National Foundation for American Policy

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L-1 Visa Denials Continue to Increase for Skilled Employees

Arlington, Va. – The denial rate for L-1B petitions to transfer high-skilled employees into the United States increased to an historic high of 35 percent in FY 2014, according to data obtained from U.S. Citizenship and Immigration Services (USCIS). In FY 2006 the denial rate for L-1B petitions was only 6 percent. Since 2012, USCIS has pledged to issue guidance on transferring employees with "specialized knowledge" on L-1B petitions, a pledge repeated in November 2014. USCIS released the data in response to a Freedom of Information Act (FOIA) request filed by the National Foundation for American Policy (NFAP), an Arlington, Va.-based policy research group.

The report, "L-1 Denial Rates Increase Again for High Skill Foreign Nationals," is available at www.nfap.com.

An analysis of the data reveals:

> The denial rate for L-1B petitions to transfer employees of Indian origin is a remarkable 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 FY 2014.
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> Surprisingly, USCIS denies L-1B petitions at a higher rate for employees already working in the U.S. and extending their status (41 percent in FY 2014) than initial applications (32 percent).
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> Time-consuming Requests for Evidence (RFE) from adjudicators for L-1B petitions have continued at a high level – 45 percent in FY 2014. In FY 2004, only 2 percent of cases received a Request for Evidence.

Table 1
L-1B Denial Rates for Employees Transferred into the U.S
FY 2006 to FY 2014

Fiscal Year	L-1B Denial Rates
FY 2014	35%
FY 2013	34%
FY 2012	30%
FY 2011	27%
FY 2010	22%
FY 2009	26%
FY 2008	22%
FY 2007	7%
FY 2006	6%

Source: USCIS; National Foundation for American Policy.

To obtain permission to transfer an employee with "specialized knowledge" in L-1B status into the United States an employer, in most cases, must first obtain an individual petition approval from U.S. Citizenship and Immigration Services and, in general, then use that approved petition to obtain a visa from a U.S. post abroad for the employee to gain entry to America. (The data in this report include only petitions at USCIS, not decisions made at consular posts.) The employee must have worked at least one year abroad for the employer. L-1B admission for an employee transferred with "specialized knowledge" is limited to 5 years, with regulations limiting the initial period of admission to three years. Under the law, "An alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company."

Table 2
L-B Denial Rates by Country: FY 2012-2014

Country of Origin	Total	Denials	Denial Rate
Indian Nationals	25,296	14,104	56%
Canadian Nationals	10,692	424	4%
British Nationals	2,577	410	16%
Chinese Nationals	1,570	347	22%
Japanese Nationals	1,145	171	15%
German Nationals	1,100	161	15%
French Nationals	753	140	19%
Mexican Nationals	740	157	21%

Source: USCIS; National Foundation for American Policy.

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 United States and compete globally. 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 U.S. employers in a timely manner. The multi-year wait for employment-based green cards (permanent residence) generally makes it impractical as a category for direct hires.

"Over the past several years, the law governing L-1B petitions did not change, while the economy has become more global," said Blake Chisam, former chief counsel of the House Ethics Committee and a partner at the Fragomen law firm. "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 – about how the agency will act with respect to the specialists who drive their businesses is significant."

Employers have reported the time lost due to the increase in denials and Requests for Evidence has cost millions of dollars in project delays and contract penalties, while aiding competitors that operate exclusively outside the United States – beyond the reach of U.S. Citizenship and Immigration Services adjudicators (and U.S. consular officers). The U.S. Chamber of Commerce estimates the additional Requests for Evidence on H-1B and L-1 petitions have increased employer compliance costs, both internally and for outside counsel fees, by between $20 million and $121 million annually.

Employers say that at times they believe applicants are rejected for L-1B status if a particular consular officer or an adjudicator believes a company could not possibly have more than three to five people with specialized knowledge in a particular area. Nothing in the statute or regulations indicates "specialized knowledge" need be numerically restricted to a handful of people in a

company. In fact, in companies employing thousands of people in highly specialized fields and product lines, it would not even be feasible to operate in most circumstances if specialized knowledge was restricted to three or four people at a time in a specific subject area, product or service. Another type of denial, employers say, comes from USCIS adjudicators and consular officers requiring a standard of "extraordinary ability" be met to permit the transfer of employees into the United States with specialized knowledge. Requests for Evidence for L-1B petitions have included asking whether the individual received a patent. And companies note that even patent holders have been denied L-1B petitions under the new, arbitrary standards.

Robert Deasy, deputy director of programs at the American Immigration Lawyers Association, has examined examples of Requests for Evidence and found a troubling pattern. "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 and have had to address. That strategy doesn't always work because RFE and denial templates are constantly changed by USCIS, and new demands for evidence appear in RFEs, and new grounds to deny petitions appear in final decisions. What is most concerning is that RFE and denial templates and rationales are developed behind the scenes in a policy vacuum; moreover, hyper-exacting evidentiary and documentary demands made by USCIS undermine the principle of 'the totality of the evidence' and the preponderance of the evidence standard."

The significant increase in denial rates and Requests for Evidence in recent years illustrates that USCIS adjudicators have made it difficult for companies to transfer their own employees within a company to work in America. 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 – to avoid the difficulties of the U.S. immigration system. "It is very difficult for companies to make business decisions when there is so much uncertainty in the L-1 visa process," according to Lynden Melmed, partner, Berry Appleman & Leiden and former chief counsel at USCIS. "A company is going to be unwilling to invest in a manufacturing facility in the U.S. if it does not know whether it can bring its own employees into the country to ensure its success."

The Obama Administration is expected to issue new, long-awaited guidance on L-1B "specialized knowledge" workers in 2015. Given the high denial rates under existing adjudications, any guidance that further narrows eligibility for the L-1B specialized knowledge category will undermine the Administration's stated goal to use immigration policy to enhance America's economy and the global competitiveness of U.S. companies.

About the National Foundation for American Policy

Established in the Fall 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, former U.S. Senator and Energy Secretary Spencer Abraham and other prominent individuals. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post*, and other major media outlets. The organization's reports can be found at www.nfap.com.

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