

'Premium Processing' Freeze Causes H-1B Hiring Hurdles

By Nicole Narea

Law360 (September 10, 2018, 9:35 PM EDT) -- U.S. Citizenship and Immigration Services' recent move to extend its suspension of "premium processing" for H-1B skilled worker visas has created staffing challenges for U.S. employers and left recent hires petitioning for the visa in limbo, attorneys said.

The H-1B program, which allows skilled foreign workers to work in specialty occupations, is popular with information technology and tech companies. The number of new visas granted through the program is capped at 65,000 a year, with extra visa slots allotted for those with master's degrees or higher. Demand has outstripped supply, however, forcing USCIS to conduct an annual lottery to allocate the visas.

Surging in popularity over the last few years, premium processing allows petitioners to pay an additional fee so their applications may be processed faster or else receive a refund. The agency first suspended the service in April for petitions subject to the annual cap to clear its backlog and announced Aug. 28 that it will continue to be paused until February. It also expanded the suspension to apply to petitions from current H-1B holders seeking to switch jobs beginning Sept. 11.

Attorneys said the premium processing suspension has created uncertainty for employers who are still awaiting adjudications of H-1B petitions that were filed in April and created hurdles especially for H-1B holders seeking to switch jobs.

"Deciding whether to file an H-1B application is always a balancing test for an employer," David Rugendorf, a partner at Mitchell Silberberg & Knupp LLP, said. "There have already been a number of impediments to filing H-1Bs in recent years, and the suspension is another factor making the program as it currently exists less helpful to employers."

In the days after the suspension was announced, attorneys had to take immediate actions to try to mitigate long wait times for pending H-1Bs.

Becki Young, co-founder of Hammond Young Immigration Law, said her firm had to immediately take stock of the H-1B cases it had in the pipeline after the announcement and initiate the application process for clients looking to switch jobs who were still eligible for premium processing until Sept. 11.

Within two days of the Aug. 28 announcement, the firm had to file so-called Labor Condition Applications seeking Department of Labor approval as a preliminary step before formally filing H-1B petitions. It then scrambled to send in H-1B petitions by Sept. 7 so that the agency would receive them before the deadline, Young said.

Young said she has also had several petitions subject to the cap that were filed April 1 for an expected start date of Oct. 1, but still remain pending. It is likely that they may remain pending past Oct. 1 and possibly into 2019, she said.

“As if it isn’t crazy enough that employers need to plan nearly a year in advance for their H-1B workers, now those employers won’t even get their workers on October 1, and can expect the process to drag on for many more months,” she said.

Rugendorf said he also has pending cases in which USCIS has acknowledged receipt of an application, but no action has been taken since then. It is particularly concerning in cases involving students on F-1 visas that are expiring and who are trying to adjust their status to an H-1B, he said.

Some employers have inquired whether they can send their employee to offices abroad to work for an affiliate company while they await visa approval or put the employee on leave, he said. Petitioners, meanwhile, have been questioning whether they should just go back to their home countries.

Rugendorf said he has one client who recently graduated from a California university with an accounting degree and was taking a job for a hotel management company. He said he gets emails from the employer every month asking about the status of the employee’s H-1B application, and he can only say there is nothing more they can do to expedite it. There is a possibility that they will have to send the employee back home, he said.

Another one of his corporate clients in the food processing industry wants to hire someone who worked for them as a contractor and transfer their H-1B status, but his application has yet to be processed, Rugendorf said.

“They’re stuck and they don’t know what to do,” he said. “It’s affecting their hiring processes. They haven’t been able to find anyone else to fill the role.”

Grace Shie, a partner at Mayer Brown LLP, said that as a result of the premium processing suspension, employers have had to accelerate their recruitment, hiring and H-1B filing process. She is also consulting with clients on how to best bring on board new hires knowing that their H-1B petitions might be pending with USCIS for many months.

“They have a real business need where they staff their projects,” she said. “If there’s no predictability as to when they can have that person onboard or continue working for them, that disrupts their business.”

To avoid further hurdles for employers, attorneys said they would like to get clarification from USCIS on what businesses should expect from the premium processing hiatus.

Rugendorf said he hopes the premium processing suspension will result in a cleared visa backlog and improved processing times. He also urged USCIS in the meantime to issue further guidance on what will happen to H-1B visa petitioners whose applications have been delayed and whose underlying immigration status may soon expire. He said absent a grant of interim work authorization in those situations, it could be disruptive to businesses.

He said he also hopes that, going forward, USCIS will consider ways to make the H-1B program more “user friendly.” It might not be a matter of changing laws, but rather changing processing systems.

"Their job is to enforce the labor and immigration laws, and I respect and understand that," he said. "But the economy matters and keeping business flowing matters. I would hope that the USCIS would reach out in good faith to the business community and make H-1Bs work a bit better."

Eric S. Bord, a partner at Morgan Lewis & Bockius LLP, said premium processing is just one development among many restrictive measures that are "creating new and potentially illegal obstacles to companies that are trying to recruit and retain global talent."

He also cited "erratic and capricious" H-1B adjudications and the upcoming implementation of a policy memo that will allow USCIS officers to deny visa applications point-blank without opportunities for amendment through "requests for evidence."

"Now, more than ever, employers need thoughtful, strategic and realistic strategies for recruiting and retaining global talent," Bord said. "The administration, through sub-regulatory means, is slowly undermining the intent of Congress by creating excessive and unreasonable burdens and hurdles for employers that want to play by the rules."

-- Additional reporting by Tiffany Hu. Editing by Emily Kokoll and Kelly Duncan.