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The Broad Impact Of H-1B Premium Processing Suspension

By **Yeon Me Kim, Ali Nasserghodsi and Becki Young** (October 3, 2018, 1:20 PM EDT)

With the intensifying scrutiny of immigration processes by the current administration, the largest

temporary work visa program used by U.S. companies is suffering yet another setback. On Aug. 28, 2018, U.S. Citizenship and Immigration Services announced that it would extend and expand the suspension of premium processing service to certain additional H-1B petitions. The suspension of premium processing was initially imposed only on those H-1B petitions requesting new H-1B status subject to the annual fiscal year quota. This initial suspension of premium processing service was set to end on Sept. 10, 2018. Instead, the suspension has been extended and expanded.

The H-1B classification is one of the most popular nonimmigrant categories because it enables employers to fill specialized positions for professional workers. It is utilized by a wide range of companies in various industries to fill gaps in their high-skilled and educated workforce. To quickly fill empty and challenging positions, employers rely on the premium process service, which, for a fee, provides a 15-day petition adjudication window. The augmentation of the premium processing suspension impedes companies from efficiently filling critical positions. This expansion hurts both employers and H-1B workers alike. Employers suffer because they must make workforce decisions based on the uncertainties of H-1B processing times; and H-1B workers suffer because their ability to safely and promptly change employers (port) is severely limited.

What Is Happening and Who Is Affected?

On March 20, 2018, [USCIS](#) announced that it would suspend premium processing service for H-1B petitions subject to the annual fiscal year 2019 new visa cap and notified that the suspension was expected to last until Sept. 10, 2018. On Aug. 28, 2018, USCIS announced that it was extending the suspension until an estimated date of Feb. 19, 2019. In its August announcement, USCIS added that beginning Sept. 11, 2018, the



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suspension would be extended to include other H-1B petitions, rather than just those subject to the annual new visa cap. Only the following petitions are exempt from the suspension and can still benefit from premium processing:

- Petitions that are filed with the USCIS California Service Center because the employer is a qualifying cap-exempt organization. These employers include institutions of higher education and their related affiliated nonprofit organizations, nonprofit research organizations and governmental research organizations; and
- Petitions filed with the USCIS Nebraska Service Center by an employer requesting an extension of H-1B status with the same employer and no changes to the conditions of the employment.

All other petitions are subject to the premium processing suspension. Furthermore, any premium processing request filed for these petitions on or after Sept. 11, 2018, will result in rejection by USCIS. If the petition is filed with two separate checks for the fees (i.e., one check for the premium processing fee and another for the general H-1B petition filing fees), USCIS will accept the H-1B filing fee(s), place the petition in the regular processing queue, and return the premium processing fee. However, as of Sept. 11, 2018, if the subject petition is filed with only one combined check for the premium processing and H-1B filing fees, the H-1B petition will be rejected altogether. For cases with premium processing requests that were filed prior to Sept. 11, 2018, USCIS indicated that it would refund the premium processing fee, if it was unable to act on the case within 15 days of the date of filing, indicating that filing a premium processing request before Sept. 11, 2018, ultimately never came with guaranteed expedition.

Why Is USCIS Extending and Expanding the Suspension of Premium Processing?

USCIS states that the reason for extending and expanding the suspension of premium processing is to help reduce overall H-1B processing times. According to USCIS, there should be significant processing benefits from this extension and expansion.

In its explanation, USCIS posits that the high demand and number of H-1B filings have resulted in a backlog of cases it has been unable to expeditiously process in the past months. USCIS believes that extending and expanding the suspension will enable it to process these long-standing petitions. It argues that suspending premium processing will enable it to be more responsive to petitions with time-sensitive start dates. Further, it postulates that pending cases will benefit from the premium processing suspension because the change in processing focus will free up adjudicators to prioritize pending H-1B extension petitions that are nearing the important 240-day date, i.e., the date when an H-1B worker with a pending H-1B extension petition will lose his/her automatic extension of work authorization while awaiting approval of the extension petition. Whether any of these outcomes materialize remains to be seen.

What Are Some Major Implications of the Suspension?

In addition to delaying an employer's ability to quickly fill positions for highly skilled workers, certain H-1B workers may also face harsh consequences. One of the major implications of the

suspension includes students who are in F-1 status and are in what is known as a “cap-gap” extension period. The cap-gap extension is a regulatory provision that extends a student’s status between their F-1 status and the start of their H-1B status. The provision is available to those F-1 students who are on optional practical training, or OPT, or in their 60-day grace period at the time of filing an H-1B cap petition on their behalf. USCIS expected that the adjudication of such H-1B petitions to conclude by Oct. 1. Thus, this provision would allow a smooth change of status process. Nevertheless, with the recent increase of USCIS’s requests for evidence issued for such H-1B petitions, coupled with a lengthened regular processing time, many petitions continue pending even after the anticipated Oct. 1 start date.

The initial suspension of premium processing was previously projected to end on Sept. 10, 2018. Therefore, employers and H-1B beneficiaries in F-1 status hoping to initiate employment by Oct. 1 could have relied on filing a premium processing request on Sept. 11, 2018. Now, with the extension of the suspension through February of 2019, this is no longer possible. This means that the F-1 students on a cap-gap OPT must stop working as of Oct. 1. They can remain in the U.S. based on the pending change-of-status petition.

Another implication includes the ability of beneficiaries to travel abroad. Those who applied for a change of status to an H-1B and travel while their application is pending will lose their automatic change of status. This is because a change of status is generally possible only if the beneficiary remains in the U.S. Travel will also be restricted for those who applied for an extension of their H-1B status and who have an expired visa because they must wait for approval from USCIS to be able to apply for a new visa abroad. While the change or extension of status request may be denied with travel, the H-1B petition itself will remain valid and may be approved. As a result, a beneficiary, who must travel abroad before the H-1B petition and change of status request is approved, will have to take additional steps to obtain an H-1B visa abroad before they can enter the U.S. and work on an H-1B status.

In addition, implications also arise for H-1B beneficiaries who already hold H-1B status but would like to begin employment with another company who will or has filed an H-1B petition on their behalf. While such beneficiaries can begin working with their new employer once the petition is filed, there is a risk if the petition is denied. If the beneficiary has left their previous H-1B employer for the new H-1B employer and if their I-94 expires, the beneficiary will be out of status when the transfer petition is denied and will have to depart the U.S. immediately. This situation is not only difficult for the beneficiary but also for the new H-1B employer. In the current immigration climate, most employers/beneficiaries prefer to wait until a decision is made before starting the beneficiary’s employment. Thus, premium processing would have provided more security in changing jobs in a timely fashion.

Finally, certain states require an approved H-1B petition before the Department of Motor Vehicles will issue or renew a beneficiary’s driver’s license. Without premium processing, beneficiaries will have to wait months before they can apply for or renew their driver’s license, adding another layer of hardship.

What Option Remains for Employers Impacted by the Suspension of Premium Processing Extension and Expansion?

In the event that an employer has an urgent need for the H-1B petition to be promptly adjudicated under a compelling situation, USCIS does accept expedite requests on a case-by-case basis. However, these requests are granted at the discretion of the USCIS officers and the burden is on the applicant or petitioner to prove that they meet one or more of the narrow expedite criteria. Such criteria include, but are not limited to: severe financial loss to the company or persons; an emergency situation; humanitarian reasons; and USCIS error.

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