

DRAFT FOR COMMENT ONLY

Posted: 12-12-2012

Comment period ends: 1-10-2013

This draft does not constitute agency policy in any way or for any purpose.

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

Draft PM-602-XXXX

Draft Policy Memorandum

SUBJECT: Eligibility for Employment Authorization upon Approval of a Violence Against Women Act (VAWA) Self-Petition; and, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants

Purpose

This policy memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers regarding an amendment to the Immigration and Nationality Act (INA or the “Act”) that provides eligibility for employment authorization to the beneficiary of an approved VAWA self-petition. This PM revises Adjudicator’s Field Manual (AFM) Chapters 21.14(l) and 30.13 (AFM Update AD07-16).

Additionally, this PM provides guidance to USCIS officers regarding an amendment to the Act that provides eligibility for employment authorization to battered spouses of certain nonimmigrants. The guidance contained in this PM will become effective, in advance of regulatory amendments, once the new information collection is approved by the Office of Management and Budget.

Scope

Unless specifically exempted herein, once finalized, this PM will apply to and will be binding on all USCIS employees.

Authorities

- The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005)
- INA section 204(a)(1)(K)
- INA section 106

Background

Section 814(b) of VAWA 2005 amended the Act by adding new paragraph 204(a)(1)(K), that provides eligibility for employment authorization incident to the approval of a VAWA self-petition.

Section 814(c) of VAWA 2005 amended the Act by adding new section 106, that provides eligibility for employment authorization to battered spouses of nonimmigrants admitted under subparagraph (A), (E)(iii), (G), or (H) of section 101(a)(15) of the Act.

Policy

In advance of regulations, the principal beneficiary of an approved VAWA self-petition is eligible for employment authorization and may be provided an Employment Authorization Document (EAD) incident to the approval of the VAWA self-petition. It is no longer necessary for principal beneficiaries to rely on deferred action as the only mechanism through which to obtain an EAD. However, deferred action will continue to be a required criterion for granting employment authorization to the principal beneficiary's derivative child. The derivative child must be provided deferred action to become eligible to receive an EAD.

Similarly, in advance of regulatory amendments, battered spouses of certain nonimmigrants may obtain employment authorization pursuant to section 106 of the Act. The employment authorization for section 106 applicants will be issued for a period of time equal to the remainder of the applicant's current period of authorized stay. This period of time may change upon promulgation of regulations.

Implementation

Accordingly, the AFM is revised as follows:

- ☞ 1. Add new Chapter 21.14(1) to AFM Chapter 21, entitled "Self-petitions by Abused Spouses and Children," to read:

Chapter 21.14: Self-petitions by Abused Spouses and Children

* * *

(l) Employment Authorization.

(1) Eligibility. Upon approval of a petition as a VAWA self-petitioner, the alien is eligible for employment authorization and an Employment Authorization Document (EAD) may be issued. Self-petitioners who are living outside the United States will not be issued an EAD. Although section 204(a)(1)(K) of the Act allows for the eligibility of work authorization incident to the approval of a VAWA self-petition, the principal VAWA self-petitioner still has the option to request an EAD under deferred action if deferred action was provided.

(A) Derivative Children. Derivative beneficiary children are not covered by the statutory provision found at section 814(b) of VAWA 2005. Derivative children

desiring an EAD will need to be provided deferred action in order to be eligible for employment authorization.

(B) Derivative Children Who Attain Age 21 After The Filing of The Self-Petition.

A derivative child who:

- Was included on the self-petition that was filed or approved before the date on which the child attained the age of 21; and
- Attains the age of 21; and
- Was not admitted or approved for lawful permanent residence by the date the child attained age 21 years of age, **shall be considered his or her own VAWA self-petitioner** under section 204(a)(1)(D)(i)(III) of the Act with the same priority date as the original self-petitioner (i.e., the parent).

It is unnecessary to file a new self-petition. The derivative child who converts to a VAWA self-petitioner pursuant to section 204(a)(1)(D)(i)(III) of the Act is eligible for work authorization under section 204(a)(1)(K) of the Act as a VAWA self-petitioner provided that the individual was included as a derivative beneficiary child on his or her parent's approved Form I-360. Additionally, the derivative child who converts to a VAWA self-petitioner remains eligible for work authorization under deferred action if deferred action was provided.

(2) Filing Requirements. All VAWA self-petitioners desiring an EAD must file Form I-765, Application for Employment Authorization, with the Vermont Service Center (VSC). Self-petitioners requesting an EAD under 8 Code of Federal Regulations (8 CFR) 274a.12(c)(9) because of an already pending Form I-485, Application to Register Permanent Residence or Adjust Status, may concurrently file the Form I-765 along with the Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (VAWA self-petition) with the VSC. Additionally, eligible self-petitioners (i.e. immediate relatives or self-petitioners with an immigrant visa currently available) may request an EAD under 8 CFR 274a.12(c)(9) by concurrently filing the Form I-765 along with the Form I-485 and Form I-360. However, self-petitioners requesting an EAD under 8 CFR 274a.12(c)(14) pursuant to deferred action and self-petitioners requesting an EAD under 8 CFR 274a.12(c)(31) as provided by section 204(a)(1)(K) of the Act should file their Form I-765 only after the approval of the Form I-360. A self-petitioner is not eligible to file the Form I-765 prior to the approval of the Form I-360 unless the self-petitioner has a pending Form I-485.

(3) Adjudication.

(A) Authority. Authority to adjudicate applications for employment authorization pursuant to section 204(a)(1)(K) of the Act is limited to the VSC. Applications incorrectly filed elsewhere should be promptly transferred to VSC.

(B) Review and Consideration of Documentary Evidence. The adjudicating officer must ensure that the following criteria are met prior to issuing an approval of the Form I-765:

- Original signature of the applicant or legal guardian pursuant to 8 CFR 103.2(a)(2);
- Proper fee or waiver thereof;
- Required photos;
- Applicant is residing in the United States;
- Applicant has an approved VAWA self-petition (deferred action need not be provided before adjudicating the I-765 for the principal VAWA self-petitioner or section 204(a)(1)(D)(i)(III) derivative children);
- Applicant does not currently hold a valid EAD under another provision of 8 CFR 274a.12; and
- Applicant has not been admitted or approved for lawful permanent residence.

(C) Closing Action. If found to meet the criteria, the Form I-765 will be approved and an EAD will be issued pursuant to 8 CFR 274a.12(c)(31). For approved principal VAWA self-petitioners, it is not necessary to provide deferred action prior to the adjudication of the I-765.

(D) Denials. There is no appeal from the denial of Form I-765.

(4) New Code. A new eligibility code, (c)(31), has been provided to document employment authorization for battered aliens with an approved VAWA self-petition.

(5) Deferred Action. Deferred action will continue to be a required criterion for granting employment authorization to derivative beneficiaries who are under the age of 21. Derivative beneficiaries, and VAWA self-petitioners, who are provided deferred action will continue to be eligible for employment authorization pursuant to 8 CFR 274a.12(c)(14). As described in the "Filing Requirements" paragraph above, however, if the derivative child has attained age 21 and meets the INA

204(a)(1)(D)(i)(III) criteria, the derivative is eligible for employment authorization pursuant to 8 CFR 274a.12(c)(31) as a VAWA self-petitioner.

- ☞ 2. Add new Chapter 30.13 to AFM Chapter 30, entitled “Nonimmigrants in General,” to read:

30.13 Employment Authorization for Battered Spouses of Certain Nonimmigrants

(a) Background. Section 106 of the Act extends employment authorization eligibility to battered spouses of nonimmigrants admitted under subparagraph (A), (E)(iii), (G), or (H) of section 101(a)(15) of the Act.

INA 101(a)(15):	
(A)	A nonimmigrant (or Ambassador)
(E)(iii)	E(iii) nonimmigrant (or Australian Specialty Occupation Worker)
(G)	G nonimmigrant (or Foreign Government or International Organization Representative)
(H)	H nonimmigrant (or Alien Specialty Occupation Worker)

This table does not list all the variations of A, E(iii), G, or H nonimmigrants. Please see section 101(a)(15)(A), (E)(iii), (G), and (H) of the Act for a complete listing.

(b) Eligibility.

(1) Eligibility Requirements. To be eligible, the applicant must provide information demonstrating that:

- He/she is the spouse who accompanied or followed to join a principal alien admitted under subparagraph (A), (E)(iii), (G), or (H) of section 101(a)(15) of the Act;
- He/she was admitted as a nonimmigrant under subparagraph (A), (E)(iii), (G), or (H) of section 101(a)(15) of the Act;
- He/she is maintaining status as a nonimmigrant under subparagraph (A), (E)(iii), (G), or (H) of section 101(a)(15) of the Act;
- During the marriage, the applicant or the applicant’s child has been battered or has been the subject of extreme cruelty perpetrated by the principal alien spouse; and

- He/she is currently residing in the United States.

(c) Filing Requirements. An eligible applicant desiring an Employment Authorization Document (EAD) pursuant to INA section 106 must file Form I-765, Application for Employment Authorization and the new supplemental Form I-765V, Battered Nonimmigrant Spouse Supplement to Form I-765 with the Vermont Service Center (VSC). The supplemental Form I-765V must be filed concurrently with the Form I-765.

(1) Supporting Documentation. Evidence to support the application for employment authorization under section 106 includes:

- Evidence of applicant's qualifying nonimmigrant status;
- Evidence of abusive spouse's qualifying nonimmigrant status;
- Evidence of spousal relationship; and
- Evidence of abuse, such as police reports, court records, medical records, or reports from social service agencies. If there is a protective order in place, a copy should be submitted.

Note: Although the applicant may not be able to provide documentary evidence of her/his spouse's nonimmigrant status, the applicant must provide some identifying evidence such as name, place of birth, country of birth, date of birth, date of entry into the United States, I-94 number, employer etc. Officers will conduct a search of the appropriate electronic systems to attempt to verify the qualifying nonimmigrant status of the spouse.

(2) Evidence Accepted. USCIS shall consider any credible evidence provided by the applicant that is relevant to the application. The determination of what evidence is credible, and the weight to be given to that evidence, is left to the discretion of the adjudicator in accordance with the guidance provided in this section.

(d) Adjudicative Issues.

(1) Authority. Authority to adjudicate applications and petitions filed pursuant to section 106 of the Act is limited to the VSC. Applications incorrectly filed elsewhere should be promptly transferred to the VSC.

(2) Review. The adjudicating officer must ensure that the following criteria are met prior to issuing an approval of the Form I-765:

- Original signature of the applicant and adherence to 8 CFR 103.2(a)(2);

- Proper fee or waiver thereof;
- Required photos;
- Applicant is residing in the United States;
- Applicant does not currently hold a valid EAD under another provision of 8 CFR 274a.12;
- Evidence of applicant's qualifying nonimmigrant status;
- Evidence of spousal relationship;
- Evidence of abusive spouse's qualifying nonimmigrant status; and
- Evidence of qualifying abuse.

(e) Closing Action. If found to meet the criteria, the Form I-765 will be approved for employment pursuant to:

- 8 CFR 274a.12(c)(27) as the abused spouse of an A nonimmigrant;
- 8 CFR 274a.12(c)(28) as the abused spouse of an E(iii) nonimmigrant;
- 8 CFR 274a.12(c)(29) as the abused spouse of a G nonimmigrant; or
- 8 CFR 274a.12(c)(30) as the abused spouse of an H nonimmigrant.

(f) Validity Period of EAD. USCIS will issue the EAD for a period of time equal to the remainder of the applicant's current period of authorized stay (including the applicant's duration of status, if applicable). USCIS may not approve any requests for extensions.

(g) Denials. There is no appeal from the denial of Form I-765.

(h) Termination of Employment Authorization. Should USCIS become aware that the alien is no longer in a qualifying nonimmigrant status, USCIS will terminate the alien's employment authorization.

- ☞ 3. The AFM **Transmittal Memoranda** button is revised by adding a new entry, in numerical order, to read:

AD07-16 [DATE]	Chapter 21.14 and Chapter 30.13	Provides guidance on eligibility for employment authorization for approved VAWA self-petitioners as provided by INA section 204(a)(1)(K) and for battered spouses of certain nonimmigrants as provided by INA section 106. These provisions were added by VAWA 2005.
-------------------	--	--

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.