

Practice Update

# Employee Visa Delays In Store for Employers

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Changes in processing times for H1-B petitions are the latest immigration challenge for employers. Starting April 3, no longer can employers take advantage of “Premium Processing” – a 15-day expedited service formerly available in exchange for a \$1,225 fee. That service has been temporarily suspended for an expected six months as a result of the USCIS announcement circulated on March 3, 2017.

In addition, employers seeking to hire employees under new H1-B visas in the 2018 fiscal year should apply as soon as possible. The “lottery” for such new H-1B applicants requires that a completed petition - along with a certified labor condition application and the required supporting evidence - be submitted during the first week of April for an employment start date of October 1, 2017. Accordingly, employers must complete the labor condition process no later than the end of March.

Although federal regulations require the Department of Labor to adjudicate labor condition applications within 7 working days, this process can take up to 10 calendar days. Given “normal” H-1B processing times that range anywhere between 4 and 6 months, employers may not receive notice confirming that their petition has been selected until mid-May 2017 or later and won’t necessarily know whether their H-

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1B petition has been approved in advance of the October 1 start date.

This lengthy adjudication process poses potentially significant risks for employers, H-1B workers and H-1B lottery hopefuls. The suspension of Premium Processing applies exclusively to H-1B petitions filed on or after April 3, 2017, and affects new petitions subject to the FY18 H-1B “lottery” cap, H-1B extensions and H-1B change of employer requests. Premium Processing does not affect the random selection process for lottery “cap-subject” H-1B petitions. However, Premium Processing generates an email receipt notification confirming petition selection well in advance of the paper-receipt notice delivered via mail. Following the April 3 suspension, employers have no choice but to await paper-receipt notices in the mail.

For employers, the suspension of Premium Processing could mean postponed start-dates for H-1B workers in the midst of changing employers. Also, since H-1B extensions filed on or after April 3 will be subject to “normal” processing times, employers should file H-1B extensions using Premium Processing before April 3 for any H-1B worker whose status will expire within the next six months. For employers with extension petitions pending on April 3, employers are advised that H-1B workers may continue to work for the same U.S. employer and remain in authorized status for up to 240 days beyond the current expiration date of their H-1B status, so long as the extension petition has been timely filed. Denial of the extension application before the 240-day period expires will automatically terminate the H-1B worker’s employment authorization, leaving them with 60 days from the denial notice to depart the United States. Workers who fail to leave within this “grace period” risk accruing unauthorized presence, which may adversely affect their ability to adjust to any other lawful status in the future.

**Employers beware:** H-1B extensions that are not

timely approved prior to the employee's current H-1B status expiration date can result in collateral hardship to the employee, such as difficulty renewing a U.S. driver's license or visa stamp necessary for international travel. In addition, employers are cautioned that travel outside the U.S. by H-1B employees is not advised after their H-1B status expires but while their H-1B extension is pending. If H-1B workers travel outside of the U.S. during this time, they may not be able to re-enter until they have received the approval of their H-1B extension and a coextensive renewal of their H-1B visa stamp.

For F-1 students looking to benefit from the H-1B "Cap-Gap" extension, uncertainty surrounding H-1B processing times may result in a lapse in employment authorization if H-1B petitions are not approved by October 1. Students in F-1 status who will have been employed pursuant to valid Optional Practical Training (OPT) prior to October 1 will be permitted to remain in the United States, but will no longer be authorized to work after October 1 and will have to forego further employment until their H-1B status is approved. Travel outside the U.S. after an H-1B petition is filed is not recommended for any applicant requesting an initial change of status to H-1B classification. Travel during this timeframe may give rise to a determination by USCIS that the applicant has abandoned the change of status petition. Travel during this period also revokes Cap-Gap privileges, including legal work status for F-1/OPT students.

To avoid adverse consequences to H-1B employers and their employees facing the Premium Processing suspension that will take effect on April 3, 2017, employers should:

1. File H-1B extension petitions using Premium Processing before April 3 for any H-1B worker whose status will expire within the next six months to avoid a lapse in work authorization or collateral issues for the worker.

2. Begin preparations to extend legal status for any H-1B worker whose status may expire in more than six months to ensure the extension petition is ready to file at the six month mark. Regulations prohibit employers from filing H-1B petitions until six months before the expiration date of the H-1B worker's current status.
3. Upgrade any pending H-1B extensions to Premium Processing before April 3, 2017.
4. Ensure that checks for standard H-1B filing fee are not combined with the premium processing filing fee for any H-1B petition to be filed prior to March 31, 2017.
5. For H-1B petitions that will be adjudicated under normal processing times after April 3, consider whether any qualifying "expedite criteria" apply. Case by case expedite requests may be granted at the discretion of USCIS according to emergency, humanitarian or other criteria noted on the following website:  
<https://www.uscis.gov/forms/expedite-criteria>.
6. Contact an immigration attorney regarding any H-1B worker who may be impacted by anticipated processing delays, and may experience difficulty with driver's license renewals or international travel.

Akerman continues to monitor this situation and will keep clients abreast of immigration developments as they occur.

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.