

# PUBLICATION

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## More Premium Processing is Congress' Solution to USCIS Financial Woes

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**A stopgap funding bill to avoid a U.S. federal government shutdown temporarily extends otherwise expiring immigration categories, but also includes an interesting permanent provision to solve the ongoing financial problems of USCIS, a fee-funded agency. The law requires USCIS to increase its fee for "premium processing" of currently allowed case types to \$2,500 from \$1,440. It also requires USCIS to expand premium processing to other broad categories after rulemaking, but it exempts from rulemaking and allows immediate implementation for certain case types where USCIS previously has chosen not to use premium processing or has been generally falling farther behind in regular processing. With USCIS' rule to increase fees otherwise enjoined by a court this week, expanded premium processing seems likely to be USCIS' most immediate way out of its financial crisis.**

The Continuing Appropriations Act, 2021 and Other Extensions Act (H.R. 8337) (the Act), enacted on September 30, not only extends until December 11, 2020 the various "temporary" immigration programs that normally ride with the appropriations process (religious workers, EB-5 investors, and J-1 physician waivers), but it also includes at Division E, Title I the "Emergency Stopgap USCIS Stabilization Act" which permanently rewrites former INA section 286(u) concerning "premium processing" fees and sets some other parameters about such fees.

The Act permanently and immediately requires USCIS to use premium processing at \$2,500 (\$1,500 for H-2B and R) for case types for which it already was charging \$1,440, and we expect USCIS to implement this immediately without regulation. Expect an announcement in the coming days.

The Act also requires USCIS to implement by regulation a premium fee for additional case types, including all employment-based nonimmigrant petitions (all I-129s), most employment-based immigrant petitions (all I-140s), all applications to change nonimmigrant status or extend stay (all I-539s), and all employment authorization applications (all I-765s).

Interestingly, the law allows USCIS to set new premium fees without going through the regulatory process for congressionally specified case types within those expanded categories at certain prices and processing times:

- Immigrant petitions for multinational manager transferees (EB-1C) and national interest waivers (certain EB-2), at \$2,500 in 45 days (where USCIS had chosen not to allow premium when the law already allowed it),
- Change of status to F, M, J, at \$1,750 in 30 days (where USCIS has historically dragged its feet in ways that made the process not a workable option),
- E, H, L, O, P, and R derivatives at \$1,750 in 30 days (where USCIS had stopped its "courtesy" adjudication on the same premium timeline as the worker because of new biometrics intake), and
- Employment authorization document applications, at \$1,500 in 30 days (where USCIS processing times had started slipping meaningfully).

We expect USCIS will take some time to choose to take advantage of that opportunity while it gears up to handle those case types on new timeframes. Required rulemaking to expand to the broader categories probably will take a year or more.

The Act allows USCIS to designate by rulemaking the option for premium processing of "any other immigration benefit type that the Secretary deems appropriate." The main case types not specifically designated by the Act include "special immigrant" petitions (EB-4 including religious workers), EB-5 investors, all family sponsorship cases, adjustment of status to permanent residence (the step after a petition is approved, if the alien is in the U.S.), and naturalization. It seems unlikely that USCIS will choose to exercise its new authority to pursue premium processing for those categories in the foreseeable future.

Aside from the time it takes to pursue rulemaking (which is always significant), the language of the new law gives USCIS several grounds for delay in implementing expansion of premium processing: "subject to reasonable conditions or limitations," "if circumstances prevent the completion of processing of a significant number of such requests within the required period," and "develop and implement processes to ensure that [premium processing] does not result in an increase in processing times for immigration benefit requests not designated for premium processing or an increase in regular processing of immigration benefit requests so designated." It will be no small feat for USCIS to gear up for premium processing for new categories. Therefore, we expect immediately only a fee increase in existing categories to \$2,500 from \$1,440.

The timing of the Act is also interesting. USCIS had just finalized and was about to implement an across-the-board fee increase based on its assessment of its costs to process, with several meaningful changes in how fees are calculated. But this week, a federal judge enjoined that fee rule from taking effect, in part because the court deemed that the key officials who decided the rule were not legally appointed. USCIS announced yesterday that for now the new fees will not take effect. USCIS might well choose to focus its energies away from appealing that injunction or re-engaging in broad re-rulemaking on general fees in favor of implementing premium processing for the first wave of broader categories that it can do without rulemaking under the Act.

If you have any questions, please contact [Robert Divine](#) or any member of Baker Donelson's [Immigration Team](#).