

INTERIM MEMO FOR COMMENT

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This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



**U.S. Citizenship
and Immigration
Services**

October 24, 2012

PM-602-0077

Policy Memorandum

SUBJECT: Age-Out Protection for Derivative U Nonimmigrant Status Holders: Pending Petitions, Initial Approvals, and Extensions of Status

Purpose

This policy memorandum (PM) provides guidance relating to certain U-3 derivative nonimmigrant petitions that are being held for final adjudication or have had their prior approvals limited in time due to the derivative aging-out. This PM also authorizes the approval of U-3 derivative nonimmigrant petitions for the full eligibility period of four years, allowing the U-3 derivative to remain in U nonimmigrant status past his or her 21st birthday, if necessary. This PM updates the Adjudicator's Field Manual (AFM) by adding Chapter 39.1(f)(4)(v-viii); AFM Update AD11-41.

Scope

Unless specifically exempted herein, this PM applies to and is binding on all U.S. Citizenship and Immigration Services (USCIS) employees.

Authority

- Victims of Trafficking and Violence Protection Act (VTVPA)
- William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008)
- Immigration and Nationality Act (INA) sections 101(b)(1), 214(a)(1), and 214(p)

Background

In order for a derivative of a principal U nonimmigrant to be considered a qualifying family member, the qualifying relationship between the principal and the derivative must: (1) exist at the time the principal files the petition; (2) continue to exist at the time the derivative's petition is adjudicated; and, (3) continue to exist at the time of the derivative's subsequent admission to the United States.¹ Therefore, a derivative child must meet the definition of "child" under the INA, which is an unmarried person under 21 years of age,² at the time his or her derivative petition is filed, adjudicated, and admitted. Due to unforeseen delays, some derivative children aged-out of derivative eligibility while their derivative petitions for U nonimmigrant status were pending.

¹ 8 CFR 214.14(f)(4)

² INA section 101(b)(1)

The INA allows qualifying family members to hold U nonimmigrant status for up to four years.³ At this time, USCIS does not accord U nonimmigrant status beyond a derivative child's 21st birthday, and affords no possibility of extending derivative U nonimmigrant status beyond the age of 21. However, all U nonimmigrants, including derivatives, must be physically present in the United States for a continuous period of at least three years from the date of admission as a U nonimmigrant before they may apply to adjust status to that of a lawful permanent resident under INA section 245(m) and must continue to hold such status at the time of filing the application for adjustment.⁴ Derivatives who were accorded U nonimmigrant status only until their 21st birthday are currently unable to file for an extension of derivative status beyond the age of 21 and may, therefore, not have the requisite physical presence necessary to apply for adjustment of status. Ensuring these derivative U nonimmigrants are afforded the opportunity to maintain their status is important to preserve family unity, which ultimately benefits law enforcement because the principal U nonimmigrant will be more likely to continue to cooperate knowing his or her family member is in status.

Policy

A. Deferred Action for Certain U Derivative Petitioners who Age-Out while the Form I-918A Petition is Pending with USCIS

USCIS is currently holding U nonimmigrant petitions for qualifying family members who aged-out of eligibility after turning 21 years of age while their petitions were pending. USCIS is engaging in rulemaking to change its current regulations to provide protection for these U-3 derivatives. Until such regulations are promulgated, USCIS will review such petitions on an individualized case-by-case basis predicated on the exercise of prosecutorial discretion to determine if deferred action is warranted. If USCIS determines that a derivative has submitted *prima facie* evidence of his or her eligibility for derivative U nonimmigrant status, the case will be reviewed to determine whether to exercise USCIS's discretion to provide deferred action. Absent adverse factors, deferred action should be reviewed following established USCIS guidelines. Deferred action should not be permitted in any petition that includes adverse factors, such as where the petitioner is clearly ineligible for derivative U nonimmigrant status, has an aggravated criminal history, or otherwise poses a threat to public safety or national security. Deferred action does not preclude USCIS, U.S. Immigration and Customs Enforcement, or other federal entities from initiating or conducting removal or deportation proceedings at any time against the derivative petitioner.

Deferred action is an act of administrative convenience to give some cases lower priority for removal and does not constitute an immigration status. While deferred action is not an immigration status, an individual may request and be granted employment authorization if deferred action has been provided in his or her case. If the individual is provided deferred action, he or she shall be notified that he or she may submit a Form I-765, Application for Employment Authorization. If the derivative petitioner is provided deferred action, USCIS will hold the file and reassess the deferred action upon each application for extension of work authorization until the regulations containing amended age-out provisions are published.

³ INA section 214(p)(6)

⁴ 8 CFR 245.24(b)(2)

B. Granting/Allowing U-3 Derivative Status for Full Validity Period of Four Years

In accordance with the humanitarian nature of the U nonimmigrant program, USCIS will extend age-out protection to certain U-3 derivatives whose petitions are adjudicated on or after the effective date of this PM. For any Form I-918 Supplement A, approved on or after the effective date of this PM, USCIS will grant derivative U nonimmigrant status for the full four-year validity period if the derivative child meets the definition of “child” at the time the derivative is granted derivative U nonimmigrant status, regardless of whether the derivative child will become 21 years of age during the four-year validity period after the initial approval. USCIS will send the derivative child an approval notice with an I-94, Arrival-Departure Record, reflecting the full four-year validity period of U nonimmigrant status. For derivative children who are overseas, USCIS will send the principal petitioner an approval notice and will forward the notice and all other necessary documentation to the Department of State for delivery to the proper U.S. Embassy or Consulate. The overseas derivative will have the responsibility of scheduling an appointment with the U.S. Embassy or Consulate to apply for his or her U visa and of entering the United States in U nonimmigrant status before reaching 21 years of age.

Additionally, if a derivative child had previously received an initial grant of U nonimmigrant status for a period of less than four years, is still currently in U nonimmigrant status, and has yet to turn 21 years of age, USCIS will extend derivative status up to a total of not more than four years, regardless of whether the derivative child would age-out during this extended time period. The derivative petitioner should request this extension by filing a Form I-539, Application to Extend/Change Nonimmigrant Status, with USCIS. This procedure will allow the derivative child the ability to meet the necessary physical presence requirement to apply for adjustment of status to lawful permanent resident. Any subsequent extensions beyond the statutory four-year period would need to fall within the extension provisions of INA section 214(p)(6).

C. Late-Filed Extensions of Status for Previously Granted Derivative U Nonimmigrants Who Aged-out While in U Nonimmigrant Status

Prior to publication of this PM, USCIS approved U nonimmigrant status for derivative children for the full four-year statutory period only if the derivative child remained under 21 years of age for the entire four-year period. If the derivative child turned 21 years of age while in derivative U nonimmigrant status, USCIS previously granted valid U nonimmigrant status only until the derivative child’s 21st birthday. This resulted in the derivative child not only losing his or her lawful U nonimmigrant status, but also possibly not accruing the requisite three years of continuous physical presence in the United States necessary for eligibility to adjust status under INA section 245(m).⁵ Recognizing this, USCIS has determined that, for those derivative U nonimmigrants who aged out of derivative eligibility prior to implementation of the age-out policy described above, the failure to maintain the derivative U nonimmigrant status was due to extraordinary circumstances beyond the control of the derivative U nonimmigrant. USCIS will therefore allow derivatives previously granted U nonimmigrant status whose lawful U nonimmigrant status expired on his or

⁵ See 8 CFR 245.24(b). One of the eligibility requirements for adjustment of status as a U nonimmigrant is three years of continuous physical presence in the United States in valid U nonimmigrant status.

her 21st birthday to file for an extension of status in order to receive the remaining time in U nonimmigrant status allowed by statute.

A U nonimmigrant derivative child whose status expired upon turning 21 years of age may file for an extension of derivative U nonimmigrant status by filing Form I-539. If approved, USCIS will grant the extension of U nonimmigrant status dating back to the derivative's 21st birthday, which was the date the previously authorized derivative U nonimmigrant status expired. Upon approval of the extension of status, the remaining time of the four-year statutory limit of U nonimmigrant status will be granted.

In cases where the approval of an extension of U nonimmigrant status to the derivative child does not in the aggregate exceed the four-year statutory maximum for U nonimmigrant status,⁶ the derivative child will be granted the remaining time available in U nonimmigrant status, not to exceed four years.

An example is a U nonimmigrant derivative child whose derivative status expired on the child's 21st birthday, when the derivative had only been in U nonimmigrant status for one year. Upon the approval of the Form I-539, the remaining three years of derivative U nonimmigrant status is granted to the derivative, dating back to the date the initial derivative U nonimmigrant status ended. If the derivative's 21st birthday occurred two years ago, the derivative child, with the approval of the extension of derivative U nonimmigrant status, would have one year remaining in derivative U nonimmigrant status before that status expires.

In cases where the approval of an extension of U nonimmigrant status to the derivative child would result in the derivative receiving more than four years of U nonimmigrant status, the derivative child will be granted the remaining time available in U nonimmigrant status, to equal four years, as well as an additional period of time from expiration of the four-year period up to one year from the date of approval of the Form I-539. USCIS has determined that, for those derivative U nonimmigrants who aged out of derivative eligibility prior to implementation of the age-out policy described above, the extension of U nonimmigrant status beyond the statutorily allowed four years is warranted due to exceptional circumstances.⁷

An example is a U nonimmigrant derivative child whose derivative status expired on the child's 21st birthday, when the derivative had been in U nonimmigrant status for 2½ years. Upon the approval of the Form I-539, the remaining 1½ years of derivative U nonimmigrant status is granted to the derivative, dating back to the date the initial derivative U nonimmigrant status ended. But if the derivative's 21st birthday occurred two years ago, the derivative child, with the approval of the extension of derivative U nonimmigrant status, would have no remaining time in derivative U nonimmigrant status and would therefore need an additional extension beyond the statutorily allowed four years. Therefore, upon approval of the Form I-539, the derivative child will receive an additional period of time from the conclusion of the four-year period up to one year from approval of the Form I-539.

⁶ INA section 214(p)(6)

⁷ *Id*

Once an extension of status is granted, the derivative U nonimmigrant can accrue the three years of continuous physical presence necessary to apply for adjustment of status. After approval of an extension of status in accordance with this PM, a derivative U nonimmigrant must independently demonstrate that any subsequent requests for an extension of status are warranted due to exceptional circumstances.⁸

USCIS will notify the derivative U nonimmigrant of the decision on the Form I-539 and the updated expiration date of the derivative's U nonimmigrant status. The derivative will also be eligible for an employment authorization document (EAD) if the extension of status is granted, as the derivative will again be in valid U nonimmigrant status. The derivative may file Form I-765 to request employment authorization concurrently with the Form I-539.⁹

Upon the filing of an application for adjustment of status to lawful permanent resident, the derivative U nonimmigrant status is automatically extended during the pendency of the adjustment application,¹⁰ and the derivative U nonimmigrant is also eligible for an EAD¹¹ during this period.

Implementation

Chapter 39.1 of the AFM is updated as follows (AFM Update AD11-41):

☞ 1. In Chapter 39.1, new paragraphs (f)(4)(v), (vi), (vii), and (viii) are added to read:

(v) USCIS will review, on a case-by-case basis, petitions in which the qualifying family member has aged-out of eligibility by turning 21 years of age while his or her petition was pending to determine whether an assessment of deferred action is warranted. Absent adverse factors, if the derivative petitioner is determined to have submitted *prima facie* evidence of eligibility for derivative U nonimmigrant status, deferred action may be provided.

(vi) USCIS will grant the full four-year statutory period for U nonimmigrant status to those qualifying family members who are under 21 years of age at the time of approval, but who will turn 21 years of age during the four-year statutory period. Current qualifying family members who are under 21 years of age and in valid derivative U nonimmigrant status, but will turn 21 years of age during the four-year statutory period, may apply for an extension of U nonimmigrant status to receive the full four years of U nonimmigrant status.

(vii) In cases where the qualifying family members were previously granted U nonimmigrant status and the derivative status expired upon reaching 21 years of age, the derivative petitioner may file for an extension of status. Upon approval of the extension, the derivative will be granted status that dates back to his or her 21st birthday when the

⁸ *Id*

⁹ 8 CFR 274a.12(a)(20)

¹⁰ INA section 214(p)(6)

¹¹ 8 CFR 274a.12(c)(9)

initial grant expired, and will be granted any remaining time of the four-year statutory period for U nonimmigrant status.

If this time period totals more than the statutory period of four years of U nonimmigrant status, the qualifying family member will be given an additional extension period of up to one year of U nonimmigrant status from the date of the approval of the extension of status to allow for sufficient time to apply for adjustment of status to a lawful permanent resident.

- ☞ 2. The AFM Transmittal Memorandum table is revised by adding, in numerical order, the following entry:

AD11-41 10/24/2012	Chapter 39.1(f)(4)(v)-(viii)	Provides guidance on providing age-out protection for derivative petitioners for U nonimmigrant status, including those petitioners who aged-out while the derivative petition was pending or whose U nonimmigrant status expired upon turning 21 years of age.
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Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Policy and Strategy or the Service Center Operations Directorate.