



**Annotated Notes: ASISTA and ILRC Webinar on Bona Fide Determinations for U
Nonimmigrant Status**
August 18, 2021

A bipartisan majority in Congress created U visas in order to promote public safety and provide security for immigrant crime survivors. However, there is a statutory cap of how many U visas can be granted each year, [which is significantly lower than the number of eligible petitioners who come forward to apply for this relief](#). This creates substantial delays for survivors of crime. To begin to address the growing processing delays, in June 2021 USCIS implemented a process to grant work authorization and deferred action for U visa petitioners who present a bona fide case, while their case is pending.

On August 18, 2021, ASISTA and ILRC hosted a conversation with USCIS representatives to learn more about bona fide determination (BFD) policy and procedures and what it means for U visa petitioners and their families. The notes below include information shared during this event, including additional analysis. These notes are not vetted nor endorsed by USCIS, and they are presented for informational purposes ONLY, and do not constitute legal advice.

NOTE: USCIS will be holding its own stakeholder engagement on bona fide determinations on September 29, 2021, and issuing its own Q&A in the upcoming weeks.

I. Overview

The USCIS Policy Manual [U visa section](#) contains new provisions regarding both the USCIS waitlist as well [as the new BFD policy](#), which was introduced on June 14, 2021. This new policy applies both to principal petitioners as well as qualifying family members living in the United States. Bona fide generally means that the application was made in good faith, without fraud or deceit. The authority to grant work authorization based on BFD is rooted in the U visa statute¹

¹ INA § 214(p)(6).

and the purpose of the policy is to provide safeguards to U visa petitioners while their applications are pending.

The BFD adjudication comprises two steps:

- First, USCIS will check whether the Form I-918 is complete and properly filed. It will also check whether the Form I-918 Supplement B is complete and was signed within six months prior to filing, whether there is a signed statement from the petitioner regarding the victimization, and whether the noncitizen has completed biometrics. Although Form I-192 is required initial evidence, USCIS will not review it as part of the BFD because doing so would delay the BFD adjudication process.
- For derivatives, USCIS will check if the Form I-918 Supplement A is complete and properly filed, whether there is credible evidence of the qualifying relationship, and whether the derivative has completed biometrics. In addition, the derivative can only receive a BFD EAD if the principal does, too.
- Second, USCIS will use the biometrics results to determine whether the noncitizen poses a risk to public safety or national security and whether he or she merits a BFD EAD as an exercise of discretion. USCIS can consider evidence that the noncitizen's criminal history is connected to their victimization. Derivatives undergo the same national security, public safety, and discretionary analysis as principals.

If USCIS determines that a BFD EAD is warranted, then the EAD will be issued, along with Deferred Action, for four years. If USCIS does not issue a BFD, then the case will be reviewed for the U visa waitlist, which consists of a full adjudication of the entire petition, including the Form I-192. If the case is approved for waitlist placement, USCIS will issue an EAD and deferred action for four years. Cases in which a BFD EAD has been issued or that are on the waitlist will remain in line for final U visa adjudication and will be reviewed in receipt-date order.

Pending U visa petitions will now fall into one of three categories: those where a BFD EAD has been issued, those that have been placed on the waitlist, and those that are still awaiting review for either the BFD or the waitlist. Petitioners who are outside the United States cannot receive a BFD EAD and will go through the waitlist adjudication instead. Once a case reaches final adjudication, it will either be approved or denied. A petitioner whose petition has been denied

may request review through an appeal or motion. For a visual depiction of the adjudication process, review USCIS's [flowchart](#).

II. Questions & Answers

A. Timeline

1. Approximately how long will the BFD EAD determination take per application?

USCIS does not have sufficient reliable data to calculate processing times for BFDs. Once USCIS has such data, it will make the data available.

2. Will USCIS start with the oldest cases first? If yes, what is the approximate date that the agency will be starting with?

USCIS is reviewing cases in first-in, first-out order, starting with those that have not already received a waitlist adjudication.

Note: Although USCIS has not provided the filing dates for cases that are currently undergoing BFD review, based on anecdotal reports from practitioners, most cases that have received BFDs were filed in 2016.

3. As the BFD process is starting to be implemented, how will U visa petitioners be informed if their deferred action EADs are based on the waitlist or BFD determinations?

When USCIS issues a BFD, it will issue a notice to the noncitizen notifying him or her of the determination and eligibility for employment authorization. If USCIS does not issue a BFD, it will issue an RFE notifying the noncitizen that a BFD was not issued and that the case is now being considered for the waitlist. The RFE will also explain what additional evidence is required.

Petitioners who were placed on the waitlist prior to June 14, 2021 will not undergo the BFD process and will remain in the same line for final adjudication of their U visa petition. All

petitioners, whether they have a BFD or are on the waitlist, will be reviewed in receipt-date order for final U visa approval.

Note: You can find a sample BFD letter and waitlist letter [here](#). The BFD letter is titled, “Correspondence,” and states “USCIS has determined your case is bona fide and that you warrant a favorable exercise of discretion.” The waitlist letter is titled, “Informational,” and states “your petition is being placed on a waiting list.”

4. We have heard of several U petitioners receiving two-year deferred action upon an approved BFD. Is there a reason some petitioners are receiving two-year grants and some four-year grants? If this is in error, how can U visa petitioners and/or their representatives go about correcting it? Will recipients receive a letter confirming BFD in addition to the (c)(14) EAD?

USCIS will issue initial grants of deferred action and EADs under both the BFD process and the waitlist for a four-year period. If you receive an EAD for less than four years, you can email the USCIS service center hotline to request a correction.

- Vermont Service Center hotline: HotlineFollowUpI918I914.vsc@uscis.dhs.gov
- Nebraska Service Center hotline: nsc.i-918inquiries@uscis.dhs.gov

Noncitizens who receive a BFD will receive a notice to that effect, in addition to a (c)(14) EAD.

B. Processing Questions

1. How will adjudicators be allocated between U visa case adjudications and bona fide determinations?

USCIS assigns resources as available based on priorities. Adjudicators will continue to be assigned to all necessary adjudications, including full U adjudication, waitlist, and BFD. All three adjudications will carry on at the same time.

2. How will the bona fide determination policy interact with requests to expedite? What will happen to applications where USCIS has approved a request to expedite but no action has yet been taken?

USCIS is generally adjudicating BFDs in receipt-date order, starting with the oldest that have not had waitlist adjudication yet. In terms of a request to expedite, USCIS will adjudicate on a case-by-case basis based on agency policy.

3. Can applicants applying now for the U visa submit a Form I-765 with their filing (with NO fee) to await the eventual BFD review? How do you recommend that applicants flag that the I-765 is for the BFD determination?

New I-918 petitioners can file Form I-765 without a fee per the BFD policy, under the current EAD (c)(14) code. The first review that will take place is the BFD review for all new cases, so there is no need to specifically lay out which review the petitioner would like to receive.

Note: ILRC and ASISTA have heard of standalone Form I-765 applications filed in category (c)(14) without a fee rejected for failure to include a fee or a fee waiver, despite the language above and in the Policy Manual that the BFD is free. This is an area where ILRC and ASISTA are continuing to monitor and conduct advocacy.

4. If petitioners wish to supplement their U visa filing with a Form I-765 now so it is in the file when the adjudicator conducts the BFD review, what is the recommended process? How can petitioners most efficiently supplement their applications? What code should practitioners put on the I-765 so that we can get it through the mail room with no filing fee [e.g. (c)(14) for deferred action]?

If petitioners already have an I-918 or I-918A petition on file, but no I-765 on file, USCIS will issue a notice indicating that they have received a BFD grant and that they are eligible for an EAD. For these cases, where petitioners do not already have a Form I-765 pending, USCIS recommends waiting to file Form I-765 until the petitioner receives a BFD grant from USCIS in order to be most efficient. If petitioners have already filed Form I-765 under EAD category (a)(19)(20), (a)(19)(20), or (c)(14), that I-765 will be adjudicated for the BFD. For additional information on filing the I-765, see Volume 3, Chapter 5 of the USCIS Policy Manual.

Note: Although USCIS recommends not filing an I-765 where one is not already pending, and instead waiting for the BFD grant, ILRC and ASISTA suggest that there may be some advantage to supplementing the file with an I-765 to speed up the ultimate EAD grant.

- 5. The Policy Manual states that USCIS plans to amend the Form I-765 at a later time to include a specific reference to this category. Does this mean that the code will change?**

USCIS is in the process of reviewing Form I-765 in light of the BFD policy. USCIS will give notice of any change once the internal review is completed.

Note: Currently, practitioners should use existing Form I-765 and EAD code (c)(14) to request an EAD pursuant to a BFD grant.

- 6. For families where the principal applicant is abroad (and therefore ineligible for the BFD EAD), will you make an exception for their derivatives who are in the U.S. to receive a BFD EAD review?**

The BFD process is intended for principal petitioners living in the United States. USCIS will first determine whether the principal is eligible for a BFD grant. If so, USCIS will next look to see if the derivatives are eligible for a BFD grant. If the principal is outside of the United States, USCIS will put the principal and any derivatives through the waitlist process. USCIS cannot make a BFD determination for derivatives if the principal is outside of the United States because the process must start with whether the principal is eligible.

- 7. If the BFD EAD determination is always being made first for cases going forward, and if BFD EAD granted U principals will never go on a waitlist, should U principals and derivatives who are here stop filing/paying for (c)(14) EADs?**

If a noncitizen is filing an initial U visa petition, he or she can file the Form I-918 and Form I-765 concurrently. The I-765 does not require a fee.

- 8. Relatedly, the Policy Manual states that USCIS will convert I-765s filed under (a)(20) and (c)(14) to BFD EADs. However, (a)(20) and (c)(14) I-765s require a filing fee, whereas the initial BFD EAD is free. Will USCIS refund the filing fees from (a)(20) and (c)(14) filings that are converted?**

Note: USCIS did not directly answer this question, but it is our interpretation that USCIS will not automatically refund fees paid for (a)(20) or (c)(14) I-765s even if those forms are converted to initial BFD EAD applications that do not require a fee. If noncitizens wish to seek a refund, they should “submit a written request for a refund to the office having jurisdiction over their application or petition.” [AFM 10.10, Refund of Fees](#) (superseded by USCIS Policy Manual, Volume 1: General Policies and Procedures as of October 2, 2020). Practitioners can contact ASISTA at questions@asistahelp.org or ILRC at aod@ilrc.org for further information and

assistance. If you are able to obtain a refund, please let us know.

- 9. The Policy Manual states that USCIS will convert pending I-765s filed under category (a)(19) (for principal petitioners) to BFD EAD applications. However, principal petitioners generally do not file I-765s under category (a)(19); USCIS issues those EADs automatically upon final approval of the I-918. Can USCIS confirm that it will issue BFD EADs to principal petitioners without requiring the submission of an I-765?**

In order for USCIS to issue a BFD EAD, a Form I-765 is required. If a Form I-765 has not been filed by the time the BFD is made, USCIS will issue a notice that a BFD has been made, that the petitioner is eligible for employment authorization, and that he or she will need to file a Form I-765 in order to receive the EAD.

- 10. We are concerned that if a petitioner's *arrest* falls under the enumerated public safety or national security grounds, then they potentially would not be eligible for a BFD and USCIS will not accept or process motions to reopen or reconsider, appeals, or requests to re-apply for a BFD EAD. As such, the petitioner has no recourse to rebut a negative BFD determination, even if charges were dropped, never filed, or the conviction is not for an enumerated public safety or national security ground.**

Can the petitioner/counsel have an opportunity to supplement their file so as to receive a favorable BFD and/or waitlist consideration?

When USCIS decides not to issue a BFD, it is not making a final agency action. Rather, the case will be reviewed for waitlist placement, and USCIS will issue an RFE. The petitioner can supplement their petition in response to the RFE, during the waitlist consideration.

The purpose of the BFD policy is to reduce wait times for EADs and Deferred Action, out of concern for the effect that long wait times were having on victims. The current backlog of pending U visa petitions is 268,000, and at the time the BFD policy was implemented, there was a 5-year wait for the waitlist.

Note: U visa petitions can be supplemented through to the final adjudication. If you have additional evidence to support a U visa petition, you can file it at any time - even before you have received an RFE. If you are supplementing a U visa petition outside of an RFE response, we suggest including a copy of the Form I-918 receipt notice and flagging the case as a supplement to a pending petition in order to increase the likelihood that the USCIS mailroom will accurately route it to the existing file.

11. Given that arrests do not *per se* make petitioners inadmissible, and the BFD is not a final decision on U nonimmigrant status, would USCIS consider limiting the BFD biometrics review to serious convictions that definitively trigger the enumerated public safety or national security criteria?

USCIS will review the noncitizen’s inadmissibility grounds and any waiver application at the waitlist phase or final adjudication of the U visa. For further information about how background checks and criminal history are considered in the BFD process, please refer to the [Bona Fide Determination section](#) of the USCIS Policy Manual.

12. How does USCIS anticipate coordinating with ICE for petitioners in removal?

As stated in the Policy Manual under “Adjudicative Process” and “Prima Facie Case for Approval,” USCIS believes that the BFD satisfies the prima facie standard under INA § 237(d)(1) as well as the “prima facie determination” that ICE previously requested under the [2009 Vincent memo](#).

Note: Although ICE’s Directive 11005.2 (eliminating the prima facie determination process created under the 2009 Vincent memo) has been superseded by [Directive 11005.3](#),² it is unclear to what extent OPLA will request BFDs and expedited processing for respondents with pending U visa petitions. It is also unclear whether a BFD will satisfy the prima facie standard outlined in *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), which requires a consideration of “the likelihood that the USCIS will exercise its discretion favorably.”³ Because the 2009 Vincent memo was never formally rescinded, and Directive 11005.2 has now been superseded, we recommend that practitioners ask OPLA to request BFD and expedited processing for all respondents with a pending U visa petition, where it would benefit the respondent. In addition, OPLA is part of the same agency as USCIS and should follow USCIS’s interpretation that a BFD shows prima facie eligibility for the U visa.

13. What are the case processing times for applications submitted today?

The current backlog is 268,000 cases. USCIS is aiming to promote efficiency with the BFD process. USCIS is committed to adjudication in a timely and efficient manner. While the BFD is quicker than the waitlist, USCIS does not have sufficient data for estimating processing at this time. USCIS is gathering information to be able to calculate and publish once the data is available.

² See ASISTA’s [Policy Alert](#) on Directive 11005.3 for additional information.

³ *Sanchez Sosa* at 814.

14. Can the U1 opt out of the BFD process and into the waitlist?

No. USCIS will initiate the BFD process without any action taken by the petitioner or derivative, so no, an individual cannot opt out. USCIS is only conducting limited waitlist adjudications for petitioners who are not given a BFD grant.

15. If USCIS makes a negative bona fide determination, how soon will an RFE for the waitlist determination be issued?

The waitlist review will start as soon as the BFD determination is made that no BFD will be granted. USCIS will review the case and the need for documents and then issue an RFE. USCIS will issue a notice that BFD has not been granted.

16. If USCIS determines that a BFD should not be granted, what, if any, notice will be issued? If a notice is issued, will a reason be issued? Even if an appeal is not allowed, it would be helpful for practitioners to be on notice of any issue in the case so that they can begin addressing it in anticipation of final adjudication.

Once an officer has decided not to grant a BFD, the officer will issue a notice saying that no BFD will be granted, and a separate section with an RFE or NOID explaining the deficiencies or concerns as part of the waitlist adjudication. For more information, see Volume 3, Part C, Chapter 5, Section (C)(5), *Waiting List Adjudication for Petitioners Not Issued a Bona Fide Determination Employment Authorization Document* in the [Policy Manual](#).

C. Resources

1. Will USCIS provide a flowchart for qualifying family members residing in the United States?

USCIS will consider providing a flowchart for qualifying family members in the future. If so, it will be in the Policy Manual in the same section as the current flowchart.

2. Will USCIS track how many BF determinations have been made? Will USCIS release quarterly data reports on how many BF determinations have been made and the results (granted or denied)?

USCIS aims to gather sufficient adjudicative data. Once data is available, USCIS will post it. Historically, USCIS has published data from the time of filing until the waitlist adjudication. While gathering data, USCIS is not recording the processing time for Form I-918 right now. This

will be updated in January 2022, or once there is enough reliable data to report. USCIS reiterates that the BFD process does not include denials, so there is nothing to report there. Those who are not granted BFD under initial review will proceed to full waitlist adjudication and will receive notice of that as well.

D. *Medina-Tovar*

- 1. Can USCIS confirm that its new guidance on *Medina-Tovar* will include after-acquired stepkids as long as marriage took place before 18? It seems like the language of the Policy Alert will allow for this, as it states “Therefore, when confirming a relationship between the principal petitioner *and the qualifying family member which is based on marriage*, USCIS will evaluate whether the relationship existed at the time the principal petition was favorably adjudicated, rather than when the principal petition was filed.”**

Yes. The definition of “child” is found at INA § 101(b)(1)(B). A stepchild is a “child” provided that he or she was not yet 18 years of age at the time the marriage between the child’s natural parent and step-parent occurred. A stepchild can be a qualifying family member for a U visa as long as the qualifying relationship exists when the Form I-918 is favorably adjudicated, *and* at the time of filing the Form I-918 Supplement A, *and* at the time of the child’s entry into the US as a U visa derivative.

- 2. Will USCIS reopen I-918As that were denied or revoked prior to *Medina-Tovar*?**

USCIS will not reopen Form I-918 Supplement As denied prior to the issuance of the decision in *Medina Tovar* because those cases were decided appropriately at the time of adjudication based on the regulations in effect at that time. Affected petitioners may be able to refile.

Note: Refiling the Form I-918 Supplement A may not be possible in some cases, such as those in which child derivatives turned 21 after the principal’s Form I-918 was adjudicated and are thus not protected from aging out under INA 214(p)(7). Filing a Form I-290B Motion to Reconsider based on the change in law may be a better alternative, but timeliness may pose a barrier in many cases. Practitioners may consider arguing that the conditions for allowing an untimely Motion to Reopen should also apply to Motions to Reconsider.⁴ Practitioners may also consider filing their own APA action based on *Medina-Tovar* in cases where the principal has not yet adjusted.⁵

⁴ See 8 CFR § 103.5(a)(1).

⁵ For more information on filing APA actions in immigration cases, see the American Immigration Council’s [practice advisory](#).

3. Will USCIS reopen I-918A that were denied or revoked after the Medina-Tovar decision, but before issuance of USCIS policy applying the decision nation-wide?

Once the decision in *Medina-Tovar* was issued, USCIS began identifying and holding U and T visa petitions that might be affected in order to ensure that no denials would be issued while USCIS implemented its policy.

Note: If you have a U or T visa case in which the Supplement A for an after-acquired family member was denied after the issuance of *Medina-Tovar*, you should file a Form I-290B, Appeal or Motion to Reconsider, based on the change in law and policy. You can also consider requesting that USCIS reopen the case *sua sponte* based on their statement that they were supposed to hold these cases pending the implementation of their new policy; but you should still plan to file a timely motion or appeal if needed.

4. Can USCIS confirm the agency has implemented its announced position to apply the holding of Medina-Tovar nationwide in both U and T visa matters?

Yes, USCIS is applying *Medina-Tovar* nationwide in both U and T visa matters.