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The denial rate for L-1B petitions to transfer high-skilled employees into the United States increased to a historic high of 35 percent in fiscal year 2014, according to data obtained from US Citizenship and Immigration Services by the National Foundation for American Policy through the Freedom of Information Act.

NFAP noted that in FY 2006 the denial rate for L-1B petitions was only 6 percent.

In the report titled 'L-1 Denial Rates Increase Again for High Skill Foreign Nationals', NFAP said, "The denial rate for L-1B petitions to transfer employees of Indian origin is 56 percent for FY 2012 through FY 2014, compared to an average denial rate of 13 percent to transfer employees from all other countries during the same period... Only 4 percent of Canadian nationals were denied L-1B petitions, compared to 56 percent of Indian nationals, between FY 2012 and FY2014."

Stuart Anderson, executive director, NFAP, who has served as head of policy and counselor to the Commissioner of the Immigration and Naturalization Service, told *India Abroad*, "This is the first time that USCIS has released data that show the difference in denial rates between Indian nationals and the rest of the world. The data was released after our organization filed a Freedom of Information Act request and it shows that the immigration agency is far more likely to deny an application for an employee transferred into the United States from India than from any other country."

"USCIS has not explained the very large difference in denial rates between Indian nationals and employees born and working elsewhere in the world. The issue is important because the continuing high rate of denials and Requests for Evidence for L-1B petitions has a negative impact on the ability of companies to make products and services in the US and compete globally."

"The evidence indicates the agency is adopting too narrow a definition of the law and using a different standard for nationals of one country."

NFAP also found, "Surprisingly, USCIS denies L-1B petitions at a higher rate for employees already working in the US and extending their status (41 percent in FY 2014) than initial applications (32 percent)."

Also, "time-consuming Requests for Evidence from adjudicators for L-1B petitions have continued at a high level — 45 percent in FY 2014." In FY 2004, it said, only 2 percent of cases received an RFE.

To obtain permission to transfer an employee with 'specialized knowledge' to L-1B status an employer, in most cases, must first obtain an individual petition approval from USCIS and, in general, use that approved petition to obtain a visa from a US post abroad for the employee to gain

# Stark difference in L-1 visa denial rates between Indians and rest of the world



Inside an Aastrom Biosciences laboratory in Ann Arbor, Michigan.

REBECCA COOK/REUTERS

entry to America.

L-1B admission for an employee transferred with 'specialized knowledge' is limited to five years, with regulations limiting initial period of admission to three years.

NFAP argued, "The continuing high rate of denials and Requests for Evidence for L-1B petitions has a negative impact on the ability of companies to make products and services in the US and compete globally."

It said, 'L-1 visas to transfer employees and H-1B visas to hire international students and others are generally the only two practical means by which high-skilled foreign nationals can work long-term in the United States for US employers in a timely manner. The multi-year wait for employment-based green cards — permanent resi-

The US Chamber of Commerce estimated that additional RFE increased employer compliance costs by between \$20 million and \$121 million annually.

Employers said at times they believed applicants were rejected if a particular consular officer or adjudicator believed a company could not possibly need more than three to five people with specialized knowledge in a particular area. Nothing in the statute indicates 'specialized knowledge' need be numerically restricted. In fact, in companies employing thousands in highly specialized fields and product lines, it would not be feasible to operate in most circumstances if specialized knowledge was restricted to three or four people at a time.

Another type of denial, employers said, came from USCIS adjudicators and consular officers requiring a standard of 'extraordinary ability' be met. RFE for L-1B petitions have included asking if the individual held a patent, and companies noted that even patent holders had been denied L-1B.

Employers also said that the time lost due to the increase in denials and RFE cost millions in project delays and contract penalties, while aiding competitors operating outside the US, beyond the USCIS' reach.

NFAP said, "In a highly competitive global marketplace, the consequence is that companies become more likely to move work out of the United States — or to invest less in America in the first place."

Lyden Melmud, partner, Berry Appleman & Leiden, and former USCIS chief counsel, said, "It's very difficult for companies to make business decisions when there is so much uncertainty in the L-1 visa process. A company is going to be unwilling to invest

in a manufacturing facility in the US if it does not know whether it can bring its own employees into the country to ensure its success."

Robert Deasy, deputy director, programs, American Immigration Lawyers Association, found a troubling pattern in RFE.

"Petitioning firms learn from prior RFE and denial experience, and 'build' their petitions to speak up-front at the time of submission to issues they've seen in the past," he said. "That strategy doesn't always work because RFE and denial templates are constantly changed... What is most concerning is that RFE and denial templates and rationales are developed behind the scenes in a policy vacuum."

The Obama Administration is expected to issue long-awaited guidance on L-1B 'specialized knowledge' workers this year. But NFAP warned, "Any guidance that further narrows eligibility for the L-1B... will undermine the administration's stated goal to use immigration policy to enhance America's economy and the global competitiveness of US companies."

Anderson added to *India Abroad*, "As recently as 2006, the denial rate for L-1B petitions was only 6 percent. It seems during the recession USCIS started adopting a narrow definition of the law and that has continued, creating a nearly six-fold increase in the denial rate despite no change in the law or regulation. Preventing companies from transferring people they already employ in another country does not protect jobs in America, but instead ends up encouraging more work to be done outside the US."

## Visa Vortex



—generally makes it impractical as a category for direct hires."

Blake Chisam, former chief counsel of the House Ethics Committee and a partner at the Fragomen law firm, was noted as saying, "Over the past several years, the law governing L-1B petitions did not change, while the economy has become more global. Yet the immigration agency has managed both to change the rules and complicate the process, without giving the regulated community even an inkling of its expectations or the reasons for its behavior. The costs and consequences to global businesses of having to guess, and second guess, how the agency will act with respect to the specialists who drive their businesses is significant."