



## **Practice Advisory Series**

# **BIDEN ADMINISTRATION'S NEW POLICY ON U VISAS & EADS**

**2021**

**Center for Human Rights and Constitutional Law  
256 S. Occidental Blvd.  
Los Angeles, CA 90057  
Telephone: (213) 388-8693**

## Practice Advisory Forward

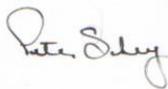
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*This practice advisory provides an overview of the Biden administration's June 14, 2021 Policy Alert ("Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners") revising the guidelines for employment authorization permits for principal petitioners for U nonimmigrant status. This advisory outlines the specifics of the new BFD EAD process, analyzes relevant court cases, and provides insight to the reception to the new policy.*

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Peter Schey  
President and Executive Director  
Center for Human Rights and  
Constitutional Law

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## I. INTRODUCTION

On June 14, 2021, the Biden administration released a Policy Alert (“Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners”) (“Policy Alert”) revising the guidelines for employment authorization permits for principal petitioners for U nonimmigrant status. USCIS, POLICY ALERT (June 14, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>.

“U nonimmigrant status is available to noncitizens who have been victims of certain crimes, including domestic violence and sexual assault, and who are or have been helpful to law enforcement in the prosecution or investigation of those crimes.” *Id.*

Under longstanding policy, “A noncitizen granted U-1 nonimmigrant status as a principal petitioner is authorized to work based on that status. USCIS automatically issues an Employment Authorization Document (EAD) to principal petitioners upon the approval of the Petition for U Nonimmigrant Status (Form I-918).” *Id.*

You can apply for a U Visa by submitting a [Form I-918, Petition for U Nonimmigrant Status](#) (“Form I-918”) and a [Form I-918, Supplement B, U Nonimmigrant Status Certification](#). 8 CFR § 214.14(c). The Form I-918, Supplement B, must be

[S]igned by a certifying official within the six months immediately preceding the filing of Form I-918. The certification must state that: the person signing the certificate is the head of the certifying agency...; the applicant has been a victim of qualifying criminal activity...; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States, its territories, its possessions, Indian country, or at military installations abroad.

[8 CFR § 214.14\(c\)\(2\)\(i\)](#).

When the number of applications exceeds the annual visa cap allocation of 10,000<sup>1</sup>, then USCIS reviews the petition and “places the approvable petitions on a waiting list. USCIS grants deferred action or, in limited circumstances, parole to U-1 principal petitioners and qualifying family members on the waiting list. USCIS may, as a matter of discretion, also authorize employment for such petitioners and qualifying family members.” *Id.*; See [8 CFR § 214.14\(d\)\(2\)](#) (explaining that “approvable petitions” are those from “eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status...”).

Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U-1 nonimmigrant status has been issued to qualifying petitioners on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed.”

*Id.*

“USCIS created [the] waitlist process by regulation requiring that “[a]ll eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status *must* be placed on a waiting list and receive written notice of such placement.”” [Doe v. Wolfe, No. 1:20-CV-02339, 2021 U.S. Dist. LEXIS 172856, at \\*3 \(M.D. Pa. Sep. 13, 2021\)](#) (emphasis in original) (quoting [8 C.F.R. § 214.14\(d\)\(2\)](#)). Although there’s an annual limit on the number of U visa petitions approved, “no such limit exists on placing eligible petitions on the waiting list or on approving an employment authorization.” Ur M. Jaddou, *Humanitarian Petitions: U Visa Processing Times*, USCIS (Aug. 12, 2021), <https://www.uscis.gov/sites/default/files/document/reports/USCIS-Humanitarian-Petitions.pdf>.

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<sup>1</sup> See [8 U.S.C. § 1184\(p\)\(2\)\(A\)](#) (“The number of aliens who may be issued visas or otherwise provided status as nonimmigrants under section 1101(a)(15)(U) of this title in any fiscal year shall not exceed 10,000”).

Despite the creation of the waitlist, “[t]he average wait just to get placed on an official waiting list for temporary work authorization is now at least five years...[and] Congress only allows the government to issue 10,000 such visas a year, leaving many other applicants on a waiting list for future years and vulnerable to deportation.” Eileen Sullivan, *Biden extends temporary work permissions for some undocumented immigrants who are victims of crime*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/biden-immigration-victims-work-visa.html>.

Recognizing the sheer volume of U nonimmigrant applications “and a growing backlog awaiting placement on the waiting list or final adjudication, USCIS has decided to exercise its discretion under INA 214(p)(6) to conduct bona fide determinations (BFD) and provide EADs and deferred action to noncitizens with pending, bona fide petitions who meet certain discretionary standards.” USCIS, POLICY ALERT at 2.

“In the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Congress specifically authorized DHS to grant employment authorization to a noncitizen who has a pending, bona fide petition for U nonimmigrant status. This guidance implements that authority.” USCIS, USCIS ISSUES POLICY PROVIDING FURTHER PROTECTIONS FOR VICTIMS OF CRIME (June 14, 2021), <https://www.uscis.gov/newsroom/news-releases/uscis-issues-policy-providing-further-protections-for-victims-of-crime> (“USCIS U Visa Policy Press Release”). That law provides, “The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U) of this title.” [8 U.S.C. § 1184\(p\)\(6\)](#).

According to the Government, before the implementation of the bona fide determination process (8 U.S.C. § 1184(p)(6)) via the June Policy Alert, “the general regulation [did not] allow

for interim EADs while petitioners are waiting for the waiting list adjudication. 8 C.F.R. § 274a.13 (2017). The regulations at 8 C.F.R. § 214.14 also make no provision for employment authorization prior to a favorable waiting list determination.” [Brief in Support of Defendants’ Motion to Dismiss at 21, Doe v. Wolfe, No. 1:20-CV-02339, 2021 U.S. Dist. LEXIS 172856 \(M.D. Pa. Sep. 13, 2021\)](#). Indeed, neither regulation alludes to interim EADs while waiting to be placed on the waiting list.

The *New York Times* noted that, as of the date of the Policy Alert release (June 14), “The change will benefit immigrants who have applied for the U visa, a program that currently has a backlog of 270,000 applications, a number that grew significantly during the Trump administration.” Eileen Sullivan, *Biden extends temporary work permissions for some undocumented immigrants who are victims of crime*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/biden-immigration-victims-work-visa.html>; see also USCIS, NUMBER OF SERVICE WIDE FORMS BY QUARTER, FORM STATUS, AND PROCESSING TIME (Aug. 2021), [https://www.uscis.gov/sites/default/files/document/data/Quarterly\\_All\\_Forms\\_FY2021Q3.pdf](https://www.uscis.gov/sites/default/files/document/data/Quarterly_All_Forms_FY2021Q3.pdf).

## **II. THE SPECIFICS OF THE BFD PROCESS**

Pursuant to the new process, USCIS will conduct “an initial review of Form I-918 and will issue BFD EADs and deferred action for 4 years to petitioners for U nonimmigrant status and qualifying family members if USCIS deems their petition ‘bona fide’, instead of completing a full waiting list adjudication.” USCIS, POLICY ALERT (emphasis added). “Bona fide” means “made in good faith and without intention of deceit or fraud.” USCIS, USCIS ISSUES POLICY PROVIDING FURTHER PROTECTIONS FOR VICTIMS OF CRIME, *Id.*

USCIS will deem a petition bona fide if the following conditions are met: “[ (1) ] The principal petitioner properly filed [Form I-918](#), including [Form I-918B U Nonimmigrant Status Certification](#); [ (2) ] [t]he principal petitioner properly filed a personal statement from the petitioner describing the facts of the victimization; and [ (3) ] [t]he result of the principal petitioner’s biometrics has been received.” *Id.*

“Once USCIS has determined a petition is bona fide, USCIS determines whether the petitioner poses a risk to national security or public safety...USCIS then determines whether to exercise its discretion [under INA 214(p)(6)] to issue a BFD EAD and grant deferred action to a petitioner.” USCIS, POLICY MANUAL CHAPTER 5 - BONA FIDE DETERMINATION PROCESS, <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (last updated Oct. 29, 2021). "If USCIS determines a principal petitioner and any other qualifying family members have a bona fide petition and warrant a favorable exercise of discretion, USCIS issues them BFD EADs and grants deferred action." *Id.*

To summarize, “During the BFD process, USCIS first determines whether a pending petition is bona fide. Second, USCIS, in its discretion, determines whether the petitioner poses a risk to national security or public safety, and otherwise merits a favorable exercise of discretion.” USCIS, POLICY MANUAL CHAPTER 5 - BONA FIDE DETERMINATION PROCESS. The principal petitioner is then placed in a pool of persons awaiting the grant of a U visa.

“[T]hose who do not receive a BFD EAD under this initial review will proceed to the full waiting list adjudication and, if their petitions are approvable, will be placed on the waiting list for a U visa.” USCIS, POLICY ALERT at 2. “A petitioner who does not receive a BFD EAD and deferred action is evaluated for waiting list eligibility and still has the opportunity to obtain

employment authorization and a grant of deferred action if deemed eligible for waiting list placement.” USCIS, POLICY MANUAL CHAPTER 5 - BONA FIDE DETERMINATION PROCESS.

“USCIS does not accept or process motions to reopen or reconsider, appeals, or requests to re-apply for a BFD EAD.” *Id.* To be clear, “USCIS will generally not conduct waiting list adjudications for noncitizens who have been granted BFD EADs and deferred action. Instead, their next adjudicative step will be final adjudication for U nonimmigrant status when space is available under the statutory cap.” USCIS, POLICY ALERT at 2.<sup>2</sup>

The new guidance is being implemented immediately and applies to all Form I-918 and Form I-918A petitions that are currently pending, or filed on or after June 14, 2021. USCIS U Visa Policy Press Release, *Id.*

The USCIS website alerts that “[i]f you have not yet filed an accompanying application for employment authorization (Form I-765) and we determine your pending Form I-918 petition is bona fide, we will issue you a notice informing you to file a Form I-765.” USCIS, I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, <https://www.uscis.gov/i-765> (last updated Nov. 8, 2021).

In essence, there are now three ways for a U visa applicant to obtain an EAD. In *V.U.C. v. USCIS* (discussed in detail below), the Government stated: “Since June 14, 2021, employment authorization is available to U visa petitioners and their qualifying family members at three points: upon a favorable bona fide determination and assessment that a favorable exercise of discretion is warranted, upon placement on the waitlist, and upon the grant of U nonimmigrant

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<sup>2</sup> The Policy Alert also clarifies that “USCIS is adopting the decision issued by the Ninth Circuit in *Medina Tovar v. Zuchowski* for nationwide application.” USCIS, POLICY ALERT at 3. In other words, “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.” *Id.* USCIS will therefore not look at the validity of the spousal relationship at the time the Form I-918 is filed in order for the spouse to be eligible for classification as a U-2 nonimmigrant.

status.” [Memorandum in Support of Defendants’ Motion to Dismiss at 7, V.U.C. v. United States Citizenship & Immigration Servs., No. 21-10652-RGS, 2021 U.S. Dist. LEXIS 155621 \(D. Mass. Aug. 18, 2021\).](#)

The government further elaborated:

Petitioners whose petitions are pending, and those on the waitlist and their qualifying family members, are not automatically granted work authorization. In 2008, Congress amended 8 U.S.C. § 1184(p)(6), specifying that “[t]he Secretary *may* grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 1101(a)(15)(U) of this title.” (Emphasis added). Acting within the discretion granted by the plain language of the statute, USCIS did not separately implement 8 U.S.C. § 1184(p)(6)’s amended language to provide work authorization to petitioners who were not yet on the waitlist until June 14, 2021. Under the new policy, USCIS conducts bona fide determinations and considers whether to exercise its discretion under 8 U.S.C. § 1184(p)(6) to grant employment authorization to pending, bona fide petitioners. At the waiting list phase, “USCIS, *in its discretion, may* authorize employment for such petitioners and qualifying family members” who are in the United States. 8 C.F.R. § 214.14(d)(2) (emphasis added). By contrast, once the U visa petition is granted, “the Attorney General *shall*, during the period those aliens are in lawful temporary resident status under that subsection, provide the aliens with employment authorization.” 8 U.S.C. § 1184(p)(3)(B) (emphasis added).

[Memorandum in Support of Defendants’ Motion to Dismiss, V.U.C., 2021 U.S. Dist. LEXIS 155621 \(No. 21-10652-RGS\), at \\*8.](#)

In short, “[i]f USCIS determines [that] a principal petitioner and any other qualifying family members have a bona fide petition and warrant a favorable exercise of discretion, USCIS issues them BFD EADs and grants deferred action.” USCIS, POLICY MANUAL CHAPTER 5 - BONA FIDE DETERMINATION PROCESS, <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5> (last updated Oct. 29, 2021).

Even before issuance of the June 14 Policy Alert, pursuant to [8 U.S.C. § 1184\(p\)\(6\)](#), DHS clearly had the authority to grant employment authorization to applicants with pending U visa applications. Section 1184(p)(6), INA § 214(p)(6), states in part: “The [DHS] Secretary may

grant work authorization to any [noncitizen] who has a pending, bona fide application for nonimmigrant status under [section 1101\(a\)\(15\)\(U\)](#) of this title."

It appears that the June 2021 Policy Alert simply involves USCIS exercising its long-standing discretion under INA 214(p)(6) to conduct bona fide determinations with respect to U visa applicants and issue EADs to those with bona fide applications. The Policy Alert acknowledges as much: "USCIS may also provide employment authorization under INA 214(p)(6), but has not done so historically." USCIS, POLICY ALERT at 1. Footnote 6 elaborates: the TVPRA 2008 "provide[d] DHS with discretion to grant employment authorization to a noncitizen who has a pending, bona fide petition for U nonimmigrant status...Though permitted by statute, DHS has not previously implemented a process for providing such employment authorization, separate from the existing regulatory waiting list. (The existing regulatory structure, which predates the TVPRA 2008 authority, does not provide a mechanism for noncitizens with pending petitions to apply for employment authorization prior to waiting list placement.)" USCIS, Policy Alert at 1-2.

In terms of where to file, the USCIS website states that "[t]he filing address depends on your reason for applying and the eligibility category you entered in Question 27. Please check the [filing locations for Form I-765](#) for a list of addresses. If you file at a Lockbox, read our [filing tips](#)." USCIS, I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, <https://www.uscis.gov/i-765>.

The hyperlink, "filing locations for Form I-765," states: "If you are filing Form I-765 with another form, file both forms at the location specified by the other form. For example, if you are filing Form I-765 with Form I-539, file both forms according to the Form I-539 Instructions. Use the addresses below only when you are NOT submitting Form I-765 with

another form.” USCIS, DIRECT FILING ADDRESSES FOR FORM I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, <https://www.uscis.gov/i-765-addresses>.

According to the form I-918 Instructions, if an applicant lives in California, they must file at the USCIS Nebraska Service Center. USCIS, I-765, I-918, PETITION FOR U NONIMMIGRANT STATUS, <https://www.uscis.gov/I-918> (last updated Sept. 23, 2021). When the applicant is not submitting Form I-765 with another form, and lives in California, then they would still file at the USCIS Nebraska Service Center. USCIS, DIRECT FILING ADDRESSES FOR FORM I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION, <https://www.uscis.gov/i-765-addresses> (last updated Oct. 20, 2021).

“There is no filing fee for Form I-918.” USCIS, INSTRUCTIONS FOR PETITION FOR U NONIMMIGRANT STATUS AND SUPPLEMENT A, PETITION FOR QUALIFYING FAMILY MEMBER OF U-1 RECIPIENT, at 3 (Apr. 24, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-918instr.pdf>. There is a general \$410 filing fee for Form I-765, but a victim of Qualifying Criminal Activity (U-1 Nonimmigrant) is exempt from that fee if it is their initial application. See USCIS, INSTRUCTIONS FOR APPLICATION FOR EMPLOYMENT AUTHORIZATION, at 26 (Aug. 25, 2020), <https://www.uscis.gov/sites/default/files/document/forms/i-765instr.pdf>.

In terms of timeline, it is unclear when USCIS will make bona fide determinations on pending U visa applications, and “[i]t [is] not immediately clear how quickly applicants would receive temporary permission to work once the government believes they are applying in good faith.” Eileen Sullivan, *Biden extends temporary work permissions for some undocumented immigrants who are victims of crime*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/biden-immigration-victims-work-visa.html>.

It's worth noting that USCIS is "temporarily removing the processing times for Form I-918." USCIS, CHECK CASE PROCESSING TIMES, <https://egov.uscis.gov/processing-times/home>

(last visited Nov. 15, 2021). The website goes on to note:

Historically, USCIS has reported the processing time from filing to waiting list determination. On June 14, 2021, USCIS updated the USCIS Policy Manual to implement a new process, referred to as the Bona Fide Determination (BFD). The new policy enables USCIS to review petitions more efficiently, and provide the benefits of employment authorization and deferred action to more petitioners in a shorter time period than the waiting list process. As with the waiting list, petitions will generally be adjudicated under the BFD process in the order they were received. While USCIS implements the BFD process and gathers initial data on the BFD adjudications, including the possible impacts of the new process on overall U adjudications, USCIS is not reporting processing times for the Petition for U Nonimmigrant Status (Form I-918). This page will be updated on January 1, 2022 or once USCIS has collected sufficient data to report accurate BFD processing times, whichever occurs earlier. **For reference, the final processing time range calculated under the pre-BFD process, marking the time from initial filing to waiting list determination, was 60.5-61 months.**

*Id.* (emphasis added).

According to an August 2021 USCIS report to Congress, "In the fourth quarter of FY 2020, the median processing time from receipt of a U visa petition until placement on the waiting list was 50.9 months and the processing time from waitlist placement until final adjudication was 10.0 months." Ur M. Jaddou, *Humanitarian Petitions: U Visa Processing Times*, *Id.*

With respect to progress made on the implementation of the BFD EAD process, USCIS stated: "USCIS published the new bona fide determination process in the USCIS Policy Manual on June 14, 2021, **and began adjudicating and issuing EADs shortly thereafter.**" U NONIMMIGRANT STATUS BONA FIDE DETERMINATION PROCESS FAQs, USCIS, <https://www.uscis.gov/records/electronic-reading-room/u-nonimmigrant-status-bona-fide-determination-process-faqs> (last updated Sept. 23, 2021) (emphasis added). In terms of order of adjudication, "USCIS will generally adjudicate cases for bona fide determinations in receipt date order, starting with the oldest pending petitions that had not already gone through a waiting list

adjudication as of June 14, 2021.” *Id.* In response to the question, “How long will it take to receive my bona fide determination EAD?” USCIS said: “USCIS is committed to adjudicating petitions in a timely and efficient manner. While the goal of the bona fide determination process is to provide initial reviews of pending U petitions more efficiently, USCIS does not yet have sufficient data to provide an estimated processing time at this stage.” *Id.*

### III. COURT CASES

The following cases may be of interest in the wake of USCIS’s June 14, 2021 Policy Alert.

1. *V.U.C. v. United States Citizenship & Immigration Servs.*

In the August 2021 case, *V.U.C. v. United States Citizenship & Immigration Servs.*, plaintiffs V.U.C. and P.C.C. brought an individual action in the United States District Court for the District of Massachusetts to compel USCIS “to adjudicate their eligibility for the U nonimmigrant status (U-visa) waitlist and Employment Authorization Documents (EAD).” [\*V.U.C. v. United States Citizenship & Immigration Servs.\*, No. 21-10652-RGS, 2021 U.S. Dist. LEXIS 155621, at \\*1 \(D. Mass. Aug. 18, 2021\)](#) (“*VUC v. USCIS*”). V.U.C. filed a U-visa petition and an EAD application on October 2017; P.C.C. filed a U-visa petition and an EAD application on August 9, 2017, and December 31, 2020, respectively. “Neither has received a U-visa waitlist or an EAD determination, nor has there been a ‘bona fide’ determination of their U-visa petitions.” *VUC v. USCIS*, at 3. (citing to USCIS’s new policy released on June 14, 2021).

USCIS filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim for relief that can be granted. See [Defendants’ Motion to Dismiss at 1, \*VUC v. USCIS\*](#). Defendants argued that “the Court lacks jurisdiction over the claims alleging unreasonable delay of U visa petitions and concomitant employment authorization applications, since the pace at

which U.S. Citizenship and Immigration Services (“USCIS”) adjudicates such filings is discretionary and therefore unreviewable...” *Id.* Second, defendants argued that the Court also lacks jurisdiction “over the claims regarding the adjudication of requests for pre-waitlist employment authorization because the Secretary of Homeland Security has discretion under 8 U.S.C. § 1184(p)(6) to decide whether to grant work authorization while a U visa petition is pending, and thus that decision is also unreviewable...” *Id.* Defendants reasoned that plaintiffs were effectively asking the Court “to order USCIS to adjudicate their placement on the waitlist before petitioners with earlier-filed petitions. If the Court allows Plaintiffs to jump the line, it would ‘simply move all others back one space and produce no net gain.’ *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003).” *Id.* at 2.

In its Memorandum and Order on Defendants’ Motion to Dismiss, issued August 18, 2021, (Docket # 1:21-cv-10652-RGS) (“Memorandum”) the court

accept[ed] plaintiffs' argument that [the Court] has subject matter jurisdiction to review a claim of unreasonable delay [] with respect to the U-visa waitlist adjudication...Accordingly, USCIS has no discretion over *whether* to adjudicate a U-visa petition for waitlist eligibility. A claim that USCIS unreasonably delayed a U-visa waitlist determination is thus reviewable under the APA. There is no similar mandate, however, directing the Secretary to implement the permissive work authorization provision of [8 U.S.C. § 1184\(p\)\(6\)](#).

*VUC v. USCIS*, at 5-6 (emphasis in original).

With respect to the issue of delay, the court said it “is sympathetic to the uncertainty and frustration generated by the lengthy delay in plaintiffs' U-visa waitlist adjudication. Nevertheless, the court concludes that plaintiffs have not made out a claim for *unreasonable* delay,” even though plaintiffs have been waiting nearly four years. *VUC v. USCIS*, at 10 (emphasis in original). Furthermore, “The court is without the power to order USCIS to accelerate the pace of adjudication generally, or to dictate the overall order of adjudications. See [N-N, 2021 U.S. Dist.](#)

[LEXIS 94429, 2021 WL 1997033, at \\*14...](#)” *VUC v. USCIS*, at 11<sup>3</sup>. For the foregoing reasons, the court granted the defendants’ motion to dismiss.

## 2. *Doe v. Wolfe*

In *Doe v. Wolfe*, plaintiff was a Guatemalan citizen who filed a Form I-918 and an accompanying Form I-765 in 2016. [Doe v. Wolfe, No. 1:20-CV-02339, 2021 U.S. Dist. LEXIS 172856 \(M.D. Pa. Sep. 13, 2021\)](#) (“*Doe v. Wolfe*”). On December 14, 2020 (before the June 2021 Policy Alert was issued), plaintiff individually filed a three-count complaint in the District Court for the Middle District of Pennsylvania alleging:

(1) that the four-year waiting period constituted an unreasonable delay of the USCIS’s nondiscretionary obligation to determine Doe #1’s eligibility for the U Visa waitlist within a reasonable amount of time; (2) if the USCIS determines that Doe #1 qualifies for the U Visa waitlist, the USCIS has a nondiscretionary duty to place her on the waitlist and to grant her deferred action within a reasonable amount of time; and (3) if the USCIS determines that Doe #1 is eligible for the U Visa waitlist, the USCIS has a nondiscretionary duty to grant her a temporary employment authorization document within a reasonable amount of time. (Id. ¶¶ 58??64.) Count II alleges that the USCIS’s failure to issue Doe #1 employment authorization as required by 8 C.F.R. § 274a.13 violates the APA. (Id. ¶¶ 65??72.) Finally, Count III alleges an unlawful failure to determine eligibility for the U Visa waitlist under the Mandamus Act. (Id. ¶¶ 73??82.)

[Complaint, filed December 14, 2020 at 12-14 \(Docket #: 1:20-cv-02339-JPW\)](#) (“*Wolfe Complaint*”).

Defendants filed a motion to dismiss arguing, *inter alia*, “Congress did not prescribe how quickly USCIS must complete the adjudication process or place petitioners on the waiting list so

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<sup>3</sup> In *N-N v. Mayorkas*, plaintiffs were petitioners for U nonimmigrant status, and sued USCIS (and others) challenging the delay in adjudicating their visa applications and applications for employment authorization (filed between August 2015 and January 2018). [N-N v. Mayorkas, No. 19-CV-5295\(EK\), 2021 U.S. Dist. LEXIS 94429 \(E.D.N.Y. May 18, 2021\)](#) (“*N-N v. Mayorkas*”). The court held that the plaintiffs have not stated a claim for unreasonable delay, reasoning that “the mere passage of time cannot sustain a claim of unreasonable delay,” which is supported by the fact that “Courts have held delays in the vicinity of five years in the adjudication of immigration benefits not to be unreasonable as a matter of law — [including] in the U visa context...” *N-N v. Mayorkas*, at 34. Moreover, “for this Court to demand an accelerated protocol, [it] would have to intrude into a quintessentially administrative function, and in the process reconfigure the agency’s priorities to advance more than 100,000 U visa petitioners at the expense of applicants who seek other benefits from the agency, such as every other type of immigrant- and non-immigrant visa, asylum, and other remedies.” *N-N v. Mayorkas*, at 36-37.

that they may secure deferred action for employment authorization.” [Brief in Support of Defendants’ Motion to Dismiss, filed March 2, 2021 at 11 \(Docket #:1:20-cv-02339-JPW\)](#) (“Wolfe Def Mo. Dismiss”).

Defendants further argued that “USCIS adjudicates U visa petitions for waiting list eligibility on a first-in first-out basis, subject to limited exceptions not at issue here. Moreover, the statute on which Plaintiff’s employment authorization claims rely is discretionary on its face. 8 U.S.C. § 1184(p)(6) ...” [Wolfe Def Mo. Dismiss at 11-12.](#)

An issue before the court, therefore, was “whether the pace by which the USCIS determines whether petitioners qualify for the U Visa waiting list is a non-reviewable discretionary matter, or whether the pace may be reviewed for reasonableness under the standard set forth in the APA. 5 U.S.C. § 555(b).” Memorandum, issued September 13, 2021 at 13 (Docket #: 1:20-cv-02339-JPW) (“Memorandum”). The court held that “jurisdiction lies over a claim of unreasonable delay under the APA,” and reasoned that despite there being “no timeframe specified by statute or regulation within which the USCIS is required to adjudicate U Visa petitions or to place individuals on the U Visa waiting list,” USCIS “has a nondiscretionary duty to fulfill the requirements listed within the statutes and regulations within a *reasonable* amount of time. [5 U.S.C. § 555\(b\)](#). Therefore, the amount of time that it takes the USCIS to place a petitioner on the U Visa waiting list cannot be indefinite.” Memorandum, at 14-15.

The court noted,

On its face, it is plausible that a four-year wait to have a U Visa petition reviewed is unreasonable under the APA. *See Twombly, 550 U.S. at 556*... While it is plausible that this four-year delay may be found to be reasonable based on specific circumstances, the court cannot conclude this fact as a matter of law at this juncture. The parties must be given the opportunity to further develop the facts related to this claim through discovery before the court engages in a fact-intensive analysis to determine the reasonableness of the USCIS's actions.

Memorandum, at 31.<sup>4</sup>

As such, the court found “that this claim will survive Defendants' motion to dismiss under Rule 12(b)(6).” *Doe v. Wolfe*, at 28.

Both the court and defendants stipulated that “USCIS has a nondiscretionary duty to place eligible U Visa petitioners who remain after the statutory cap has already been met for the year on the U Visa waiting list. See [8 C.F.R. § 214.14\(d\)\(2\)](#)” and “that if Plaintiff is placed on the U Visa waiting list, then she will be granted deferred action while waiting to receive her U Visa. See *id.*” *Doe v. Wolfe*, at 17. However, with respect to plaintiff’s claim that “USCIS has a nondiscretionary duty to grant an individual employment authorization upon determining that they are eligible for the U Visa waiting list[.]” the court held that “[b]ecause the language of the statute and regulation in question is discretionary, the court cannot find that the USCIS is required to grant employment authorization to individuals who are eligible for the U Visa waiting list[.]” and thus the court dismissed plaintiff’s claim with prejudice for lack of subject matter jurisdiction. *Doe v. Wolfe*, at 18-20.

In sum, the court granted in part and denied in part defendants’ motion to dismiss. It’s worth noting that the court’s opinion made only passing reference to the June 14 Policy Alert. It’s unclear whether the supplemental briefs filed by both parties in July of 2021 mentioned the June 14 Policy Alert, as the documents are not available to the public. However, on October 18, 2021, plaintiff filed a stipulation of dismissal. On October 19, the district court ordered “that all claims against all Defendants in the caption matter, are dismissed. The Court is directed to close this case.” [Order Approving Stipulation of Dismissal, \*Doe v. Wolfe\*, at 1.](#)

### 3. *Garcia v. United States Dep't of Homeland Sec.*

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<sup>4</sup> The *Wolfe* court cited *Twombly*’s “plausibility” standard to defeat a 12(b)(6) motion to dismiss, which the plaintiff in *Wolfe* was facing. [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 \(2007\).](#)

In the 6<sup>th</sup> Circuit Court of Appeals case, *Garcia v. United States Dep't of Homeland Sec.*, plaintiffs were a group of noncitizen victims who applied for U visas and work authorization permits and have waited years for USCIS to adjudicate their applications. See [Garcia v. United States Dep't of Homeland Sec., Nos. 21-1037, 21-1056, 21-1063, 21-5022, 2021 U.S. App. LEXIS 27444 \(6th Cir. Sep. 13, 2021\)](#) (“*Garcia v. DHS*”). In their lawsuit, plaintiffs (not a proposed class) alleged that USCIS and DHS “have unreasonably delayed placing the principal applicants on the U-visa waitlist and adjudicating Plaintiffs' work-authorization applications.” *Garcia v. DHS*, 14 F.4th at 468.

Before the 6<sup>th</sup> Circuit took the appeal, plaintiff Barrios Garcia initiated the lawsuit against DHS on May 22, 2020 (before the June Policy Alert was released) in the District Court for the Western District of Michigan. Plaintiff asserted that on March 1, 2018, he “submitted applications for a U-Visa and for work authorization pending the adjudication of his U-Visa application. Plaintiff asserts two claims for relief: (1) his application for a U-Visa has been unreasonably delayed, and (2) his request for work authorization pending resolution of his U-Visa application has been unreasonably delayed.” [Garcia v. United States Dep't of Homeland Sec., 507 F. Supp. 3d 890 \(W.D. Mich. 2020\)](#), at 2.

Defendant filed a motion to dismiss, which the district court granted. The district court held that 8 U.S.C. § 1184(p)(6), which states that “[t]he Secretary [of Homeland Security] may grant work authorization to any alien who has a pending, bona fide application [for a U-Visa],” “explicitly grants to the Secretary of DHS the discretion whether to grant an application for work authorization.” *Garcia v. DHS*, 507 F. Supp. 3d at 4. As such, the court held that it lacks jurisdiction to review the claim “[b]ecause this claim concerns a matter left to the discretion of the Secretary of DHS...” *Garcia v. DHS*, 507 F. Supp. 3d at 4. With respect to plaintiff’s claim

that a decision to adjudicate his U-visa application has been unreasonably delayed, the court reasoned, “the absence of an adjudication timeline or deadline in the relevant statute gives to the USCIS the discretion to determine the pace at which U-Visa applications are adjudicated.” *Garcia v. DHS*, 507 F. Supp. 3d at 5 (quoting [Beshir v. Holder](#), 10 F.Supp.3d 165, 172-77 (D.D.C. 2014)). The court did provide that it “can certainly envision a circumstance in which an adjudication delay is so lengthy that such is fairly characterized as a refusal to adjudicate,” though it didn’t elaborate on a specific timeline. *Garcia v. DHS*, 507 F. Supp. 3d at 6.

Plaintiffs appealed the district court’s order. During the pendency of the appeal, USCIS announced the new "Bona Fide Determination Process." The Court of Appeals observed “that the BFD process is not found in a regulation or a statute...and the BFD process is a nonstatutory statement of USCIS's discretion to grant work authorization to persons associated with pending U-visa applications.” *Garcia v. DHS*, 14 F.4th at 25. The court first concluded that § 1252(a)(2)(B)(ii) might “bar judicial review when another statute specifies that the DHS Secretary or Attorney General has discretion over removal orders. But [§ 1252\(a\)\(2\)\(B\)\(ii\)](#) does not clearly and convincingly evince Congress's intent to prohibit the federal courts from reviewing DHS's refusal to adjudicate work-authorization applications submitted by persons seeking U-nonimmigrant status.” *Garcia v. DHS*, 14 F.4th at 24-25. The court also held that 8 U.S.C. § 1184(p)(6) requires “the DHS Secretary to decide if an application is ‘pending’ and ‘bona fide’ *before* the agency can wield its discretion to grant an applicant work authorization.” *Garcia v. DHS*, 14 F.4th at 27 (emphasis included). The court noted that the USCIS Policy Manual supports its view in terms of sequence. *See* USCIS, POLICY MANUAL CHAPTER 5 - BONA FIDE DETERMINATION PROCESS.

After concluding that the court had the authority to review plaintiffs' claims, the court held:

[A]ll Plaintiffs have sufficiently alleged that USCIS has unreasonably delayed deciding whether to place principal petitioners on the U-visa waitlist. Our decision is compounded by the applicants' lengthy wait. Barrios Garcia, Arguijo, and the Mendez Mendezes filed their U-visa applications in 2018. Patel and her family members filed their U-visa applications in 2016—five years ago.

*Garcia v. DHS*, 14 F.4th at 46.

The court did not elaborate on what constitutes an “unreasonable delay.” Yet, it invoked 8 U.S.C. § 1571(b), which states that “[i]t is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application” to contend that “even though an ‘unreasonably delayed’ analysis does not rise and fall on a statutory deadline, we are mindful that Congress *has* expressed that immigration-benefit applications should be adjudicated within six months.” [8 U.S.C. § 1571\(b\)](#); *Garcia v. DHS*, 14 F.4th at 51 (emphasis in original). Of course, the court felt that 3 years was too long a wait since three of the plaintiffs filed their U-visa applications in 2018.

With respect to plaintiffs' work authorization claim, the court concluded that it “cannot compel USCIS to adjudicate prewaitlist work-authorization applicants notwithstanding any unreasonable delay.” *Garcia v. DHS*, 14 F.4th at 47. However, the court noted that “[b]ecause the BFD process was issued after Plaintiffs' complaints were filed, Plaintiffs should be allowed to amend their complaints should they wish to assert that USCIS has unreasonably delayed its determination that their U-visa applications are ‘bona fide.’” *Garcia v. DHS*, 14 F.4th at 53-54.

To summarize, the court held the following:

[T]he issuance of the Bona Fide Determination Process moots no part of this case. We further hold that [5 U.S.C. § 701\(a\)\(1\)](#), [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(ii\)](#), and [\[\\*\\*3\] 5 U.S.C. § 701\(a\)\(2\)](#) do not prevent the federal courts from reviewing claims that USCIS has unreasonably delayed placing principal petitioners on the U-visa waitlist and adjudicating

prewaitlist work-authorization applications. We hold that the federal courts may compel USCIS to place principal petitioners on the U-visa waitlist when an unreasonable delay has occurred per [5 U.S.C. § 706\(1\)](#). We conclude that [8 U.S.C. § 1184\(p\)\(6\)](#) and the Bona Fide Determination Process require USCIS to decide whether a U-visa application is "bona fide" before the agency can exercise its discretion and decide whether principal petitioners and their qualifying family members may receive Bona Fide Determination Employment Authorization Documents. We thus hold that [5 U.S.C. § 706\(1\)](#) permits the federal courts to hasten an unduly delayed "bona fide" determination. But we also hold that [§ 706\(1\)](#) does not allow the federal courts to force USCIS to adjudicate prewaitlist work-authorization applications.

*Garcia v. DHS*, 14 F.4th at 53-54.

The 6<sup>th</sup> Circuit thus reversed the district courts' grants of defendants' motion to dismiss, and remanded for further proceedings.

4. *Bustos v. Mayorkas*

In *Bustos v. Mayorkas*, plaintiffs were 90<sup>5</sup>

[F]oreign nationals who have applied for U visas. Their three-count Complaint alleges: (1) Plaintiffs have a right to a declaratory judgment that Defendants have violated the law and caused them harm by failing to adjudicate their petitions for U visa status within a reasonable time; (2) Plaintiffs have a right to relief under the Administrative Procedures Act (APA) because Defendants have unreasonably delayed adjudicating their U visa petitions; and (3) Plaintiffs have a claim for mandamus relief under [28 U.S.C. § 1361](#). Doc 1 ¶¶ 140, 147, 5.

[Bustos v. Mayorkas, No. CV 20-1348 KG/SMV, 2021 U.S. Dist. LEXIS 167905, at \\*3-4 \(D.N.M. Sep. 2, 2021\)](#) ("*Bustos v. Mayorkas*").

"Sometime between November 2016 and January 2019, each Plaintiff completed the I-918 Petition...Seventy-five of the Plaintiffs have filed applications for EADs with their U visas...As of July 21, 2021, none of the Plaintiffs had received U visas, waitlist placement, BFDs, or EADs." *Bustos v. Mayorkas*, at 9. The defendants filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and 12(b)(6) motion for failure to state a claim upon which relief can

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<sup>5</sup> The case was brought as an individual action.

be granted. Like their argument in similar cases, defendants argued that the court lacks subject matter jurisdiction over these claims

[B]ecause the pace at which USCIS processes a U visa petition or an EAD is a discretionary decision shielded from judicial review. Alternatively, Defendants assert that under [Rule 12\(b\)\(6\)](#) the Court must dismiss the Complaint, because Plaintiffs have not alleged facts that support their allegations that USCIS has unreasonably delayed processing their U visa petitions or EAD applications.

*Bustos v. Mayorkas*, at 9.

Neither party initially referenced the June BFD Policy Alert in their complaint or response given that they were filed before it was issued. However, plaintiffs filed a notice of supplemental authorities, wherein they contended:

Plaintiffs' position remains the same, as their applications for work authorization have not yet been adjudicated despite Defendants change in policy and they seek review of Defendants' failure to adjudicate their applications within a reasonable time under either 8 U.S.C. § 1184(p)(6) or the mandatory waitlist process in 8 C.F.R. § 214.14(d)(2). Plaintiffs have bona fide applications pending according to the policy guidance issued by Defendant USCIS and to this date no Plaintiffs have received a bona fide EAD under the new guidance.

[Plaintiffs' Notice of Supplemental Authorities, filed July 16, 2021 at 2 \(Docket #: 1:20-cv-01348-KG-SMV\) \("Ps' Supp. Auth."\)](#).

In the Defendants' Response to Plaintiffs' Notice of Supplemental Authorities, defendants maintained

Although Plaintiffs argue they have bona fide applications pending, see Doc. 9 at 2, they are not automatically entitled to EADs under this new policy, much less within any particular time period. Because the new policy is discretionary, it is still the case that "[t]he decision whether to grant work authorization during the pendency of a U visa petition before waitlist adjudication is committed to agency discretion." Doc. 4 at 16. Accordingly, "the Court lacks jurisdiction under both 8 U.S.C. § 1252(a)(2)(B)(ii) and 5 U.S.C. § 701(a) to review Plaintiffs' claims regarding allegedly delayed work authorizations." *Id.* at 16-17 (footnotes omitted). The Court should therefore dismiss Plaintiffs' claim of delayed pre-waitlist work authorization under Federal Rule of Civil Procedure 12(b)(1). See *id.* 4

[Defendants' Response to Plaintiffs' Notice of Supplemental Authorities, filed July 21, 2021 at 2 \(Docket #: 1:20-cv-01348-KG-SMV\) \("Ds' Response"\)](#).

The court concluded that “The INA does not address the pace at which USCIS must adjudicate U visa petitions. Without a specific statutory delegation to the Attorney General of discretionary authority to establish a timetable, USCIS’s regulatory decisions about the pace are not statutorily excluded from judicial review.” *Bustos v. Mayorkas*, at 13-14. Therefore, “the INA does not prohibit this Court’s review of Plaintiffs’ claim that USCIS has unreasonably delayed adjudicating U visa application.” *Bustos v. Mayorkas*, at 14. With respect to review of plaintiffs’ EAD applications, the court concluded

[A] petitioner is not statutorily entitled to an EAD until USCIS decides to award U visa status. Although [§ 1184\(p\)\(6\)](#) enables users to consider an EAD application before assessing a U visa petition, whether to do so is at its discretion. Nor does the new policy change the analysis. Whether a nonimmigrant’s U visa petition proceeds through a full waitlist review or through the BFD pathway, the right to an EAD is always tethered to a substantive discretionary decision about a U visa petition. See [Gonzalez, 985 F.3d at 366-371](#) (thoroughly analyzing why the agency’s failure to timely adjudicate EADs is unreviewable). The INA does not give petitioners seeking a U visa a standalone right to an EAD, so there is no concomitant requirement for USCIS to process EAD applications within a reasonable time. For this reason, the Court finds that it does not have subject matter jurisdiction over Plaintiffs’ claims that USCIS have unreasonably delayed awarding them EADs.

*Bustos v. Mayorkas*, at 19.

In response to plaintiffs’ claims of unreasonable delay, the court found that “any delay by Defendants may result in significant harm to their interests. Those nonimmigrants who are in the United States have not been lawfully admitted and may be deported. Moreover, they are not legally able to work.” *Bustos v. Mayorkas*, at 22. The court considered the June Policy Alert, stating, that although it “changes USCIS’s approach to processing U visas and offers the possibility of an alternate, quicker route to U visa status, as a matter of law, it does not change Plaintiffs’ arguments that there has been an unreasonable delay.” *Bustos v. Mayorkas*, at 23. Ultimately, the court denied defendants’ motion to dismiss plaintiffs’ claim of a right to relief under the APA for defendants’ unreasonably delayed adjudication of their pending U visas.

To summarize, the court held

While the substantive decision about whether to award a U visa is solely within USCIS' discretion, the timeframe within which USCIS must do so is not. USCIS must statutorily process U visa petitions within a reasonable time, and whether it has done so is a question reviewable by a federal court. But USCIS is not similarly obligated to process EADs, and the granting of the EAD is tied to USCIS' substantive decision about whether to award U visa status, so the Court does not have subject matter jurisdiction over that claim alone. The definition of what constitutes a reasonable time is a fact specific inquiry. At this stage of the proceedings, it is premature for the Court to render a decision about whether USCIS has conformed to the reasonableness standard.

*Bustos v. Mayorkas*, at 24-25.

5. *Doe v. Mayorkas*

In *Doe v. Mayorkas*, plaintiff, “an unauthorized immigrant physically present in the United States, has been waiting four years for adjudication of her U Visa petition. She seeks an Order from this Court requiring the Government to make a decision on her application, one way or another.” [Doe v. Mayorkas, No. 5:21-cv-02430-JMG, 2021 U.S. Dist. LEXIS 208074, at \\*1 \(E.D. Pa. Oct. 28, 2021\)](#) (“*Doe v. Mayorkas*”). Specifically, plaintiff asked the court to conclude, *inter alia*:

(1) that USCIS has violated its ‘nondiscretionary obligation to determine Jane Doe #1’s eligibility for placement on the U-visa waiting list within a reasonable time’; (2) if USCIS determines that Jane Doe #1 qualifies for the waitlist, USCIS has a ‘nondiscretionary duty to place her on the waiting list, grant her deferred action, and grant her employment authorization’...

*Doe v. Mayorkas*, at 8.

The government filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction and 12(b)(6) motion for failure to state a claim upon which relief can be granted. Defendants argued that “the APA does not provide a basis for federal question jurisdiction over Plaintiffs’ claims” because according to §§ 701(a)(1)-(2) and 706(1), “an agency’s *pace* of adjudication is

discretionary and thus not reviewable.’ Defs.’ Mem. 14 (emphasis added).” *Doe v. Mayorkas*, at 10.

The court found defendants’ argument “unavailing,” reasoning that

While Defendants are not required to process U Visa petitions within a set timeframe, “[t]he absence of a specified deadline within which action must be taken does not change the nature of USCIS’ obligation from one that is ministerial and *mandatory* to a matter within the agency’s *discretion*.” [\*Lara v. Mayorkas\*, No. 1:20-cv-4508-CAP, 2021 U.S. Dist. LEXIS 137233, 2021 WL 3073690, at \\*3 \(N.D. Ga. Apr. 16, 2021\)](#) (emphasis added) (quoting *Sultan v. Roark*, No. 2:09-cv-02158-GEB-EFB, [2010 U.S. Dist. LEXIS 57750, 2010 WL 1992195, at \\*5 \(E.D. Cal. May 13, 2010\)](#)).

*Doe v. Mayorkas*, at 10.

The court thus concluded that “[w]aitlist adjudications, therefore, are nondiscretionary, and USCIS must take that action ‘within a reasonable time.’ [5 U.S.C. § 555\(b\)](#)[.]” *Doe v. Mayorkas*, at 11. As a result, the court found that it had “jurisdiction to review claims that the USCIS failed to adjudicate Plaintiffs’ U Visa petitions within a reasonable time.” *Doe v. Mayorkas*, at 16.

With respect to plaintiff’s claim that USCIS has a nondiscretionary duty grant her employment authorization, the court cited § 1184(p)(6) to reject plaintiff’s claim and hold that it lacks subject matter jurisdiction.

The court explained the June 14 Policy Alert, but the Policy Alert didn’t factor into the court’s decision, or in the parties’ arguments. On November 8, 2021, the court stayed the proceedings for 45 days.

#### **IV. REACTIONS TO THE NEW POLICY**

CLINIC welcomed the new USCIS policy

The Immigration and Nationality Act limits the number of U nonimmigrant visas that can be issued each fiscal year to 10,000. As a result, the waiting list for individuals seeking to obtain a U visa has grown each year as the number of principal petitioners exceeds the number of allowed approvals. In addition, the processing time to be placed on the waiting list has grown to over five years.

Under prior USCIS policy, U visa petitioners could not obtain work authorization and deferred action until they were placed on the waiting list. This new program is a welcome change, as it should enable U status petitioners and their family members to obtain deferred action and EADs much faster.

Sarah Bronstein, *Bona Fide U Status Petitioners to be Given Deferred Action and EADs*, CLINIC (June 28, 2021), <https://cliniclegal.org/resources/humanitarian-relief/bona-fide-u-status-petitioners-be-given-deferred-action-and-eads>.

The Immigrant Legal Resource Center (ILRC) remarked that the new “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 will be implemented.” Ariel Brown, Alison Kamhi, *Overview of the New U Nonimmigrant (“U Visa”) Bona Fide Determination*, ILRC (July 2021), [https://www.ilrc.org/sites/default/files/resources/u\\_nonimmigrant\\_status\\_bfd.pdf](https://www.ilrc.org/sites/default/files/resources/u_nonimmigrant_status_bfd.pdf). ILRC noted that “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...” *Id.* This new BFD policy thus “is an attempt to get individuals EADs and deferred action sooner.” *Id.* ILRC lamented the “three main groups of people left out.” *Id.* at 5. The first being U petitioners living outside the United States. Second, individuals deemed to be a national security or public safety threat. ILRC noted that “[t]his discretionary determination will be based on a quick review of the petitioner’s background check, without delving into arguments regarding inadmissibility and waivers.” *Id.* at 5-6. As a result, “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 denied BFD as raising

‘public safety’ concerns.” *Id* at 6. Third, “where a principal does not receive a BFD, their derivatives will not either.” *Id*.

ASISTA stated that “While this is a clear step in the right direction, many questions remain on the implementation of this BFD policy and its effects on pending U visa petitions.”

*Policy Alert: Bona Fide Employment Authorization for U Visa Petitioners*, ASISTA,

[https://asistahelp.org/wp-content/uploads/2021/06/Policy-Alert\\_-Bona-Fide-Employment-Authorization-for-U-petitioners-1.pdf](https://asistahelp.org/wp-content/uploads/2021/06/Policy-Alert_-Bona-Fide-Employment-Authorization-for-U-petitioners-1.pdf) (last visited Nov. 9, 2021).

The Legal Aid Society of New York said

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.

*Employment Authorization for Bona Fide U Nonimmigrant Status Petitioners*, LEGAL AID SOCIETY N.Y.C., <https://www.immigrationadvocates.org/download.cfm?id=381273> (last updated June 28, 2021).

Poarch Thompson Law said, “This new policy is a welcome change for victims who have been diligently assisting in keeping their communities safe by reporting crimes and cooperating with law enforcement.” Rachel Thompson, *U Visa Policy Update: Bona Fide Determination*

*Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action*

*for Certain Petitioners*, POARCH THOMPSON L. (June 24, 2021),

<https://poarchthompsonlaw.com/u-visa-policy-update-bona-fide-determination-process-for-victims-of-qualifying-crimes-and-employment-authorization-and-deferred-action-for-certain-petitioners/>.