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SUSPENSION OF PREMIUM PROCESSING: ANOTHER ATTACK ON THE H-1B PROGRAM

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The Trump administration has restricted the H-1B program by making it harder for employers to obtain an approval. It has done this without changing the law through Congress or amending any rule. Routine H-1B visa petitions that were previously approvable are now subject to difficult to overcome Requests for Evidence. Even after valiantly submitting evidence to overcome an RFE, the H-B petition is more susceptible to being denied. The USCIS has also announced that it will initiate removal proceedings in case an extension request is denied and the underlying H-1B status previously expired, further harassing H-1B workers who have remained lawfully in the United States until the point their H-1B request is denied under needless heightened scrutiny. It is thus no surprise that businesses are loudly complaining on Labor Day that they are hurting because they are struggling to fill the jobs they need with foreign workers.

To rub further salt in the wound, USICS announced on August 28, 2018, that it was extending the previously announced temporary suspension of premium processing for cap-subject H-1B petitions and, beginning Sept. 11, 2018, will be expanding this temporary suspension to include certain additional H-1B petitions. These suspensions are expected to last until Feb. 19, 2019. Premium processing service provides expedited processing for a specific list of employment-based immigrant and nonimmigrant petitions upon paying an additional fee. This list has always included the H-1B petition.

The expanded temporary suspension applies to all H-1B petitions filed at the Vermont and California Service Centers (except for filings by certain cap exempt employers).

The previously announced suspension of premium processing for fiscal year

2019 cap-subject H-1B petitions was originally slated to last until Sept. 10, 2018, but that suspension is being extended through an estimated date of Feb. 19, 2019.

The USCIS has specifically indicated that the suspension **does not** apply to:

1. Cap-exempt petitions that are filed exclusively at the California Service Center because the employer is cap exempt or because the beneficiary will be employed at a qualifying cap exempt institution, entity, or organization; or
2. Those petitions filed exclusively at the Nebraska Service Center by an employer requesting a "Continuation of previously approved employment without change with the same employer" (Box b. on Part 2, Question 2, Page 2 of the current Form I-129) with a concurrent request to:
    1. Notify the office in Part 4 so each beneficiary can obtain a visa or be admitted. (Box on Part 2, Question 4, Page 2 of the current Form I-129); or
    2. Extend the stay of each beneficiary because the beneficiary now holds this status. (Box c. on Part 2, Question 4, Page 2 of the current Form I-129).

The reasoning behind the extension and expansion of the suspension of premium processing, according to the USCIS, is to help it to reduce overall H-1B processing times by allowing it to:

- Process long-pending petitions, which we have been unable to process due to the high volume of incoming petitions and premium processing requests over the past few months;
- Be responsive to petitions with time-sensitive start dates; and
- Prioritize adjudication of H-1B extension of status cases that are nearing the 240-day mark.

This may be the official position of USCIS, but it is no coincidence that continuing the suspension as well as expanding it nicely fits into the administration's objective to further restrict the H-1B visa program pursuant to "Buy American and Hire American" Executive Order No. 13788. BAHA has been deployed as a justification to restrict legal immigration for the purpose of protecting American workers. However, this rationale makes no sense in a full employment economy when businesses are hurting because they cannot hire

foreign workers. Therefore, the only other possible rationale to restrict legal immigration is to advance white nationalism, which is what Trump promised and continues to promise to his base of supporters.

The extension of the previously suspended premium processing for H-1B cap cases means that employers who were expecting foreign nationals to start their jobs on October 1, 2018 may no longer be able to do so if the H-1B petition is not approved. This renders the H-1B visa program virtually useless. Employers had to offer the jobs prior to April 1, and then file H-1B petitions on behalf of the foreign national within the first five days of April 2018 to be considered in the H-1B visa lottery. Since USCIS received 190,098 H-1B cases earlier this year, which exceeded the maximum 85,000 H-1B visas that can be issued, more applications got rejected rather than accepted under the H-1B lottery this year. Those H-1B petitions that got selected are susceptible to receiving an RFE and a possible denial under the new heightened scrutiny policy. Moreover, there are many cases that have not been adjudicated since they were filed in early April 2018, and without premium processing, employers will likely not be able to hire the H-1B worker on October 1, 2018 even though the job offer was made more than six months ago and the petition is potentially approvable. Students who are working for the employer under F-1 Cap Gap Optional Practical Training will have to stop on October 1, 2018 unless the change of status request from F-1 to H-1B is approved on or before that date.

The expansion of the suspension of premium processing means that those H-1B visa holders who are changing employers will not be able to get the assurance of an approval when they make the switch. Although an H-1B worker can port to a new job without waiting for the approval, so long as the employment starts after the new employer has filed the H-1B petition and request for extension of status, both employers and H-1B workers would like the security of an approval before they start their new jobs. The expansion of the suspension of premium processing will hinder mobility of H-1B workers. This in turn will hinder competitiveness and will also inhibit skilled H-1B workers from improving career prospects and getting better compensation, resulting in an adverse impact on US competitiveness in the long run. The suspension of premium processing further feeds into the USCIS's new removal policy. If an H-1B worker takes a chance to port to a new employer, and if that petition, along with the extension of status request, is subsequently denied after several months of delay due to lack of premium processing, this person

could be at risk of receiving a Notice to Appear and will be placed in removal proceedings.

Furthermore, an employer is required to request an amendment of the H-1B petition if the worker is being sent to a new worksite that was not contemplated in the original H-1B petition. The suspension of premium processing for amending an H-1B petition also creates further uncertainty as to the fate of the amendment request that may be challenged and denied under the heightened scrutiny being given to such petitions under the Trump administration.

The only saving grace is that premium processing has not been suspended for extension requests with the same employer. Still, caution is advised since premium processing is only allowed if box 2.b in Part 2 relating to "Continuation of previously approved employment without change with the same employer " is checked. If box 2.c is checked - "Change in previously approved employment" - then premium processing will not be allowed. The instructions to Form I-129 state that box 2.c should be checked when there is a non-material change in the employment such as a change in job title but without a material change in duties. There are bound to be non-material changes to the job duties, including salary increases, at the time of filing any H-1B extension request. Till now, USCIS has not paid close attention to whether box 2.b or 2.c is checked, since a non-material change in the job could still be considered a "ontinuation of previously approved employment." Otherwise, if the change was material, then an amendment must have been filed prior to the expiration of the H-1B validity period. However, as a commentator to this blog has astutely suggested, one can now expect the Nebraska Service Center to pay closer attention to these meaningless distinctions in order to play "gotcha" and deny premium processing if 2.b rather than 2.c was checked. It is hoped that the NSC will consider non-material changes as a continuation of previously approved employment, but one should not bank on reason these days when the mindset of the Trump administration is to restrict immigration! Cap exempt employers can also avail of premium processing, but they are few in comparison to the overall population of employers who file H-1B petitions. Premium processing for other visa categories has not been suspended. While premium processing is suspended, petitioners may submit a request to expedite an H-1B petition if they meet the criteria on the Expedite Criteria webpage. However, USCIS very grudgingly accepts expedited requests.

The USCIS has been suspending premium processing with greater frequency in recent times. It did so last on April 3, 2017 and resumed it again on September 18, 2017. USCIS again suspended premium processing for H-1B cap cases on April 2, 2018, and has now extended the suspension to February 11, 2019, in addition to expanding the suspension to other types of H-1B filings. Premium processing generates fees, which can result in more transformation through efficiency, and so by suspending premium processing USCIS is killing the goose that lays the golden egg. The USCIS wants to process other cases more quickly, but it would make more sense to accept premium processing so that it can add more staff to process all cases as efficiently as possible. Ironically, USICS has also announced an increase in the premium processing fee from $1225 to $1410. The justification for this increase is that it "represents the percentage change in inflation since the fee was last increased in 2010 based on the Consumer Price Index for all Urban Consumers." Thus, this increase is to keep up with inflation rather than generate revenues, and USCIS will still lose revenues as a result of the suspension of premium processing for many types of H-1B filings.

If the USCIS excessively delays the adjudication of H-1B visa petitions due to lack of premium processing, one possible solution is to file mandamus actions to compel the USCIS to make a decision. If the administration is faced with thousands of such actions, it will realize that it is less costly to process cases quickly, and even restore premium processing completely, rather than get bogged down in a deluge of mandamus actions against it.