

## Processing Delays Reveal USCIS Stretched To Its Limits

By Nicole Narea

*Law360 (March 13, 2019, 9:13 PM EDT)* -- Wait times for numerous petitions before U.S. Citizenship and Immigration Services have continued to climb this fiscal year, reflecting what attorneys describe as an agency that has spread its resources too thinly to keep up with the Trump administration's demand for increased vetting of foreign nationals.

Recently published USCIS data shows that wait times for adjudications of applications to adjust status or register permanent residence for noncitizens with employment-based visas continued to grow this fiscal year to 12.2 months on average, compared to 11 months the previous year and 8.1 months in fiscal year 2017. Moreover, nonimmigrant worker petitions that were not filed with premium processing, which speeds up processing for a fee, have faced wait times of 5.4 months this fiscal year on average, increasing from 3.4 months the previous year and four months in fiscal year 2017.

Numerous other petitions have seen increasing wait times, which attorneys say have reached a crisis level.

"As USCIS has increased procedural obstacles for legal immigration across areas, the backlogs have reached unmanageable levels," said Elizabeth Espin Stern, a partner at Mayer Brown LLP. "Absent more calibrated targets for enhanced review, backlogs and errors may cause long-term damage to a critical function to enrich the country with diverse, innovative talent."

### USCIS Processing Times Continue To Climb

Processing times across a broad range of immigration petitions adjudicated by U.S. Citizenship and Immigration Services have been on the rise in recent years, showing no signs of declining this fiscal year so far.

	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019*
I-129 Non-Premium Nonimmigrant Worker Petition	2.3	5.5	4	3.4	5.4
I-130 Petition for Noncitizen Relative	6.1	6	7.7	9.7	10
I-485 Employment-based Green Card/Adjustment of Status Application	6.5	6.8	8.1	11	12.2
I-485 Family-based Green Card/Adjustment of Status Application	6.6	6.8	8.4	11.1	12.1
I-765 Employment Authorization Application	2.4	2.6	3.1	4.1	4.6

\*FY 2019 as of Dec. 31, 2018. Figures above are in months.

Source: USCIS - Created with Datawrapper

Immigration agencies have become more stringent in evaluating visa applications across the board under President Donald Trump's "Buy American, Hire American" executive order issued in April 2017. The order outlined goals of reducing illegal immigration, detecting and preventing immigration fraud, and increasing information-sharing among federal agencies in order to increase employment of U.S. workers and raise their wages.

Stern said that USCIS has subjected every filing — including amendments and extensions to previously approved petitions — to “ground-up review,” resulting in greater delays and a heightened error margin at agency service centers.

In October 2017, the agency had issued a memo rescinding prior guidance instructing adjudicators to give deference to petitioners filing for extensions of their previously approved applications for nonimmigrant visas, such as H-1B skilled worker visas. As a result, extensions of previously granted status must undergo the same review as brand new petitions, demanding more agency resources and likely contributing to increased processing times, according to Miguel Manna, an attorney at Ogletree Deakins Nash Smoak & Stewart PC.

“Practically speaking, even the most straightforward request for an immigration benefit is met with a forensic level of scrutiny and heightened standard of review,” he said. “I strongly suspect that this period of heightened scrutiny arrived with little to no significant increase in USCIS staffing levels, which means processing timelines of nine-plus months are likely to become the norm.”

The agency has also recently implemented mandatory interviews for green card applicants sponsored by employers, even in cases “considered plain vanilla in the past,” Stern said.

Earlier this month, the agency reinstated premium processing for all H-1B skilled worker visas, which has come as a relief to employers seeking to move forward in onboarding employees on a clipped timetable. If an employer pays for premium processing, an application will be processed in no longer than 15 days.

But even though premium processing gives employers more control in the process, the agency still holds all the cards, according to Stern.

“While the industry may look to the resuscitation of premium processing as a lifeline, the agencies remain overpowered by the mandates of ‘extreme vetting’ in every case,” she said.

Manna said that, in the short term, the return of premium processing will likely “alleviate some pressure by bringing matters to finality sooner,” but that it could ultimately create more problems. He noted that applications with premium processing tend to get hit with so-called requests for evidence, or requests from adjudicatory officers for more information they think is missing from the application. He said that therefore premium processing, which is available only for certain visa categories, might also be subject to delays.

“Without significant staffing changes at USCIS, the premium units are likely to be bottlenecked just like the service centers,” he said. “Long term, my hope is that the revenue generated from premium processing will lead to higher staffing and training among the service center adjudicators.”

Attorneys said that the increased processing times have pushed them to plan strategically with their clients while managing their expectations in an uncertain climate.

Susan Cohen, chair of Mintz Levin Cohn Ferris Glovsky and Popeo PC’s immigration practice, said that the increased processing times have required her to come up with multiple backup plans for her clients, especially given how important it has become for petitioners to maintain their legal status in light of changes introduced last year to the way they accrue unlawful presence. She said she has also had to allay their anxieties amid the drawn-out application process, taking on the role of “social worker and therapist.”

Increased processing times also inconvenience businesses, she said. Companies have to allocate bigger budgets to hiring foreign workers because of the longer wait times. And employees who are waiting on U.S. visas may not be able to travel internationally and attend important meetings abroad.

As a result, businesses have instead sought to expand their overseas operations so as to “eliminate the risk of staffing key hires in the U.S.,” she said.

Manna said that the increased processing times have overall added to a climate of “uncertainty and anxiety.”

“Uncertainty causes delays, sometimes indefinitely, of important projects or expansions,” he said. “Recruiting talented professionals from overseas, many of them educated in the U.S., is becoming unreasonably difficult. I worry that companies will ultimately abandon the U.S. in favor of more tolerant locations, simply to remain competitive in the global economy.”

--Editing by Emily Kokoll and Jill Coffey.