



## **Q&A with USCIS Humanitarian Affairs Division and Service Center Operations Directorate (SCOPS)**

September 18, 2023

In September, ASISTA met with representatives from USCIS's Humanitarian Affairs Division and Service Center Operations Directorate to present questions raised by members and practitioners of survivor-based immigration work. What follows are ASISTA's notes paraphrasing the responses, and USCIS did not object when they were sent to the agency for verification of accuracy. USCIS also stated it plans to publish similar information on its website, though it does not appear to have happened yet. Some primary areas of focus for the Q&A were international travel by immigrant survivors, documentation of status, and miscellaneous questions on BFD notices and preservation of eligibility for U derivatives after marriage. Please reach out to ASISTA if you have any questions or concerns about the information provided here. **Please also contact us if you have experiences that differ from the policies outlined by USCIS.**

### **Miscellaneous Questions**

1. **BFD notices with 12/22/16 date.** Several practitioners recently reported receiving BFD notifications for cases filed in 2021-2022 (or slightly earlier) in which the notice from USCIS references the receipt date of December 22, 2016 in the body of the notice. Practitioners also report that these notices were not accompanied by an EAD. ASISTA has collected 11 case examples that are attached in a spreadsheet and folder of corresponding notices (not all respondents shared a copy of the notice, but most did). We have heard from other members that up to 20 such notices were received in larger offices.
  - a. Practitioners are wondering how to advise their clients about these notices, and if the December 22, 2016 error reflects an **error in issuance of the BFD or merely a typographic error on the notice.** Are the notices valid evidence of a positive BFD determination? If so, **should they expect an EAD** to follow?

***USCIS Response:** As soon as we got those, we sent them to SCOPS, who could use the examples to find out what's going on at SCs. SCOPS was able to look into it immediately. Thank you for providing those examples so quickly –*

*examples are extraordinarily helpful to pinpoint what the problem is and where the source of the error is. To extent people were comfortable sharing their notices and A#s, it was very helpful to figure out the source of the error. SCOPS ascertained these were real approvals. They are evidence of favorable review and the EADs will be forthcoming.*

*USCIS is already making system adjustments and making sure all issues are fixed so it can reissue the notices. One problem is that the director's signature was missing from the notices, which is a big issue for those using notices to seek public benefits, etc. We want that fixed ASAP, and are in the midst of fixing it. There is no concrete timeline right now but we would estimate 45-60 days. In the meantime, stakeholders should know the system is being corrected and they should not email the Service Center hotlines about the notices anymore. Folks will get updated notices.*

- b. Members indicated these notices were for cases filed in 2021 and 2022, which is not in line with published processing times. Until now, BFDs were coming for cases filed in around 2019. Is this a shift in which cases are being looked at first?

***USCIS Response:** This is not a shift, we are still processing them on a first-in, first-out basis. At the HART Service Center, we are working out some of the logistics issues with file movement back and forth, with HART officers still using existing Service Centers, and the workflow got changed a bit. This is just a little blip. The Service Center staff and contract staff know work needs to be pulled as first-in, first-out for BFD reviews, but SCOPS leadership will keep an eye on this.*

2. **U derivative age-outs during I-918A pendency and potential for broadening interpretation to include derivatives who age out after I-918 approved.** What is USCIS's current interpretation of the age-out provision at INA § 214(p)(7) for derivative children who turn twenty-one after the principal's Form I-918 is decided, but before the derivative's Form I-918A is approved? Does it matter whether the I-918A was filed before or after the I-918 was decided?
  - a. If USCIS interprets children as unprotected from aging out after the I-918 approval, is this a change in policy?
  - b. If USCIS interprets children as unprotected from aging out after the I-918 approval, would it consider broadening its interpretation to include derivatives who turn twenty-one afterwards?

***USCIS Response:** Declined to answer this question.*

3. **U derivative marry-out after U approval.** What is USCIS policy on whether a U derivative child or sibling who gets married after receiving their U3 or U5 nonimmigrant status remains eligible for adjustment of status?

***USCIS Response:** Longstanding USCIS policy is that, if a U3 or U5 marries after approval, this does not impact their ability to adjust under INA § 245(m).*

**ASISTA follow-up:** Is this policy written anywhere?

**USCIS Response:** *We will look into where it could be written.*

### **Questions Related to International Travel by Survivors**

**USCIS General Note:** *In general, what we are able to say on travel is that practitioners need to look at the [Preamble to the 2007 regulations](#) for all travel questions. Consular processing is specified there. USCIS is considering options for the future but the Preamble is all that's there right now.*

4. **Advance parole with BFD/waitlist, and travel on such AP.** We have had a variety of questions come up regarding advance parole and the U bona fide determination (BFD) and U waitlist deferred action (“waitlist”) interim benefits:
- a. Is it possible for a person to request advance parole based on BFD or waitlist approval?

#### ***No USCIS Response***

- b. If a person who has been granted the BFD or waitlist approval travels on advance parole issued pursuant to DACA or TPS, would it jeopardize their U-based deferred action?

**USCIS Response:** *It should have no impact on deferred action pursuant to waitlist or BFD review. The general risks of traveling on advance parole would apply. But if using DACA or TPS advance parole, travel itself should not impact the deferred action that was granted based on BFD or waitlist.*

- c. If a person who has been granted the BFD or waitlist approval travels on a **valid visa**, such as H2B, would it jeopardize their U-based deferred action?

**USCIS Response:** *It would have no impact. It should not jeopardize U-based deferred action. If an example arises where there is a problem or question, sharing it would help us flesh this out more.*

- d. If, in answer to the prior two questions, travel on another basis terminates U-based deferred action, **could a person request it to start again upon return? How?**

#### ***No USCIS Response***

5. **Advance parole with actual U status.** Does holding U status enable a person to apply for advance parole, as contemplated by the instructions for Form I-131 (on [page 4](#), item #3.a.(2)) and 9 FAM 402.6-6(H) (suggesting advance parole may be available by stating that U recipients “are not required to obtain advance parole before traveling outside of the United States”).

Please note, this question refers to advance parole based on approved U status, not a pending U-based I-485.

**No USCIS Response**

- a. If advance parole can be granted to U recipients, then, upon travel and return with advance parole, does USCIS consider them to have returned to U nonimmigrant status, for purposes of counting continuous presence for U-based adjustment of status?

**No USCIS Response**

6. **Travel on a different visa during U status period, need for I-539 to resume U status? NPT needed?** If an individual in U nonimmigrant status departs the US and returns on another visa (e.g., pre-existing H1B or visitor visa), should they file a Form I-539 to resume (change back to) U nonimmigrant status for purposes of accruing three years in status for adjustment? Would such a filing be accepted? This question assumes U status was never revoked.

- a. If they cannot file an I-539 to resume U status, what is the basis for that policy?
- b. If they must file an I-539 to resume U status, what is the basis for that policy?
- c. If they return on another visa *and must file an I-539 to get back into U status*, how is continuous presence calculated for purposes of adjustment, e.g., are only the days outside of the US counted toward the 90-day/180-day limits, or are days inside the US before I-539 adjudication also counted toward those limits, on the theory that the U nonimmigrant was not present in U status at that time? Could the I-539 be filed *nunc pro tunc* so that the return to U status is backdated to the return to the U.S.?

**No USCIS Response**

7. **Advance parole and pending U-AOS (CPP in U status?)** If a U-adjustment applicant travels on advance parole based on the pending I-485, what is USCIS's policy as to how their absence is assessed for purposes of counting continuous physical presence? Does USCIS view a U-based adjustment applicant's return on advance parole as being in U status, and preventing the absence from interrupting adjustment eligibility (as long as the trip does not exceed 90 days at once or 180 days in the aggregate)?

**USCIS Response:** *The date of the initial U admission is what is used by USCIS, regardless of what an I-94 reentry based on advance parole says. Continuous physical presence is broken if the person travels outside the US for more than 90 days or 180 days in the aggregate. If they break continuous physical presence and they are readmitted as a U nonimmigrant, then that new I-94's date of*

*admission will be used for purposes of calculating continuous physical presence for the I-485.*

8. **I-539 extension abandoned by travel?** For U nonimmigrants, are there circumstances where a pending Form I-539 to extend U status would be deemed abandoned for departing the U.S.?
- If so, what are those circumstances?
  - Does the answer differ if the Form I-539 is to change status?

**USCIS Response:** *The person needs to be in the US when the I-539 is filed and when it's adjudicated to completion. If they leave after filing but return in valid U status before final adjudication, the application is not considered abandoned. But that is contingent upon reentering the US in U status prior to the adjudication.*

*There is no regulatory provision that we are aware of that allows a person to change status into U status. U status can only be granted through the I-918.*

### **Questions Related to Documentation of Status**

9. **U derivative initial status compared to principal's.** The regulation at 8 CFR 214.14(g) requires a U derivative's status to expire no later than the principal's initial status expires. Does this apply even if the I-918A is filed several years after the principal's I-918 is approved?
- What if the principal has already filed a Form I-539 extension of status by the time the derivative's I-918A is either filed or approved: how does USCIS determine the expiration date for a derivative's initial status in that scenario?

### ***No USCIS Response***

10. **Length of extensions of status for U derivatives.** If a derivative is given an initial period of stay shorter than four years, due to the expiration of the principal's status and 8 CFR 214.14(g), when will USCIS approve an I-539 extension for longer than one year, to allow them to reach three years of status without having to file multiple extensions?

The 2016 USCIS Policy Memo on U and T status extensions states: "The extension of U nonimmigrant status based on law enforcement need or exceptional circumstances will be valid for one year from the date the U nonimmigrant status ends." However, we have heard from our members that U extensions have been granted for longer than one year. We would advocate for longer extensions, both because they provide more stability and certainty to noncitizens and because they will significantly reduce USCIS's workload.

**USCIS Response:** *We are grateful that you provided this feedback and it's definitely something we'll take back. If you can provide an example, that would be very helpful.*

11. **Which status-granting document controls the duration of status?** U and T recipients generally have multiple documents that state validity periods or expiration dates. For instance, a U derivative may have: (1) I-797 approval notice for the principal's I-918, (2) I-797 approval notice for their own I-918A, (3) U3 visa, (4) I-94, and (5) passport stamp from entry. Many times these documents' validity periods do not accord with one another. Moreover, many beneficiaries lack some of these documents and find them difficult to obtain. This leaves beneficiaries unsure of when their status expires, when or whether they should seek an extension of status, and what validity dates they should record in related applications.

Further, there appear to have been shifts in policy on how USCIS interprets these documents, and confusion abounds. Since around 2019, USCIS has seemingly taken the approach that the I-94 date generally controls, although no guidance has been issued to this effect. Some of our members report that they have filed adjustments under INA § 245(m) based on the dates on the I-797 approval notice only for these applications to be denied, requiring the beneficiary to file a nunc pro tunc I-539 and new I-485. Meanwhile, others have reported as recently as this month that their U-based I-765s were denied because the I-797 date had passed, so they were deemed out of status despite their I-94s reflecting more than a year of validity remaining.

- a. In cases of discrepancies, which document does USCIS interpret as controlling?

**USCIS Response:** *The I-94. CBP has the authority to set terms of admission. They often grant a validity period that corresponds with the expiration date of the passport.*

- b. In cases where no I-94 is provided, can the individual rely on their passport stamp's expiration date to be recording the same information?

**USCIS Response:** *Yes. The passport stamp would be sufficient if USCIS requested information on status. We principally rely on I-94, but they're also getting the stamp at time of admission. The passport stamp date should correspond with I-94 because that's what the I-94 is based on. If the dates are different, we take a look at the approval notice as well. We use those three documents to determine what the actual validity date is, in that order. So, the I-94 takes precedence, because CBP has the authority to limit the period when they admit them. In the absence of an I-94, we can use the passport stamp. Finally, the approval notice, which is the I-797.*

*Regarding EADs, they are almost always approved from the date of adjudication, not backdated. We do not rely on the I-94 to set the date the*

*validity period starts for the I-765. For the date the validity period ends, we will rely on the end of the U period (whatever the end of their validity period is, that's when EAD will end, as well). **If practitioners are seeing something different, please send us the case example.***

- c. In cases where a **derivative's** controlling document (as defined by your answer to Item (a) above) has an expiration date that is later than the principal's controlling document, what should the derivative understand to be their last day in valid status, given that 8 CFR §§ 214.14(g)(1) and 213.11(c)(2) state that a derivative's period in status cannot exceed the principal's?

**USCIS Response:** *This question can also be answered by our answer to the I-94 being the controlling document (see response to (b) above).*

**ASISTA follow up:** Is the policy that the I-94 controls the duration of status for USCIS applications written anywhere?

**USCIS Response:** *We will look into where it could be written.*

### **Additional Question**

12. We are seeing issues with expediting USCIS decisions when a person is in removal proceedings. Does discretion play a role in the decision to expedite, whether regarding if OPLA will make the request or if USCIS to issue a decision?

**USCIS Response:** *As far as we know, OPLA sends the request to a special email account, and USCIS's processing of the expedite request is **not discretionary**. Sometimes it is slower if there is not a final order or the person is not in custody, or if ICE makes the request but USCIS needs the file to review the documents. The process should be very straightforward with very specific criteria agreed upon between USCIS and ICE to determine a prima facie or bona fide determination. Of course it is still discretionary, upon expediting, whether to grant the BFD, deferred action, etc.*

- a. From what we are hearing, it seems like OPLA does not necessarily receive the training to adhere to these policies.

**USCIS Response:** *USCIS is trying to work with ICE to make sure their steps correspond with the process to have the best approaches possible to this.*