Updates and Practice Pointers on Age-Out Protections for U Derivatives

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ASISTA Immigration Assistance
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Goals of Presentation

- Overview of Interim Policy Memorandum
- Practice Pointers
- Outstanding issues
Requirements - 8 CFR 214.14(f)(4)

(1) Relationship MUST exist at the time petition is filed

(2) Continue to exist when petition is adjudicated

(3) Continue to exist at the time of subsequent "admission"

Definition of child - INA 101(B)(1)

(1) Unmarried

(2) Under 21
Problem

Children turning 21 were not able to:

- get their pending petitions approved
- accrue time towards 3 years continuous presence
- extend their status to accrue 3 years
- adjust
Three Categories covered in new U visa Age-Out Guidance

Derivatives who age out

1. *while* the principal’s U visa application is pending

2. *after* the principal’s U visa application has been approved

3. U-3 status *has already expired*
1. U-3 Derivatives who age out while the I-918A is pending

- Derivatives who turn 21 after the I-918A U visa application is filed will be eligible for deferred action (DA) status if requirements are met.

- **Process for issuance of DA:**
  
  - Derivative must submit prima facie evidence of his/her eligibility for derivative non-immigrant status, THEN
  - Case will be reviewed to determine whether to exercise discretion to grant deferred action status.
  - If granted, applicant will be notified to file EAD.
  - Applications considered on case-by-case basis.
Deferred Action & Prima Facie

DA "should not be granted" where there are adverse factors such as

- clearly ineligible
- aggravated criminal history
- poses a threat to public safety of national security
- It does not preclude gov’t from initiating or conducting removal proceedings
Potential Problems for Derivatives with DA

- No guidelines on how USCIS will perform the case-by-case review

- USCIS potentially denying deferred action to otherwise eligible U derivatives, especially without any notice of what factors are considered “adverse” or the opportunity to see and rebut derogatory evidence

- Problems with Adjustment of Status for Principal and Derivative Applicants

- U-3s in removal proceedings will be ineligible for DA unless removal is terminated or adm. closed
Practice Pointers for Derivatives with Deferred Action

• Adjustment Issues

• If a derivative has deferred action status, then the principal U-1 applicant SHOULD NOT ADJUST his/her Status to LPR

Practitioner's tip on DA prima facie request

1- File I-192s for derivatives with inadmissibility issues (Arguments for waivers, rehabilitation and strong equities must be presented)

2- On going (re-assessed with each renewal)

3- Roadmap cover letter - State in cover letter that derivative is prima facie eligible

- For cases in proceedings, ask ICE to request prima facie determination from VSC. Move to terminate or continue proceedings. If final order in place file I-246 request for stay.
Practice Pointers for EAD

• Need to be notified of granting of DA to then submit 765

• File I-765 for derivative using (c)(14) deferred action status designation.
2. U-3 Derivatives who turn 21 after approval

- USCIS will (as of the effective date of the Guidance--December 12, 2012) grant full four-year U-3 status to derivatives who are under 21 years of age at the time of approval, but who will turn 21 during the four-year statutory period.

- For derivatives overseas
  - VSC will send the approval of the U-3 to the principal applicant and forward all documents to Department of State for processing.
  - The derivative will have the responsibility to schedule the appointment with the U.S. Embassy or Consulate to apply for his/her U visa and enter the U.S. prior to turning 21 years old.

- TIP: work with derivative from the beginning to ensure passport requirements, location of embassy and trip etc. are planned for ahead of time
U-3 Derivatives who turn 21 after approval

For those currently were granted U-3 status for a period less than 4 years and has yet to turn 21

- USCIS will extend their U-3 status to a 4 year period

- The U-3 derivative must file an I-539 extension of status with USCIS

- This will allow derivatives to accrue enough continuous presence to adjust under INA 245(m)
Potential Problems for Derivatives who turn 21 after U-1 approval

• Guidance does not specify a time period for when the I-539 should be filed for those U-3s with grants for less than a 4 year period.

• Guidance does not state when they will begin to adjudicate previously filed I-539 applications for U-3 derivatives currently in status who are about to age out.
Practice Pointers for Derivatives who Age-Out after approval

• U-3 derivatives should file an I-539 extension of status if their initial grant was less than the 4 year statutory period.

• If needed, file an I-765 concurrently under (a)(20) designation.

• Cite recent guidance in cover letter.
3. U-3 Derivatives whose status has expired

- Guidance permits derivatives to file a Form I-539: Application to Extend/Change Nonimmigrant Status (“I-539 applications”) after the expiration of their U-3 status.

- No expiration for filing date

- Upon approval of a U-3’s I-539 application, derivatives would be granted the remaining time of the four-year period of U nonimmigrant status.

- For these U-3 derivatives who aged out long before the Guidance, USCIS may grant the remaining time available in U nonimmigrant status, to equal four years, as well as an additional time from expiration of the four-year period up to one year from the date of approval of the I-539 application.
Potential Problems for Derivatives with expired status

- Guidance does not state when they will begin to adjudicate previously filed I-539 applications from aged-out U-3 derivatives or if re-filing is necessary.
Procedural Practice Pointers

• **I-539 instructions** state that if the application is filed after status has expired then the individual must demonstrate that the delay was caused by circumstances outside of their control.

• The Age-Out Guidance specifically states that for those with derivative U-3 status who aged out prior to the implementation of the Guidance, the failure to maintain U-3 status was due to extraordinary circumstances beyond their control.

• CITE this language of the Guidance in your application to make the connection for the adjudicator.

• File an I-539 extension for aged-out derivatives ASAP together with an I-765 under (A)(20) eligibility
Outstanding Concerns

- Derivatives abroad
- Adjustment
Derivatives Abroad

- Guidance does not address age-out issues of derivatives abroad

- Comment Recommendations:
  - Treat derivatives abroad the same way they treat derivatives in the US.
  - Coordinate with DOS
  - Grant expedited review of cases for derivative children abroad.
  - Grant of humanitarian parole
### Adjustment Issues for Principals

See ASISTA's **Age Out Chart:**

<table>
<thead>
<tr>
<th>Derivative in US</th>
<th>Principal SHOULD NOT adjust before derivative obtains U-3 status (apply for extension of status on I-539)</th>
<th>Under 21 at time of approval but aged-out prior to accrual of 3 years continuous presence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Derivative outside US</td>
<td>Principal SHOULD NOT adjust before derivative obtains U-3 status (apply for extension of status on I-539)</td>
<td>---</td>
</tr>
</tbody>
</table>

Under 21 at time of filing but aged-out while application pending

PRINCIPAL's may adjust their status if U-3 derivative ages-out after their U-3 approval

Derivative should file I-539 to accrue their 3 years CP
# Adjustment issues for Derivatives

<table>
<thead>
<tr>
<th></th>
<th>Under 21</th>
<th>Over 21</th>
</tr>
</thead>
<tbody>
<tr>
<td>Derivatives outside the US</td>
<td>If derivative is under 21 by the time principal ready to adjust, principal may file I-929 as Qualified Family Member if derivative never entered with U-3 status</td>
<td>If derivative has turned 21 while abroad, currently no way for them to adjust if not in U-3 status.</td>
</tr>
<tr>
<td>Derivatives with DA status</td>
<td>N/A</td>
<td>Currently unknown if time spent with DA will count towards accrual of CP for purposes of adjustment</td>
</tr>
<tr>
<td>Derivatives with U-3 status</td>
<td>Should not have problem with accrual of continuous presence for adjustment</td>
<td>May adjust after accrual of three years CP. If aged out, must file I-539 to gain enough time in U-3 status before adjusting.</td>
</tr>
</tbody>
</table>
QUESTIONS?

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