

## 5 Steps To Take After H-1B Premium Processing Suspension

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For the second year in a row, U.S. Citizenship and Immigration Services recently announced that it will temporarily suspend premium processing for the upcoming fiscal year's H-1B petitions, for which filings may be accepted as of April 2, 2018:

Starting April 2, 2018, USCIS will begin accepting H-1B petitions subject to the Fiscal Year (FY) 2019 cap. We will temporarily suspend premium processing for all FY 2019 cap-subject petitions, including petitions seeking an exemption for individuals with a U.S. master's degree or higher.

USCIS's premium processing service guarantees 15-calendar-day processing to those petitioners or applicants who choose to use this service, or USCIS will refund the premium processing service fee. If the fee is refunded, the relating case will continue to receive expedited processing.

In contrast to 2017, when USCIS also suspended H-1B extensions and amendments, the March 20, 2018, USCIS announcement indicates that the current suspension will apply only to FY 2019 H-1B petitions. But as FY 2019 filings will only increase processing backlogs, the likelihood of a broader suspension of premium processing is material. USCIS specifically noted in its announcement that its objective in suspending premium processing for FY 2019 H-1B petitions is to enable officers to address backlogs without a "surge" of premium processing requests:

This temporary suspension will help us reduce overall H-1B processing times. By temporarily suspending premium processing, we will be able to:

- Process long-pending petitions, which we have currently been unable to process due to the high volume of incoming petitions and the significant surge in premium processing requests over the past few years; and
- Prioritize adjudication of H-1B extension of status cases that are nearing the 240 day mark.

USCIS's current announcement indicates the suspension for new petitions will last until Sept. 10, 2018.



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What actions should employers take in response to the upcoming suspension?

### **1. Prepare for Intensive Scrutiny of H-1B Eligibility**

Suspending premium processing will allow the agency additional time to advance new interpretations of whether positions and job duties constitute specialty occupations eligible for H-1B classification, as well as whether compensation levels and academic credentials comport with H-1B classification. See, e.g., "USCIS H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models." Petitions for placement of H-1B workers at third-party worksites will similarly face enhanced scrutiny. See USCIS Policy Memorandum, Feb. 22, 2018, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites." The likelihood of enhanced scrutiny is underscored by our recent discussion in "Getting to No Through a Crackdown on 'Lenient' Case Officers at USCIS," which highlights the likely results from USCIS creating an internal division to police caseworkers who "may be too forgiving toward applicants for permanent legal residence or citizenship ..."

### **2. Communicate Impact of Announcement to H-1B Petition Candidates**

Employers should notify candidates and hiring managers of the change in USCIS premium processing times. If the employer has an "ask mobility" e-hotline, it should make that e-hotline available to employees with particular concerns about the timing of their petitions, including with regard to their ability to travel internationally while a petition is pending. Student visa holders whose employment authorization expires before Oct. 1, 2018, i.e., the beginning of FY 2019, may retain work authorization while their cap-subject H-1B petition is pending, as "cap gap" beneficiaries, provided they do not travel internationally until after Oct. 1.

### **3. Request Expedited Processing Selectively**

While premium processing is suspended, USCIS has retained an expedited processing option for exceptional cases. Employers seeking an expedite request must demonstrate fully that they meet at least one of the expedite criteria, which include:

- Severe financial loss to a company or person;
- Emergency situation;
- Humanitarian reasons;
- Nonprofit organization whose request is in furtherance of the cultural and social interests of the United States;
- U.S. Department of Defense or national interest situation (These particular expedite requests must come from an official U.S. government entity and state that delay will be detrimental to the government);
- USCIS error; or
- Compelling interest of USCIS.

#### **4. Accelerate Preparation of Extension Petitions for Other Visa Categories**

Employers should consider accelerating extension petitions for all nonimmigrant visa categories where the employees' status may be expiring during the remainder of the calendar year, in the event USCIS expands its suspension of premium processing service.

#### **5. Consider Alternative Visa Options Proactively**

Employers should assess the options for alternative work authorization in the United States, for candidates who may qualify for other visas or treaty-provided work authorization, such as North American Free Trade Agreement-based TN categories for Canadian and Mexican nationals, H-1B1 visas for Chilean and Singaporean nationals, and E-3 visas for Australian nationals.

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