



# U VISA DERIVATIVES AGE-OUT

## *A Guide for Practitioners on Age-Out Protections*

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U nonimmigrant status, often referred to as the “U Visa,” is a form of immigration relief available to noncitizens who are survivors of serious crimes in the United States. Individuals who are granted U nonimmigrant status can enter, or if already here, remain lawfully in the United States. As part of the protection given to survivors of crimes, U petitioners are able to petition for U nonimmigrant status for certain family members as well. The U petitioner is referred to as the “principal,” and their family members are known as “derivatives.” For many family members, being a derivative on a U petition may be the only way they will be able to get legal status in the United States. Because of this, it is important to understand when a derivative can be included on a petition and USCIS’s current interpretation of age-out protections.

## I. Derivative Basics

U principal petitioners can generally include their spouses, children, parents, and unmarried siblings under 18 years of age. Who a U principal can include will depend on the age of the principal petitioner when the principal files the U nonimmigrant petition.<sup>1</sup> If the principal is under 21 years of age at the time the principal properly filed the petition, qualifying family members include the principal’s spouse, children, unmarried siblings under 18 years of age (on the filing date of the principal’s petition), and parents.<sup>2</sup> If the principal is 21 years of age or older, only the spouse and children are eligible for derivative status as qualifying family members. Although there is a 10,000 visa limit set by statute for the number of U visas that can be granted each year, this numerical limitation does not apply to derivatives.<sup>3</sup>

<sup>1</sup> INA § 214(p)(7)(B); 8 C.F.R. § 214.14(f).

<sup>2</sup> INA § 101(a)(15)(U)(ii)(I).

<sup>3</sup> INA § 214(p)(2).

## U Visa Derivatives Classification

- U-1—Principal Petitioner—principal petitioner who suffered substantial harm and cooperated with law enforcement.
- U-2—Spouse—Spouse of U-1.
- U-3 Child—Child of the principal petitioner, defined as unmarried and under 21.
- U-4—Parent—Parent of U-1 petitioner, if U-1 petitioner is unmarried and under 21.
- U-5—Sibling—Unmarried sibling, if sibling is unmarried and under 18, and U-1 petitioner is under 21.

## II. Age-Out Protections

Under the initial U visa regulations, derivatives could only qualify for U nonimmigrant status if the relationship continued throughout adjudication. As a result, U-3 derivatives who were no longer under 21 at the time of approval would not qualify. As the delays in adjudicating petitions lengthened, qualifying children began to age out while their petitions were pending. There were also problems with these children only receiving U nonimmigrant status until they were 21, leaving them unable to file for adjustment of status. Some of these issues were resolved in an interim Policy Memorandum issued in 2012,<sup>4</sup> but that memorandum did not provide full age-out protection.

Legislation passed in 2013 (VAWA 2013) and subsequent regulations provided age-out protections to U nonimmigrant derivatives to address U-3 derivatives who turned 21, U-5 derivatives who turned 18, and U-1 principals who turned 21 (and had parent or sibling derivatives), before their petition had been adjudicated.<sup>5</sup> For example, VAWA 2013 amended the Immigration and Nationality Act (INA) specifically to provide that principals who filed for their unmarried U-3 children who were under 21 at the time of filing will continue to be classified as a “child” even if the child turned 21 while the application was pending.<sup>6</sup> A similar change was made

<sup>4</sup> USCIS PM-602-0077, [https://www.uscis.gov/sites/default/files/document/memos/PM-602-0102\\_TVPR\\_2013.pdf](https://www.uscis.gov/sites/default/files/document/memos/PM-602-0102_TVPR_2013.pdf).

<sup>5</sup> Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Pub. L. 113-4 (March 7, 2013).

<sup>6</sup> INA § 214(p)(7)(A); 8 C.F.R. § 214.14(f).

to accommodate U-1 principals who turned 21.<sup>7</sup> The regulations extended the age-out protection to siblings as well.<sup>8</sup>

Thus, when a principal U petitioner for U nonimmigrant status properly files their principal petition, the age of the qualifying family member (derivative) is established upon the date on which the principal properly filed for that principal's U nonimmigrant status. The protection is based on the date of filing of the I-918 petition, and not the I-918A petition for the derivative.

Example: Baptiste filed a U visa petition when he was 20 years old. Three years later, while it was still pending, he decided to file an I-918A for his parents. Even though he was 23, he could still file for his parents as derivatives because his age was established as 20 at the time he filed his U principal petition.

### III. When Do the Age-Out Protections Apply?

The age-out protections apply to any applicants (principal or derivative) who turn 21 (or 18) while the I-918 petition is pending.

Previously, USCIS interpreted the law and regulations more generously than the way in which they were worded. Under a previous interpretation, ages were “frozen” at the time of I-918 filing, regardless of whether the age-out happened before or after the I-918 petition was approved. In recent years, however, decisions from the Administration Appeals Office (AAO) indicate that the situation is different when age-outs happen AFTER the I-918 is approved.

Under current interpretation, the statutory language is being read strictly to require that the I-918 be pending in order for the age-out protection to apply. If an age-out (U-3 turns 21, U-1 turns 21, or U-5 turns 18) happens while the I-918 is pending, then there is complete age-out protection. If, however, the age-out happens after the I-918 is approved, then the derivative is not protected and an I-918A cannot be filed. This requirement comes from a strict reading of the statutory language:

- (A) An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 101(a)(15)(U)(i), and who was under 21 years of age on the date on which such parent petitioned for such status, shall continue to be classified as a child

<sup>7</sup> INA § 214(p)(7)(B); 8 C.F.R. § 214.14(f).

<sup>8</sup> INA § 101(a)(15)(U)(iii); 8 C.F.R. § 214.14(f).

for purposes of section 101(a)(15)(U)(ii), if the alien attains 21 years of age after such parent's petition was filed but *while it was still pending*.<sup>9</sup>

- (B) An alien described in clause (i) of section 1101(a)(15)(U) of this title shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's petition for status under such clause (i) is filed but *while it is pending*.<sup>10</sup>

USCIS's current interpretation is complicated and can be best illustrated by examples:

**Example:** Yesica was 16 when she filed her U visa petition. She is 20 when her U is approved, but she does not ask to file an I-918A for her father until she is 22. The I-918A will be denied because Yesica did not turn 21 while her petition was pending. There is no age-out protection because she turned 21 after her petition was approved.

**Example:** Hiroki was 17 when he filed her U visa petition. It was not approved until he was 22. Hiroki can still file an I-918A for his father, even though he is now over 21, because the age-out happened while the U visa was pending.

**Example:** Natasha does not include her minor children, Alex and Misha, in her initial U visa filing or while the case is pending. Alex turned 21 while her case was pending. Misha is still under 21 when her U visa is approved. She can still file an I-918A for Alex because he turned 21 while the petition was pending. She can still file an I-918A for Misha because he is still under 21, but she must file it before Misha turns 21.

It is unclear (due to the very few number of cases with these facts) whether an age-out that happens after the I-918 approval, but while an I-918A petition for the derivative is pending will also be protected. In cases where the I-918 has been approved and an age-out may occur soon after filing the I-918A, an expedite request should be made to the humanitarian unit.

**Example:** In the example above, Natasha must file for Misha before Misha turns 21 years old. She should request to expedite Misha's derivative petition so that Misha is still 21 when it is adjudicated. This is because it is unclear how USCIS would interpret the age-out protections in this case. Advocates should argue that the age-out protections apply because Misha's petition is still pending. But it is possible that USCIS will interpret the statutory language narrowly to find that Misha

<sup>9</sup> INA § 214(p)(7)(A).

<sup>10</sup> INA § 214(p)(7)(B).

is not protected if he turns 21 because Natasha's petition (the principal petition) is no longer pending.

## IV. Practice Tips

It is critical to assess derivative eligibility at all steps of the U process. This includes upfront when filing the principal's petition. It also means working with a client while the I-918 petition is pending (for example when waitlist notices are issued), to assess again whether all petitions have been filed for all potential derivatives. If a derivative has aged-out after the initial filing, but while the application is pending, their I-918A may be filed at any time before adjudication or while the principal holds U-1 nonimmigrant status. But there is some benefit to filing derivative applications before final adjudication, in the event that they may be reviewed with the principal's application (rather than based on their own filing date).

When closing a U case, carefully review to see if there are any child/parent/sibling derivatives for whom an I-918A was never filed. It is important that practitioners identify anyone who has not yet aged out but will age-out within the next five years (and therefore may not be able to be included at the AOS stage).

Do whatever you can to file the I-918 petition before a principal or derivative ages out. If necessary, practitioners can file a skeletal U I-918 petition that can be supplemented later. If necessary, practitioners, can also file the I-918 petition first and the derivative petitions afterwards.

Finally, note that there is no "marry-out" protection! Child derivatives must remain unmarried until the U visa process is complete and their applications have been adjudicated. Marriage will make them ineligible. Derivative children should be warned to stay unmarried until their I-918A has been approved and, conservatively, until they adjust status. Although there is a possibility that marriage while in U status will not jeopardize their ability to adjust status, it is safest to wait to marry until after they have successfully adjusted status.

Similarly, there is no "marry out" protection for siblings. Therefore siblings must remain unmarried until the U visa process is complete. There is a possibility that they may be able to marry after the I-918A is approved and still be able to adjust as a U nonimmigrant, but it is safest for them to remain unmarried until after they are able to adjust status.

**Example:** Amir filed a U petition when he was 20 years old. He included a petition for his 17-year-old sister Miriam. He turned 21 while his petition was pending, and his sister turned 18. Their birthdays did not affect their eligibility because Amir filed the U petition when he was under 21 and when his sister was under 18.

Miriam got married when she was 19, while her derivative petition was still pending. She is no longer eligible for U derivative nonimmigrant status. Even though she was not married when the petition was filed, she needs to remain unmarried at the time the petition is adjudicated to be eligible. There is no “marry-out” protection.

Nevertheless, parents of principal applicants under 21 years of age should qualify as derivatives even if the principal applicant is married. Generally, a child is defined for immigration purposes as an unmarried individual under 21 years old. However, parents may be able to be included as derivatives for their “children” even if the children are married because of the way the statute is worded. Nothing in the statutory language invokes the term “child,” which would require the principal petitioner to be both under 21 years of age and unmarried. Despite language in the regulations that seems to limit eligibility for U nonimmigrant status to derivative parents whose under 21-year-old children are unmarried, according to the statute, parents should be able to qualify as U derivatives even if their children are married. In other words, according to the statutory language, if the principal petitioner is under 21 years of age and married, they should still be able to include both their parents and their spouse as a derivative (in addition to their children and minor siblings).



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