

# USCIS Reopens H-1B Premium Processing for Institutions of Higher Education and Other Cap-Exempt Petitions

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On March 3, 2017, [U.S. Citizenship and Immigration Services \(USCIS\) unexpectedly announced that it would temporarily suspend its premium processing service for all H-1B petitions received on or after April 3, 2017](#). The premium processing program allows a petitioner to receive a decision on its case within 15 calendar days in exchange for payment of an additional government filing fee to USCIS. In the initial announcement, USCIS indicated that the suspension could remain in effect for up to six months.

[On July 24, 2017, USCIS announced that H-1B premium processing is again available, effective immediately, for certain employers that are exempt from the H-1B cap](#). The H-1B visa has a total annual cap of 85,000 visas each fiscal year. Certain employers, including institutions of higher education, are not subject to this annual limit. USCIS has now reopened premium processing for this group of employers that are cap-exempt.

USCIS had previously announced, [on June 23, 2017, that H-1B premium processing was available for H-1B petitions based on the Conrad 30 Visa Waiver](#).

This significant reopening of premium processing applies to a large number of H-1B petitions, but most employers are subject to the H-1B cap and, thus, still do not have access to the premium processing service for their H-1B petitions.

## What Is a Cap-Exempt Employer?

As defined in regulation at 8 CFR 214.2(h)(19)(iii), the following employers and employment arrangements are not subject to the annual limitation on H-1B visas:

1. Institutions of higher education (e.g., colleges, universities, etc.)
2. Nonprofit entities related to or affiliated with an institution of higher education
3. Nonprofit research organizations or governmental research organizations
4. When an employee who will work the majority of his or her time at the worksite of one of the above qualifying institutions, even if employed by a cap-subject employer
5. When an employee who will perform part-time work (as defined by regulations as less than 20 hours per week) for a cap-subject employer **and** part-time work for a cap-exempt employer

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## **Is USCIS Reopening Premium Processing for all Cap-Exempt Petitions?**

No. USCIS specifically states that premium processing is available for (1) institutions of higher education; (2) nonprofit entities affiliated with an institution of higher education; and (3) nonprofit or governmental research organizations. In addition, USCIS states in the announcement that “premium processing will also resume for petitions that may also be exempt if the beneficiary will be employed at a qualifying cap-exempt institution, organization or entity.”

Because it is not mentioned in the announcement, it appears that USCIS is not making premium processing available for concurrent employment cases where an employee will perform part-time work (as defined by regulations as less than 20 hours per week) for a cap-subject employer **and** part-time work for a cap-exempt employer.

The vast majority of cap-exempt petitions will now have premium processing available to them, but employees that fall under the limited exception for concurrent employment with cap-subject and cap-exempt employers will still be unable to access the premium processing service.

## **What Is the Impact of the Resumption of Premium Processing Service on New H-1B Petitions for Cap-Exempt Employers?**

Cap-exempt institutions can apply for H-1B petitions at any time and indicate desired start dates. Cap-exempt employers can file H-1B petitions at any time for effective dates beginning at any time during the year. In contrast, cap-subject employers must file new H-1B petitions within five business days of April 1 for a start date of October 1, and are much more limited in their ability to onboard employees who are applying for H-1B status for the first time.

Many employers, particularly colleges and universities, take advantage of the significant flexibility available to cap-exempt employers when onboarding new faculty or staff with varying start dates throughout the year. Many cap-exempt employers have, in the past, relied on premium processing to ensure timely approval of H-1B petitions, particularly for prospective employees that are in some other nonimmigrant status (such as F-1 students or J-1 exchange visitors), as these employees cannot begin working until their H-1B petitions have been approved. With H-1B processing times running between four and eight months, premium processing is necessary to ensure timely approval. With the availability of premium processing, these cap exempt institutions can now more easily anticipate and plan for the timing of approval of new H-1B petitions for faculty and staff.

## **Will Premium Processing Become Available for More H-1B petitions?**

In its announcement of July 24, 2017—as in its June 23, 2017, announcement—USCIS indicated that the agency “plans to resume premium processing of other H-1B petitions as workloads permit” and that it “will make additional announcements with specific details related to when we will begin accepting premium processing for those petitions.”

As discussed in our recent articles, [“Mapping the Impact From USCIS’s Surprise Suspension of H-1B Premium Processing”](#) and [“How Will Cap-Exempt Institutions Respond to USCIS’s Suspension of H-1B Premium Processing?”](#), the impact of USCIS’s suspension of H-1B premium processing on H-1B cap-subject and cap-exempt employers, employees, and international students has been serious. This significant reopening of premium processing for cap-exempt employers resolves many concerns, but the concerns and issues related to the lack of premium processing for cap-subject

employers remain.

## What Options Are Available to Expedite Cap-Subject H-1Bs?

While premium processing remains unavailable for cap-subject employers and their H-1B petitions, petitioning employers may request faster processing based on USCIS-defined [“expedite criteria.”](#)

USCIS may expedite a petition, at the agency’s discretion, if the petition meets one or more of the following strict criteria:

- Severe financial loss to a 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 a national interest situation (these particular expedite requests must come from an official U.S. government entity and state that delay will be detrimental to the government)
- USCIS error
- Compelling interest of USCIS

In recent practice, expedite requests have been very difficult to obtain. In appropriate situations, however, employers may want to strongly consider requesting expedited processing, as no additional government filing fee is required and there are no downsides to the denial of an expedite request.

## Conclusion

H-1B premium processing has resumed for the vast majority of cap-exempt employers and for physicians under the Conrad 30 waiver program. USCIS may continue to phase in premium processing for other classes of H-1B petitions, including cap-subject employers. In the meantime, expedited processing may still be requested in appropriate cases, but the ultimate success of this approach is dependent on USCIS’s discretion.

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