U VISA”) BONA FIDE DETERMINATION

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On June 14, 2021, USCIS announced a new “bona fide determination” process whereby certain U petitioners and their family members with pending U petitions can receive four-year work authorization and deferred action while they wait for full adjudication. This process could be very good for many of the 270,000 folks who have filed for a U visa and are waiting – but there are many folks left out, and of course, much of this depends on how the process is implemented. This practice advisory explains the process as we understand it based on current information and experience and draws heavily on the new guidance published in the USCIS Policy Manual on the U Nonimmigrant Bona Fide Determination at Volume 3, Part C, Chapter 5,¹ which should be consulted for more details and further legal citations. Practice tips and processing information in this advisory also come from a conversation hosted by ASISTA and ILRC on August 18, 2021,² the questions and answers posted by USCIS on September 21, 2021,³ and the stakeholder engagement held by USCIS on October 20, 2021.

I. The New U Nonimmigrant Bona Fide Determination

A. What is it and how will it benefit my clients?

The U nonimmigrant Bona Fide Determination (BFD) is USCIS’s attempt to address the massive U visa backlog and limitations of the 10,000 annual statutory cap, by allowing certain individuals who have filed U visa petitions to receive employment authorization and deferred action while they wait for further U nonimmigrant adjudication. Historically, applicants have been able to get employment authorization documents (EADs) and deferred action once they have been added to the waitlist, but even the wait for the waitlist has been taking many years. U visa petitioners waiting for the waitlist have had little to no protection while their petitions are pending, and the BFD is an attempt to get individuals EADs and deferred action sooner. USCIS has also stated that the BFD will satisfy the prima facie standard that ICE considers when granting a stay of removal for a pending U case.⁴ See INA § 237(d)(1).

B. How is it authorized?

The Trafficking Victims Protection Reauthorization Act of 2008 added language to the Immigration and Nationality Act authorizing, among other things, USCIS to provide EADs to people with pending, bona fide U applications. See INA § 214(p)(6) (“The Secretary may grant

¹ 3 USCIS-PM C.5, <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>; see also 3 USCIS-PM C.5 Appx, Bona Fide Determination Process Flowchart, <https://www.uscis.gov/sites/default/files/document/policy-manual-resources/Appendix-BonaFideDeterminationProcessFlowchart.pdf>.

² ASISTA & ILRC Notes from USCIS Bona Fide Determination Webinar (Sept. 8, 2021), <https://www.ilrc.org/asista-ilrc-notes-uscis-bona-fide-determination-webinar>.

³ USCIS, Questions and Answers: U Status Bona Fide Determination Process, <https://www.uscis.gov/I-918>.

⁴ 3 USCIS-PM C.5(C)(4).

work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U).”).

C. To whom does it apply and when does it go into effect?

This new BFD review applies to all currently pending I-918 petitions and all I-918 petitions filed on or after June 14, 2021, when this new process was announced. The BFD review process went into effect on June 14, 2021 and is currently underway.

D. How quickly can someone expect to get an EAD and deferred action based on this process?

At this time, it is uncertain how long the BFD process will take. Given the large number of pending U nonimmigrant cases, we know it will take time, possibly even years, depending on when the case is filed and what resources USCIS does or does not obtain for BFD review. We know USCIS started with cases filed in 2016, where the waitlist left off, and that they are reviewing cases based on a “first in, first out” policy. At this point there has not been any additional funding designated for this, so that may delay a swift rollout. Nonetheless, practitioners have reported receiving notices of BFD for cases filed in 2016 and early 2017. USCIS has cited efficiency as a primary goal with this new process, which is why the BFD involves a more truncated review (see Section II below).

E. How does the BFD interact with the U waitlist?

If a U petitioner is granted BFD, they do not later undergo waitlist adjudication. The BFD process is an alternate route to gain an EAD and deferred action while waiting for a final decision on the U nonimmigrant petition.

If a U petitioner is *not* granted BFD at this preliminary stage, then they will next be assessed for eligibility for waitlist placement under the usual procedure. As before, if they are placed on the waitlist then they will get deferred action and be eligible for an EAD while they await full adjudication of their U nonimmigrant petition. If they are found ineligible for waitlist placement, then their petition will be denied.

II. Eligibility for the Bona Fide Determination

A. Who qualifies for it and how do you get it?

Anyone who has a currently pending I-918 or I-918A, or who files an I-918 or I-918A on or after June 14, 2021, and who is living in the United States will be considered for deferred action and employment authorization based on this bona fide determination. USCIS states that it does not

have the authority to provide deferred action or work authorization for petitioners residing outside of the United States. 3 USCIS-PM C.5(C)(7) (citing INA § 274A).

USCIS will initiate review of all pending U petitions for the BFD; there is nothing that an individual with a pending U petition—or anyone who is filing a U petition now—needs to do to initiate the BFD review by USCIS.

To be considered for the BFD as a principal U petitioner, a person must properly file or have already properly filed:

- A complete I-918 with all required initial evidence, specifically:
 - An I-918 Supplement B law enforcement certification signed no more than six months prior to submission, and
 - A personal statement, describing the facts of the crime victimization.

To be considered for the BFD as a qualifying family member of the principal U petitioner, a person must:

- Properly file or have already properly filed a complete I-918A, with evidence of the qualifying family relationship to the principal U petitioner, and
- The principal U petitioner must have been granted BFD.

In either situation, biometrics must also be complete in order for USCIS to consider BFD in a given case. The first step is to determine whether the petitioner meets the completed petition requirements. The second step is a discretionary determination of whether the petitioner poses a risk to national security or public safety by reviewing the biometrics results.⁵

Note that an I-192 waiver application is *not* required, nor will be reviewed as part of the BFD, since USCIS believes an I-192 review will unnecessarily slow down the BFD decision-making process. USCIS will be relying primarily on background checks at this stage for assessing whether a BFD grant is warranted.

⁵ See 3 USCIS-PM C.5 Appx, Bona Fide Determination Process Flowchart, <https://www.uscis.gov/sites/default/files/document/policy-manual-resources/Appendix-BonaFideDeterminationProcessFlowchart.pdf>.

B. Who is left out?

There are three main groups of people left out. First, U petitioners living outside the United States are ineligible for the BFD EAD and deferred action.

Second, USCIS is also excluding individuals deemed to be a threat to national security or public safety or who present other adverse discretionary factors. This discretionary determination will be based on a quick review of the petitioner’s background check, without delving into arguments regarding inadmissibility and waivers. Individuals whose background checks show convictions—or even just arrests—for offenses related to aggravated assault, sexual abuse, firearms, child pornography, drug manufacturing, distributing, or sale, among other offenses, will likely be seen as raising “public safety” concerns and not granted BFD.

Third, where a principal does not receive a BFD, their derivatives will not either. If a principal does not receive a BFD because they are residing abroad, their derivatives will not either, even if the derivatives are inside the United States. Similarly, if the principal does not receive a BFD because they are deemed to be a threat to national security or public safety, their derivatives will not either, regardless of the derivatives’ criminal history or lack thereof.

C. Are there any crime bars?

Yes. In addition to making sure that the above-listed forms and supporting documents have been submitted, such that the case is deemed “bona fide” (made in good faith), USCIS will review the background checks to make sure that the applicant is not a national security or public safety risk and otherwise merits a favorable exercise of discretion.

In general, USCIS will not favorably exercise discretion to grant BFD EADs and deferred action if the petitioner has been convicted, or even just arrested, for:

- Acts that raise national security concerns (USCIS references the security-related ground of inadmissibility for this, INA § 212(a)(3)), or
- Acts that raise public safety concerns, including:
 - Murder, rape, sexual abuse;
 - Offenses involving firearms, explosive materials, or destructive devices (USCIS cites to the aggravated felony definition at INA § 101(a)(43)(C) & (E));
 - Offense relating to peonage, slavery, involuntary servitude, and human trafficking (USCIS cites to the aggravated felony definition at INA § 101(a)(43)(K)(iii));

- Aggravated assault;
- Offenses relating to child pornography; and
- Manufacturing, distributing, or selling drugs or narcotics (USCIS cites to the aggravated felony definition at INA § 101(a)(43)(B)).

USCIS states that it is not bound by the above list and can determine on a case-by-case basis that other adverse factors also weigh against a favorable exercise of discretion. Similarly, USCIS may still grant the BFD even if the above concerns are present, “if warranted on a case-specific basis.”

USCIS will update and review background and security checks “at regular intervals” during the BFD period, and may revoke the BFD if USCIS decides that the individual no longer warrants the grant, or the grant was issued in error.

The criminal bars may be one of the biggest areas of uncertainty, and concern, surrounding the BFD process. Some grounds align with grounds of inadmissibility at INA § 212(a)(2) and § 212(a)(3), offenses that have been classified as “violent and dangerous crimes,” and/or that fall within certain definitions of aggravated felonies at INA § 101(a)(43). However, not all do, and it remains to be seen how USCIS is applying these bars. If interpreted and implemented broadly, these criminal grounds could exclude many eligible petitioners from obtaining EAD and deferred action through the BFD process, based on arrests and convictions that do not ultimately bar them from U nonimmigrant status. With no way to appeal a BFD decision, or respond to questions, the concern is that folks with criminal history may be left out of the BFD process. ILRC encourages practitioners to advocate with USCIS to get rid of the criminal grounds (particularly because these grounds do not necessarily bar someone from U nonimmigrant status), or at a minimum to interpret them as narrowly as possible.

D. Do I need to submit a new I-765 to receive a BFD?

Not necessarily. USCIS has stated that it will use already filed I-765 applications by U petitioners under the (a)(19), (a)(20), or (c)(14) category to issue BFD EADs.⁶ For U principal and derivative petitioners who filed I-765 applications under (c)(14) (for the waitlist) and (a)(20) (for U derivatives), the expectation is that those applications will be used to provide a BFD EAD. However, many principal U petitioners do not have I-765 applications on file because principal petitioners do not need an I-765 application to receive an EAD under (a)(19) (for principal

⁶ 3 USCIS-PM C.5(C)(2).

petitioners). U petitioners in this category **will need** to submit an I-765 if they don’t already have one on file.

If a principal or derivative petitioner did *not* include an I-765 application for an EAD, then USCIS will issue a notice informing the individual that they have been granted BFD and can get a BFD EAD by filing an I-765 under category (c)(14).

USCIS recommends waiting to file Form I-765 until the petitioner receives a BFD grant from USCIS in order to be most efficient. Despite USCIS’s recommendation, ILRC and ASISTA suggest that there may be some advantage for individuals who do not have an EAD application pending to supplement the file with an I-765 to speed up the ultimate EAD grant.

E. How long does it last?

The U BFD deferred action and employment authorization will be valid for 4 years and can be renewed.

III. Fees

A. If an individual is granted BFD, do they have to pay for the BFD EAD?

No. Petitioners and derivatives granted BFD can file the initial Form I-765 without a fee or fee waiver. Nevertheless, in the first several months of the BFD implementation, USCIS erroneously rejected many Form I-765 applications that were filed without a fee or fee waiver. On November 22, 2021, USCIS announced that it will be providing refunds to individuals who filed an initial BFD-related I-765 under the (c)(14) category from June 14, 2021, through September 29, 2021, and paid a fee.⁷ This refund policy applies to individuals who paid a fee when they first filed the I-765 as well as to individuals who submitted a fee in response to an initial rejection for lack of fee. USCIS stated that it is taking steps to identify affected applicants and establish a process to issue refunds by March 22, 2022. If do you do not receive a refund by March 22, 2022, you may contact the Vermont Service Center at HotlineFollowupI918I914.vsc@uscis.dhs.gov, or the Nebraska Service Center at NSC765C14inquiries@uscis.dhs.gov.

⁷ USCIS, *Certain Petitioners for U Nonimmigrant Status May Receive a Refund for Applications for Employment Authorization Submitted Before Sept. 30, 2021* (Nov. 22, 2021), <https://www.uscis.gov/newsroom/alerts/certain-petitioners-for-u-nonimmigrant-status-may-receive-a-refund-for-applications-for-employment>.

If your BFD I-765 was erroneously rejected *after* September 29, 2021 because it was submitted without a fee or fee waiver, please reach out to Alison Kamhi at ILRC at akamhi@ilrc.org, Amy Cheung at ASISTA at amy@asistahelp.org, or ask for case assistance with CIS Ombudsman.⁸

B. If an individual is filing an initial U visa petition, do they have to include a fee for the BFD EAD?

No. Petitioners and derivatives filing an initial U visa petition should include Form I-765 in category (c)(14) for the BFD process. They can file Form I-765 without a fee. If the initial Form I-765 was rejected for lack of fee, they can resubmit Form I-765 without a fee.

C. If an individual seeks to renew a BFD EAD, do they have to pay?

Yes. Although the initial BFD EAD is free, individuals have to pay to renew their EAD.

D. If an individual submitted an EAD under category (a)(20) with a fee, will USCIS refund the fee if the EAD is converted for the free BFD EAD?

No. The refund policy USCIS announced applies only to EAD applications filed under category (c)(14) from June 14, 2021 through September 29, 2021.⁹ Because of this, we recommend submitting initial EADs without a fee. If the individual is ultimately granted a BFD, no fee is needed, and if a fee was submitted, it will not be refunded. Although EADs based on the waitlist are generally not free, USCIS stated at the October 20, 2021, stakeholder engagement that petitioners and derivatives may file the I-765 without a fee for either the BFD EAD or the waitlist EAD.

IV. Approvals, Renewals, Revocations, and Denials

A. If an individual gets BFD, does it mean they are certain to be granted U nonimmigrant status?

No. A BFD grant does not guarantee final U nonimmigrant status approval. At the BFD review stage, USCIS is applying a quick review, looking only for bona fide applications that warrant a

⁸ To seek case assistance from CIS Ombudsman, complete the online form here: <https://www.dhs.gov/topic/cis-ombudsman/forms/7001>.

⁹ USCIS, *Certain Petitioners for U Nonimmigrant Status May Receive a Refund for Applications for Employment Authorization Submitted Before Sept. 30, 2021* (Nov. 22, 2021), <https://www.uscis.gov/newsroom/alerts/certain-petitioners-for-u-nonimmigrant-status-may-receive-a-refund-for-applications-for-employment>.

favorable exercise of discretion. The BFD review is not, for instance, fully evaluating the case including any waivers or other issues that may ultimately lead to a denial of U nonimmigrant status. Furthermore, USCIS will do periodic background checks so a subsequent arrest could result in the revocation or non-renewal of a BFD EAD and the issuance of an RFE for a waitlist adjudication.

B. Can the BFD EAD and deferred action be renewed?

Yes. While there is no filing fee for the initial BFD EAD, applicants filing for renewal must either pay the fee or include a fee waiver request using Form I-912, along with their I-765 application. If the EAD is renewed, the deferred action is also renewed.

C. What happens if an individual is not granted BFD?

If an individual is not granted BFD, that is not a denial of the U visa case. The next steps depend on whether the individual is a principal petitioner or a derivative.¹⁰

For a principal U petitioner, if BFD is not granted, the case proceeds to waitlist placement adjudication where there may be a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) issued. If approved for the waitlist, they can still get an EAD and deferred action based on being placed on the waitlist. Here the result is the same—EAD and deferred action—but they may just have to wait longer for the EAD and deferred action through the waitlist than through the BFD process. However, they may also be denied at the waitlist adjudication stage, and then the case is denied.

For qualifying derivative family members who are not granted a BFD, they move on to full adjudication, including the issuance of RFEs or NOIDs. If the principal was not granted BFD but placed on the waitlist, the derivative may also be placed on the waitlist if they are able to resolve the issues identified. If the principal was granted BFD, the derivative cannot be placed on the waitlist because a derivative cannot be placed on the waitlist without the principal on the waitlist. In that case, if the derivative is able to resolve the issues identified, they can receive a BFD at that point. If they are not able to resolve the issues, they have to wait for the principal’s final adjudication. At that point, USCIS will make a final decision on the derivative’s application.

¹⁰ See 3 USCIS-PM C.5 Appx, Bona Fide Determination Process Flowchart, <https://www.uscis.gov/sites/default/files/document/policy-manual-resources/Appendix-BonaFideDeterminationProcessFlowchart.pdf>.

D. Can you appeal if not granted BFD?

No. USCIS will not allow the filing of a motion to reopen or reconsider, request to reapply, or appeal where BFD is not granted because this is not a final agency action, and because in general there is no appeal of an employment authorization denial. See 8 CFR § 274a.13(c).

E. What happens if the BFD grant is revoked?

USCIS reserves the right to revoke the BFD grant at any time. If USCIS decides to revoke the BFD grant, the case will move to waitlist adjudication, at which point USCIS will 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 U visa waitlist.



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