

Who Will Be Hurt By The Latest USCIS Decision On H-1B Visas?

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A recent decision by U.S. Citizenship and Immigration Services (USCIS) to suspend premium processing for many H-1B petitions worries employees and employers. (Photo by John Moore/Getty Images)

On August 28, 2018, U.S. Citizenship and Immigration Services (USCIS) [announced](#) it would “extend and expand” its suspension of premium processing for H-1B petitions. Given the frequent use of premium processing for business immigration this announcement carries potentially significant consequences for individuals and employers.

To better understand the issue, I interviewed [William Stock](#), a founding member of Klasko Immigration Law Partners, LLP. William has practiced immigration law for more than two decades and is a recent past president of the American Immigration Lawyers Association.

Stuart Anderson: What is premium processing?

William Stock: The [Premium Processing Service](#) is offered for some employment-based temporary and permanent petitions filed with USCIS. In exchange for an extra fee of \$1,225, proposed to rise to \$1,410 in October, USCIS commits to adjudicate

the petition in 15 days or fewer. If USCIS fails to meet that processing time commitment, then it must return the extra fee to the petitioner.

Anderson: What did USCIS just announce?

Stock: USCIS just reduced substantially the number of H-1B petitions eligible for premium processing for the next five months. No H-1B petition filed on behalf of an H-1B professional changing employers – or changing jobs or location with the same employer – can be filed with premium processing during this suspension.

Anderson: Who do you think will be hurt most by the decision?

Stock: Those hurt most will be employees in H-1B status seeking to leave their current jobs for ones that pay a higher salary. In today's environment of increasing denials and Requests For Evidence, as well as threats to start removal proceedings if a denial leaves an employee out of status, H-1B employees are understandably reluctant to quit a job for which they hold H-1B status until they are sure that the new job is also approved for H-1B status.

The next biggest detriment will be to H-1B employees wishing to travel internationally – they may have to put off travel plans if they need their H-1B petition approved in order to return to the United States.

Anderson: Doesn't the decision to suspend premium processing eliminate one of the best strategies for a high-skilled foreign national to avoid being placed in deportation proceedings under the recent [Notices to Appear memo](#)?

Stock: The [Notices to Appear memo](#), which instructs officers to initiate removal proceedings if they deny a petition or application and the denial leaves the foreign national without status, makes H-1B employees nervous about changing jobs or projects without first obtaining an approval for the new job or project. Premium processing would ensure the individual receives a decision while still in legal status, rather than having a decision take so long that by the time a decision is reached the individual is now out of status and could potentially be placed in deportation proceedings.

The reason this is important is that USCIS now has a backlog of 5 to 7 months for adjudicating H-1B petitions, and so premium processing provided a way to get an answer from USCIS about whether the new position was approvable in a commercially reasonable period of time. And from a business perspective, most employers can wait two weeks for an employee to start, but very few can wait 5 to 7 months.

Anderson: Do you think USCIS created the problem starting in 2015 and continuing to this day, beginning with requiring new H-1B petitions whenever employees changed job locations for the same employer?

Stock: There is no question that USCIS increased the number of H-1B petition filings by mandating a new petition every time a worker moved locations. Prior to the [Matter of Simeio Solutions decision](#) from the USCIS Administrative Appeals Office, many employers obtained a new Labor Condition Application for a worker's new location, but USCIS had issued inconsistent guidance about whether it considered performing the same job in a new location to be a "material change" requiring a new H-1B petition.

In the Simeio Solutions decision, USCIS issued a bright line rule that all location changes requiring a new LCA were considered "material" changes, which increased the number of H-1B petitions the agency received in 2016 and 2017 as compared with prior years. It is clear from the delays in processing times since the Simeio Solutions decision that USCIS did not anticipate the increased volume of filings in their staffing planning.

Anderson: What advice do you have for a high-skilled foreign national or his or her family worried about this USCIS decision?

Stock: One piece of advice that seems more and more necessary is: "Don't panic!" Many foreign nationals feel under siege from the current administration, and this decision to suspend premium processing deprives H-1B professionals of one way to feel a little more in control of the process. The second piece of advice would be that premium processing is not always necessary to achieve immigration and professional goals. A new employer can be transparent with employees about recent adjudication trends they have seen, and a good attorney can predict those cases more likely to be a problem in today's environment. Even with the extra scrutiny being given certain H-1B petitions, starting a new position while the new employer's petition is pending is allowed under the H-1B portability rules, and often in the employee's best interest.

Anderson: What do you recommend for employers?

Stock: Employers should be prepared to offer employees good counsel about the risks and benefits of changing employers without an approved petition in hand. For some positions and some H-1B beneficiaries, H-1B petitions face a greater risk of denial than others. Helping employees to understand the risk (or relative lack of risk) for their particular petition, and getting them comfortable with changing employers using the "H-1B portability" rules that don't require an approved petition to start a new job, takes patience and understanding on the employer's part as well. Human Resources staff and outside counsel should also be proactive in communicating about these issues with business line managers to help them understand the concerns their H-1B employees are raising.

Anderson: What do you think would be the best policy for the U.S. economy and the country?

Stock: Premium processing wouldn't be necessary in a world in which USCIS delivered transparent, consistent and timely adjudications of H-1B petitions. In the meantime, USCIS should focus on reducing their backlog, eliminating unnecessary Requests For Evidence that increase their workload with no benefit to decision quality, and bringing back premium processing for all types of H-1B petitions as quickly as possible.

High-skilled professionals on H-1B visas are critical to many businesses and benefit their local economies through their taxes and purchases. Policies that encourage high-skilled immigration are best for the economy and the country.