

PUBLICATION

No H-1B Premium Processing. At All. For Who Knows How Long.

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On March 3, 2017 USCIS announced that it will not honor any requests for premium processing for ANY H-1B petitions filed starting April 3 until further notice. That includes capped and cap-exempt petitions, and petitions for initial status, change of status, extension of stay, and change of employer or other amendment. Other classifications using Form I-129 such as L-1 and O-1 can still use premium processing.

USCIS says it is doing this to catch up on older petitions and deal with an increasing volume of petitions.

Petitions for capped slots filed in the first week of April can't really be used to work until October 1 anyway, but workers can't apply for visas until their petitions are approved, and late approvals could end up delaying work start dates. F-1 students with OPT in effect on April 3 can use the "cap gap" regulation to enjoy automatically extended OPT until October 1, but they can't travel internationally during that time without becoming stuck outside the U.S. until the H-1B petition becomes approved and they obtain a visa.

USCIS has repeatedly and increasingly failed to adjudicate non-premium capped petitions by October 1, and now every petitioner faces this possibility.

More alarmingly, cap exempt employers of workers who don't have other authorization in place (such as F-1 OPT, TN, etc.) will have to do without those workers for many months until USCIS adjudicates the H-1B petitions. Especially these employers might want to request expediting of their petitions under normal criteria:

- Severe financial loss to company or person;
- Emergency situation;
- Humanitarian reasons;
- Nonprofit organization whose request is in furtherance of the cultural and social interests of the United States;
- 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.

But we expect very sparing grants of expediting for truly compelling situations.

Petitions to extend H-1B employment for the same employer triggers an automatic 240-day employment authorization by regulation, but most state driver license bureaus will not issue licenses to workers without a current approved H-1B stay, and if a worker needs to travel internationally while awaiting extension after expiration of prior petition the worker would be unable to get a new visa to return. Employers need to file extension petitions on the first day possible – six months ahead of expiration. But, again, USCIS might take more than six months or even 240 days to adjudicate extension petitions.

Workers for whom a petition to change employers is filed can "port" to work for the new employer upon the filing of the H-1B petition and can even use the receipt notice to obtain a new visa, but many workers prefer to wait for approval in order not to "burn a bridge" to the existing approved employment in case the change of employers gets denied.

While in one sense USCIS announcement of March 3 suggests an egalitarian approach to allocating resources. But it ignores the congressional mandate to make premium processing available. And USCIS will miss out on \$1225 per petition for which premium processing otherwise would have been paid, robbing the agency of capital desperately needed for the "infrastructure improvements in the adjudications and customer-service processes" for which Congress intended such fees.

The Trump Administration and Attorney General Sessions have expressed some interest in restricting the use of H-1B visas, and some representatives in Congress have introduced bills to carry that out (see, for instance, S.180). The real worry is that, with limited options to restrict substantive eligibility for H-1B workers without difficult legislative battles, the Trump Administration may be planning to "starve out" the program's users. We hope this is not the case, and that this ill-advised move will be reversed in favor of "staffing up" the H-1B program.