

# ASISTA Practice Pointer

## I-94 v. I-797: Which U Visa Expiration Date Applies?

### February 2019



Many practitioners have reported problems with U visa adjustment adjudications where there is a difference between the expiration date on the U petition I-797 Approval Notice issued by USCIS and the expiration date on the I-94 Arrival-Departure Record issued by Customs and Border Protection (CBP). This practice pointer provides strategies for addressing such expiration date discrepancies.

#### **Why does this matter?**

Those with U nonimmigrant status must show three years continuous presence in U status to adjust under INA section 245(m). In the past, practitioners have relied on the expiration dates noted on the I-918/918A I-797 Approval Notice for counting continuous presence, even for U petitioners or derivatives who were not in the U.S. when the I-918/918A was approved. For those U nonimmigrants who consular process, however, the dates on the USCIS I-797 Approval Notice may be different than the period of admission on the CBP I-94 card. Despite prior practice, USCIS is now denying U adjustment regardless of the I-797 validity dates *if the CBP-issued I-94 card expired* before the U visa holder completed three years of continuous presence and/or before the U visa holder filed the I-485 adjustment of status application.<sup>1</sup>

#### **What's the fix?**

Check now whether there is a discrepancy between your approved U clients' CBP I-94 expiration dates and their USCIS I-797 Approval Notice dates. If the I-94 provides less than the three plus years required to adjust, follow the steps below as applicable.

#### **1. CBP-Issued I-94 is Less Than 3 Years and Has Not Expired**

- Request an extension of status to VSC on Form I-539 before the I-94 assigned time expires.
- Request the remainder of the 4 years of U status, counting from the date of admission into the US.<sup>2</sup>

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<sup>1</sup> Fortunately USCIS appears to be assigning the date on the I-797 to Employment Authorization Documents (EAD) issued after entry.

<sup>2</sup> [USCIS Policy on Extension of U Status](#) for derivatives specifically allows for extension to complete the 4 years of U status. USCIS PM 602-0001, 6/22/2010.

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While USCIS has previously stated that extensions should be filed as soon as the applicant knows an extension will be necessary, we have seen them reject some recent I-539 filings because the I-539s were filed more than 90 days before the date of expiration as provided in USCIS's 2016 policy memo on U extensions.<sup>3</sup>

### **2. CBP-Issued I-94 was Less Than 3 years and Has Expired**

- File the I-539 extension application and request *nunc pro tunc* extension pursuant to 8 CFR 214.1(c)(4) and USCIS policy.<sup>4</sup>
- Show that failure to timely file was due to circumstances beyond the control of the petitioner (i.e. sudden change in VSC policy of accepting I-797 approval date), and the delay was reasonable given these circumstances.
- Argue that VSC should extend U status back to the I-94 expiration date and up to the four years allowed for U visa status.

The goal of these steps is to ensure the applicant will have been in valid status for the requisite period before and on the date of filing the I-485.

### **3. CBP I-94 Expiration Date has Passed, but Your Client Would Be Eligible to Adjust if the VSC I-797 Expiration Date Controlled**

- File the I-539 along with the I-485 adjustment of status application, making the arguments above concerning *nunc pro tunc* extensions.
- In addition to the *nunc pro tunc* request, request that your client's U should be extended beyond 4 years to allow the derivative enough time to apply for AOS.

VSC has accepted and adjudicated such concurrent filings. To make your argument, review INA §214(p)(6): Exceptional circumstances in this case may include the confusion of the 4-year VSC I-797 approval notice with the 3 year or less CBP I-94 card, your client's reliance on VSC's prior practice of accepting the I-797 validity period as controlling, and any other factors that relate to the failure to extend status timely.<sup>5</sup>

Given the agency's recent abrupt policy reversals without notice on other survivor procedures, we cannot promise concurrent I-539/I-485 filings will continue to work. Nevertheless, particularly in cases where your clients would be eligible to adjust if VSC's I-797 dates controlled, we think this is the best practice and a persuasive argument. This is especially true because VSC is not responding in a timely fashion to stand-alone I-539 extension requests.

### **4. CBP-Issued I-94 and VSC I-797 Expiration Dates Have Both Expired Prior to Your Inheriting the Case**

- Contact us to discuss strategy; some of those suggested above may work if combined with an ineffective assistance of counsel argument, which raises due process concerns. We can help

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<sup>3</sup> [USCIS Policy Memorandum on T and U Visa extensions](#). USCIS PM 602-0032.2, 10/4/2016.

<sup>4</sup> Id. Note that 8 CFR 214.1(c)(4) applies to *nunc pro tunc* requests for all nonimmigrant visas categories and contains provisions not applicable to U visa holders (e.g. that the applicant has not otherwise violated his or her nonimmigrant status).

<sup>5</sup> Attached is an example of VSC's practice to accept the I-797 validity period for adjustment eligibility regardless of the I-94 date. \*Special thanks to Sarah Schlicher for sharing this example for inclusion in this Practice Pointer.

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you argue that due process justifies USCIS applying a *nunc pro tunc* extension of status and a late-filed adjustment.

### **Is there anything we can do about the delayed extension decisions?**

Even though USCIS apparently believed it had authority to apply its own dates in the past, the long-term solution may require changing USCIS policy and regulations, which takes time. Meanwhile, ASISTA is exploring possible litigation in federal court on both systemic issues and in individual cases. It may be worth considering mandamus in federal court, for instance, if VSC is failing to take timely action on extensions, and such delays harm your clients. The obvious harm for most U holders in such situations is losing the ability to apply for lawful permanent residence, not based on any Congressionally-dictated requirement, but purely based on government delay and the confusion DHS itself created.

Please keep us posted on strategies you are trying and how they are working. Additionally, we continue to collect evidence of VSC's prior practice of accepting the I-797 validity period for U AOS purposes regardless of the CBP-issued I-94 validity period. If you have your own correspondence from VSC confirming this practice, please contact us: [gail@asistahelp.org](mailto:gail@asistahelp.org) and [laura@asistahelp.org](mailto:laura@asistahelp.org).

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## ADDENDUM

**Sarah J. Schlicher**

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**From:** VSC, Hotline Follow Up I918 I914 <HotlineFollowUpI918I914.VSC@uscis.dhs.gov>  
**Sent:** Tuesday, May 19, 2015 12:51 PM  
**To:** Sarah J. Schlicher  
**Subject:** RE: Shorter I-94 card, Axxxxx449

An I-539 does not need to be filed for an extension of U-status, the date on the I-94 card is not an issue. The applicants U-visa status is valid from 7/10/2012 until 4/29/2016.

Thank you

ISO 1  
VAWA VSC  
Officer Monique

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**From:** Sarah J. Schlicher [mailto:sarah@schlicherlawoffice.com]  
**Sent:** Friday, May 01, 2015 11:04 AM  
**To:** VSC, Hotline Follow Up I918 I914  
**Subject:** FW: Shorter I-94 card, [REDACTED]

Hi,

I'm resending this email (along with a G-28 that we had the beneficiary sign, pursuant to your request).

Now we have missed the deadline on the I-94 card, but I guess we could file a late I-539 if required.

Thanks,

Sarah

Law Office of Sarah J. Schlicher, P.A.  
9303 W. 75th St., Ste. 110  
Overland Park, KS 66204  
Ph. 913-722-3400  
Fax 913-722-0521  
sarah@schlicherlawoffice.com

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**From:** Sarah J. Schlicher [mailto:sarah@schlicherlawoffice.com]  
**Sent:** Wednesday, March 25, 2015 10:54 AM  
**To:** hotlinefollowupI918I914.vsc@dhs.gov  
**Subject:** Shorter I-94 card, A205-045-449

RE: [REDACTED] (A [REDACTED])  
VTU [REDACTED]

Dear Officer,

Our client was given an I-918, Supplement A, validity from 7-10-12 to 04-29-16, and that is how long is visa was given for also.

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Because of the expiration of his passport, his I-94 card was stamped as expiring on 4-14-15. His EAD from your office was granted until 4-29-16.

My question is whether we need to file an I-539, due to the fact his I-94 card shows an expiration of 4-14-15, or whether that does not matter due to his EAD and the I-918, Supplement A, being granted until 4-29-16?

Thank you for your reply. We will do whichever you advise us to do.

Sincerely,

Sarah

Law Office of Sarah J. Schlicher, P.A.  
9303 W. 75th St., Ste. 110  
Overland Park, KS 66204  
Ph. 913-722-3400  
Fax 913-722-0521  
[sarah@schlicherlawoffice.com](mailto:sarah@schlicherlawoffice.com)