

May 2015 Special Immigration Alert

[Premium Processing Option for H-1B Extensions Is Temporarily Suspended](#)

[USCIS Announces H-4 Work Authorization Application Procedures and Details](#)

I. Premium Processing Option for H-1B Extensions Is Temporarily Suspended

On May 19, 2015, the U.S. Citizenship and Immigration Services (“USCIS”) announced that it will temporarily suspend 15-day premium processing for all H-1B Extension of Stay petitions. This suspension will begin on May 26, 2015 (the day after Memorial Day), and run until July 27, 2015. The USCIS indicates that it needs this suspension to implement processing of employment authorization applications (filed on Form I-765) for H-4 dependent spouses.

This temporary suspension affects only H-1B Extension of Stay petitions. Premium processing will ***still remain available for other types of H-1B petitions***, including Change of Status and Consular Notification filings. And, although not expressly stated, we assume that premium processing remains available for Change of Employer petitions where no extension of stay is requested. According to the USCIS announcement, the agency will continue to process H-1B extensions filed before May 26, 2015, that request premium processing but will return the premium processing fee if it cannot meet the 15-calendar-day deadline.

II. USCIS Announces H-4 Work Authorization Application Procedures and Details

On February 26, 2015, the USCIS announced that, beginning on May 26, 2015, it will accept applications for work authorization by eligible H-4 dependent spouses. To be eligible, the H-1B principal beneficiary must be the beneficiary of either (i) an approved I-140 petition or (ii) an H-1B extension under the American Competitiveness in the Twenty-first Century Act of 2000, as amended by the 21st Century Department of Justice Appropriations Authorization Act (“AC21”). AC21 permits H-1B workers seeking employment-based lawful permanent residence to work and remain in the United States beyond the six-year limit.

On May 20, 2015, the USCIS released further guidance and procedural requirements regarding how the USCIS intends to process H-4 dependent spouse applications for U.S. work authorization. The pertinent highlights of this guidance are as follows:

1. The I-765 employment authorization application may be filed concurrently with any H-4 extension or change of status application, but the USCIS will initiate adjudication of the I-765 employment authorization application only ***after*** the H-4 extension or change of status application is approved.
2. Any H-4-based I-765 employment authorization application should be adjudicated within 90 days. In the cases of applications filed concurrently with H-4 extension or change of status applications, the 90-day clock begins to run only after the H-4 extension or change of status application is approved.
3. Any revocation of an already approved I-140 petition will terminate the H-4 work authorization already approved for any H-4 dependent spouse that was based on the revoked I-140 petition.

4. Any approved I-140 petition from a current or previous employer filed for the benefit of the principal H-1B spouse can be used to support the H-4 dependent spouse's I-765 employment authorization application. The approved I-140 petition need not be for the principal H-1B spouse's current employer.
5. Neither the 15-day premium processing nor the electronic filing of an H-4-based I-765 employment authorization application is allowed.
6. Although not barred, the filing of an H-4 dependent spouse's I-765 employment authorization application while an H-4 extension or change of status application is pending adjudication with the USCIS is not recommended and should be discouraged. Potential and substantial delays can be caused by the USCIS trying to match the pending H-4 extension or change of status application with the I-765 employment authorization application.
7. Any international travel while the I-765 employment authorization application is still pending adjudication is not recommended and should be discouraged. This is because the USCIS could question the H-4 dependent spouse's maintenance of H-4 status, which could result in the denial of the I-765 employment authorization application.
8. An approved H-4-based I-765 employment authorization application will allow the H-4 dependent spouse to work for anyone as well as start his or her own business and have employees work for him or her.
9. An approved H-4-based I-765 employment authorization application's start date will be the date that the USCIS approves the employment authorization application and NOT the date that the H-4 status begins—even though both the approved employment authorization application and H-4 will likely have the same end dates.
10. Spouses currently in F-1 status with valid optional practical training-based ("OPT") work authorization who apply for concurrent H-4 change of status and I-765 employment authorization applications cannot continue employment between the end date of their OPT work authorization and the start date of their H-4-based work authorization.
11. Where there is no approved I-140 petition for the H-1B principal beneficiary, then either the (i) I-140 petition filed with the USCIS or (ii) PERM Labor Certification filed with the Department of Labor must have been pending for at least one year before the H-4 dependent spouse can apply for the spouse's I-765 employment authorization application.

In summary, what appears to be a simple H-4 employment process is ripe with complexities. Properly navigating and understanding this process will allow for expansion into new sources of some of the best talent that many of today's top companies and their Human Resources and Talent Acquisition Departments covet. For this reason, employers would be well advised to consult with their Epstein Becker Green immigration counsel about how best to manage the H-4 employment authorization process for these new hiring resources.

For more information or questions regarding the above, please contact:

Robert S. Groban, Jr.
New York
212/351-4689
rgroban@ebglaw.com

Pierre Georges Bonnefil
New York
212/351-4687
pbonnefil@ebglaw.com

Patrick G. Brady
Newark
973/639-8261
pbrady@ebglaw.com

Jang Hyuk Im
San Francisco
415/398-3500
jim@ebglaw.com

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