

UNITED STATES

POLICY ALERT: SUSPENSION OF H-1B PREMIUM PROCESSING



EXECUTIVE SUMMARY

Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions or applications. Starting April 3, 2017, U.S. Citizenship and Immigration Services (USCIS) will temporarily suspend Premium Processing for all H-1B petitions. This suspension may last up to 6 months.

USCIS has suspended Premium Processing in the past, but the current suspension is broader (all H-1B petitions) and longer (6 months) than any prior suspension of Premium Processing

USCIS has issued a statement saying it is suspending Premium Processing to bring down processing times, which currently are at 6-8 months, for non-premium processing petitions.

If the agency is unsuccessful in bringing down overall H-1B processing times:

- F-1 foreign students selected in the H-1B lottery will generally be unable to travel outside of the U.S. while their change of status is pending;
- H-1B workers selected in the April lottery will be unable to begin working on October 1st; and
- H-1B workers who seek an extension of status may have to quit working if their applications are not processed within 240 days of their current H-1B status expiring.

What is Premium Processing?

ANSWER: Premium Processing Service guarantees 15 calendar day processing of certain employment-based petitions or applications upon payment of an additional fee (\$1225). USCIS will refund the Premium Processing Service fee but continue to process the case unless within 15 calendar days of receipt of a properly filed request, USCIS issues an approval notice or, where appropriate, issues a notice of intent to deny, a request for evidence or opens an investigation for suspected fraud or misrepresentation on the related petition or application.

It is expected that the agency will publish the suspension of Premium Processing in the Federal Register. Requests for Premium Processing filed after the suspension is in place will not be rejected but will be placed in normal queue for adjudication.

What is the background on Premium Processing?

ANSWER: The premium service was conceived in 1999 when increasing pressure from Congress and private industry, mainly technology firms, was placed on the INS to expedite the processing of employment-based applications. In its Fiscal Year (FY) 2000 Conference Report, Congress mandated that the INS process certain employment-based applications within 30 days.

On December 21, 2000, the President signed an amendment to the Immigration and Nationality Act (Act), which added the following new subsection:

FREQUENTLY ASKED QUESTIONS (FAQS)

The Attorney General is authorized to establish and collect a premium fee for employment-based petitions and applications. This fee shall be used to provide certain premium-processing services to business customers, and to make infrastructure improvements in the adjudications and customer service process. For approval of the benefit applied for, the petitioner/applicant must meet the legal criteria for such benefit. This fee shall be set at \$1,000, shall be paid in addition to any normal petition/application fee that may be applicable, and shall be deposited as offsetting collections in the Immigration Examinations Fee Account. The Attorney General may adjust this fee according to the Consumer Price Index.

The amendment did not explicitly define “Premium Processing”; therefore, the INS used its authority under Section 103(a) of the Act to establish the details of this new service, such as the processing timeframe and the Standard Operating Procedures.

The INS published an interim rule in the Federal Register in 2001 establishing Premium Processing for employment-based petitions and applications.

Why is the government suspending H-1B Premium Processing?

ANSWER: USCIS states that the temporary suspension will help the agency to reduce overall H-1B processing times. By temporarily suspending premium processing, the agency will be able to:

- Process long-pending petitions, which the agency has 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.

Standard H-1B processing times have been a problem for the agency. Today, H-1B processing times for non-Premium Processing cases often exceed six months.

Has the government previously suspended H-1B Premium Processing?

ANSWER: Yes. In prior years, the government has temporarily suspended Premium Processing for certain H-1B petitions. The suspension in 2017 is broader (applies to all H-1B petitions) and longer (6 months) than any prior suspension of Premium Processing.

Will the suspension of H-1B Premium Processing affect the FY18 H-1B lottery?

ANSWER: Premium Processing relates to adjudication and, at this time, has no effect on how H-1B petitions are filed or selected for the H-1B lottery.

How will the suspension of Premium Processing affect foreign graduates of U.S. universities?

ANSWER: Pursuant to agency regulations and guidance, an individual is deemed to have abandoned a petition to change status if he or she departs the U.S. while the petition is pending. This means that F-1 students who are selected in the H-1B lottery will generally not be able to travel abroad while their H-1B cap petition is pending. If an individual travels and abandons the change of status, he or she may not be able to reenter the U.S. if not presently eligible for entry in a nonimmigrant status. Assuming the underlying petition is approved but the change of status is denied, he or she would be required to reenter the U.S. after the underlying petition is approved.

If processing times for H-1B cap cases go beyond October 1st, F-1 students will not be able to begin working on that day.

How will the suspension of Premium Processing affect current H-1B workers?

ANSWER: An H-1B worker must file for an extension of status before his or her status expires. The individual may continue to work for up to 240 days after the expiration of status if the extension request remains pending. If H-1B processing times exceed that time period, the employee will not be authorized to work in the U.S. until the petition is approved.

How will the suspension of Premium Processing affect lateral H-1B hires?

ANSWER: The suspension of Premium Processing should not prevent H-1B workers from changing employers. Current law provides that an H-1B visa holder is authorized to work upon the filing of an H1B petition by a new prospective employer if three requirements are met.

- the foreign national has been lawfully admitted to the United States;
- an employer has filed a petition for new employment for the individual prior to the expiration of his/her period of authorized stay; and
- the individual has not been employed without authorization.

Will the government expedite H-1B petitions on a case-by-case basis?

ANSWER: While premium processing is suspended, a company may submit a request to expedite an H-1B petition if one of the following criteria is met:

- 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 (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

Historically, very few expedite requests are granted, particularly when the request is driven by business considerations.

How will the suspension of Premium Processing affect the agency's budget?

ANSWER: The fiscal impact of suspending Premium Processing is not yet known. Over the past 15 years, Premium Processing fees have become a significant source of revenue for the agency. A 2016 Government Accountability Office (GAO) report found that, in 2014, the agency had an unobligated carryover balance of \$983 million, of which \$467 million was derived from Premium Processing collections.

The premium service fees are deposited into the Immigration Examinations Fee Account (IEFA) along with fees from approximately 33 other routine applications and petitions. The 2001 interim rule stated that the Immigration and Naturalization Service (INS) would use Premium Processing revenue to hire additional adjudicators, contact representatives, and support personnel to provide service to all its customers. The fee would also be used for infrastructure improvements.