

EMPLOYMENT AUTHORIZATION FOR BONA FIDE U NONIMMIGRANT STATUS PETITIONERS

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On June 14, 2021, U.S. Citizenship and Immigration Services (USCIS) published a Policy Manual alert regarding the issuance of employment authorization for pending bona fide U nonimmigrant status petitions (commonly referred to as “U visa” petition), for both the principal and derivative(s). The policy applies to U petitions pending on June 14, 2021, as well as those filed on or after that date. *See [USCIS BFD Policy Manual Update](#).*

What is a Bona Fide Determination (BFD)?

A Bona Fide Determination (BFD) is a determination by USCIS that a U petition appears to be meritorious. It is distinct from the U waitlist designation – both will exist in tandem as separate adjudication tracks for pending U petitions. The BFD is more involved than simply USCIS reviewing the U petition, but not as exhaustive as the waitlist adjudication.

USCIS will automatically first review all U filings to first determine whether the petition is bona fide. If a bona fide determination is not granted, USCIS will conduct a more thorough review of the filing (most likely involving a Request for Evidence (RFE)) to determine U waitlist eligibility.

Once either a BFD or waitlist designation is granted, the U petitioner will be placed back in the queue in receipt date order for eventual adjudication approval of U nonimmigrant status. If neither BFD nor waitlist designation is granted, the principal and/or derivative U petition will be denied.

What is the benefit of a BFD?

If a petition is determined to be bona fide, USCIS will issue:

- A 4-year BFD employment authorization document (EAD) (renewable in 4-year increments); and
- Deferred action (which is a designation of low priority for removal).

The BFD EAD is available only to U petitioners and their derivatives who are in the U.S. A bona fide petition is considered prima facie approvable. However, this determination does not guarantee the eventual approval of U nonimmigrant status.

How is the BFD made?

A bona fide petition must comply with the initial evidence requirements for U nonimmigrant status and a successful background check. If those have been satisfied, USCIS will then consider any national security or public safety risks, as well as any other relevant considerations, as part of the discretionary adjudication.

Initial evidence for a principal U petitioner includes:

- A completed and executed Form I-918 U petition;
- A completed and executed I-918 Supp. B U certification;
- A personal statement from the U petitioner describing the victimization; and
- Completed USCIS biometrics.

Initial evidence for a derivative beneficiary includes:

- The petitioner has properly filed a complete Form I-918 Supplement A;
- The petition includes credible evidence of the qualifying relationship;
- The principal petitioner received a BFD EAD; and
- Completed USCIS biometrics.

Important notes:

- The BFD does not require a properly filed I-192 waiver of inadmissibility, as USCIS will rely on biometrics for the determination. However, if any inadmissibility grounds do apply, an I-192 must be filed and approved before USCIS will grant U nonimmigrant status.
- USCIS is adopting for national application recent 9th Circuit decision in *Medina Tovar v. Zuchowski* which held that after-acquired spouses of U petitioners can be included as a derivative. USCIS will evaluate whether the spousal relationship exists at the time the principal U petition is favorably adjudicated, rather than when it was filed.

Discretion and Determination of National Security and Public Safety Risks:

USCIS may choose not to exercise discretion to grant a BFD EAD and deferred action where a petitioner or qualifying family member has been **convicted or arrested** for any of the following acts:

- National security concerns;
- Murder, rape, or sexual abuse;
- Offenses involving firearms, explosive materials, or destructive devices;
- Offenses related to human trafficking;
- Aggravated assault;
- An offense related to child pornography; or
- Manufacturing, distributing, or selling of drugs or narcotics.

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

What happens if a BFD EAD is NOT granted?

If USCIS needs additional evidence regarding an arrest, or if the U petitioner has other adverse factors that require further review, then those individuals will not be granted a BFD EAD. Instead, USCIS will conduct a more in-depth adjudication, likely involving a Request for Evidence (RFE), to determine U waitlist eligibility.

If placed on the U waitlist, U petitioners and derivatives will receive deferred action and are eligible for a 4-year EAD, and renewable in 4-year increments.

Must an I-765 be filed for a BFD EAD, and is there a cost?

The Policy Manual states that USCIS will use a previously filed I-765 under categories (c)(14), (a)(19), or (a)(20) to issue BFD EADs. If an I-765 application has not been filed in BFD cases, USCIS will issue a notice indicating that the U petitioner has received a BFD and may apply for a BFD EAD.

Note: The inclusion of the (a)(19) category suggests that USCIS *may* issue a BFD EAD automatically for the principal U petitioner where they have not filed a separate Form I-765 application under category (c)(14). We are awaiting further guidance from USCIS on this point.

There is no fee for the **initial** BFD EAD.

Can a BFD EAD and deferred action be revoked?

Yes. USCIS will update and review background checks at regular intervals. If USCIS determines that a BFD EAD or a favorable exercise of discretion is no longer warranted or was issued in error, USCIS may revoke the BFD EAD and terminate deferred action. At that time, USCIS will initiate a waitlist adjudication process to gather additional information and evidence to determine waitlist eligibility. If the petitioner is not eligible for the waitlist, the petition will be denied.

Conclusion:

This is a wonderful policy development that will benefit many of our clients. However, many questions remain on the implementation of this BFD policy. It is unclear, for example, how long it will take for BFD EADs to be issued, and how the creation of this separate process will affect the timing of U visa waitlist determinations, which are currently taking over four years. We will continue to provide updates as we receive further information on the implementation of the BFD EAD process.