NATIONAL FOUNDATION FOR AMERICAN POLICY

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L-1 DENIAL RATES INCREASE AGAIN FOR HIGH SKILL FOREIGN NATIONALS

EXECUTIVE SUMMARY

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. It rose to 30 percent in FY 2012 and to 34 percent in FY 2013, representing a more than five-fold increase in the rate of denials despite no new regulation changing the adjudication standard. Employers say USCIS actions affect their ability to increase jobs, innovations and production inside the United States. 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.

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.

- 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). (See Tables 5 and 6.)

- 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.

BACKGROUND

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.[1] (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."[2]

The current high rate of denials is difficult to understand, particularly since the rate was as low as 7 percent as recent as FY 2007. The denials for L-1B petitions come from a pool of foreign nationals who already work for the employers, are considered valuable and which attorneys believe meet the standards for approval. In early 2012, U.S. Citizenship and Immigration Services officials pledged to develop new proposed guidance, for public review and comment, to update and modernize the understanding of the specialized knowledge definition for L-1B petitions. The new proposed guidance never materialized and, based on reports from employers and attorneys, inconsistent decision-making, as well as high levels of denials and Requests for Evidence have continued.[3] The data bear this out: Denial rates increased in FY 2012, FY 2013 and FY 2014 – *after* USCIS recognized the issue and failed to make changes.

In November 2014, as part of a larger statement on potential immigration policy changes, the White House included a paragraph on L-1 visas that read: "Streamlining the process for foreign workers and their employers, while protecting American workers. DHS will clarify its guidance on temporary L-1 visas for foreign workers who transfer from a company's foreign office to its U.S. office."[4]

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[1] Some employers qualify to apply for "blanket" petitions from U.S. Citizenship and Immigration Services. That allows employers to pre-certify the qualifying corporate relationship and for employees then to file directly for L-1 visas with consulates abroad, documenting their qualifications or credentials in the process. L-1A visas are used to transfer managers and executives.
[2] INA §214(c)(2)(B).
[3] USCIS did issue a July 2, 2013 policy memorandum (PM-602-0086) explaining to adjudicators that decisions of the Administrative Appeals Office (AAO) that are not precedents do not "modify agency guidance or practice," which means adjudicators should not apply the 2008 GST Case, a non-precedent AAO decision with a restrictive view of specialized knowledge, to L-1B petitions in general.
[4] "Fact Sheet: Immigration Accountability Executive Action," The White House, Office of the Press Secretary, November 20, 2014.

USCIS has generally not publicized data on L-1 visas. In February 2012, the National Foundation for American Policy released a report detailing the high denial rates and Requests for Evidence from USCIS adjudicators.[5] USCIS eventually released its own data publicly, though the agency released less than what had been obtained by NFAP. In 2014, USCIS released data in response to a Freedom of Information Act request from the American Immigration Lawyers Association. NFAP analyzed that data in a 2014 report.[6] The data in this March 2015 report came from an NFAP FOIA request to USCIS. In this report, for the first time, data are available that provide a clear breakdown of denials by country of origin and initial L-1B petitions vs. applications for extension of L-1B status. (An extension of status is sometimes also called a "renewal" of status, though the technical term is an extension of status.[7])

EMPLOYEES OF INDIAN ORIGIN FAR MORE LIKELY TO BE DENIED

The data reveal the problem with denials centers primarily on U.S. Citizenship and Immigration Services denying petitions for employees being transferred into the United States from India. The numbers are stark. Between FY 2012 and FY 2014, employers experienced an L-1B denial rate of 56 percent for employees transferred from India (Indian nationals), compared to an average denial rate of 13 percent for employees from all countries in the world other than India. (See Tables 2 and 3.)

Table 2
L-B Denial Rates for Employees Transferred from India and the Rest of the World
(FY 2012-2014)

	Employees Transferred from India	Employees Transferred from All Countries Other Than India
Denial Rate (FY 2012-2014)	56%	13%

Source: USCIS; National Foundation for American Policy.

Examining the top 8 countries of origin for L-1B petitions reveals no other country had even half the denial rate of employees from India, with Canadian nationals, which had the second most petitions at 10,692, experiencing a denial rate for L-1B petitions of only 4 percent between FY 2012 and FY 2014. (Indian nationals had the most cases decided between FY 2012 and FY 2014 with 25,296 L-1B petitions.) For British nationals the denial rate was 16 percent, for Chinese nationals 22 percent, and for Japanese and German nationals 15 percent, while the denial rate was 19 percent for French nationals and 21 percent for Mexican nationals.

[5] *Analysis: Data Reveal High Denial Rates For L-1 and H-1B Petitions at U.S. Citizenship and Immigration Services*, NFAP Policy Brief, National Foundation for American Policy, February 2012.
[6] *L-1 Denial Rates for High Skill Foreign Nationals Continue to Increase*, NFAP Policy Brief, National Foundation for American Policy, March 2014.
[7] USCIS data received in the FOIA request used the term "renewal."

Table 3
L-B Denial Rates by Country: FY 2012-2014

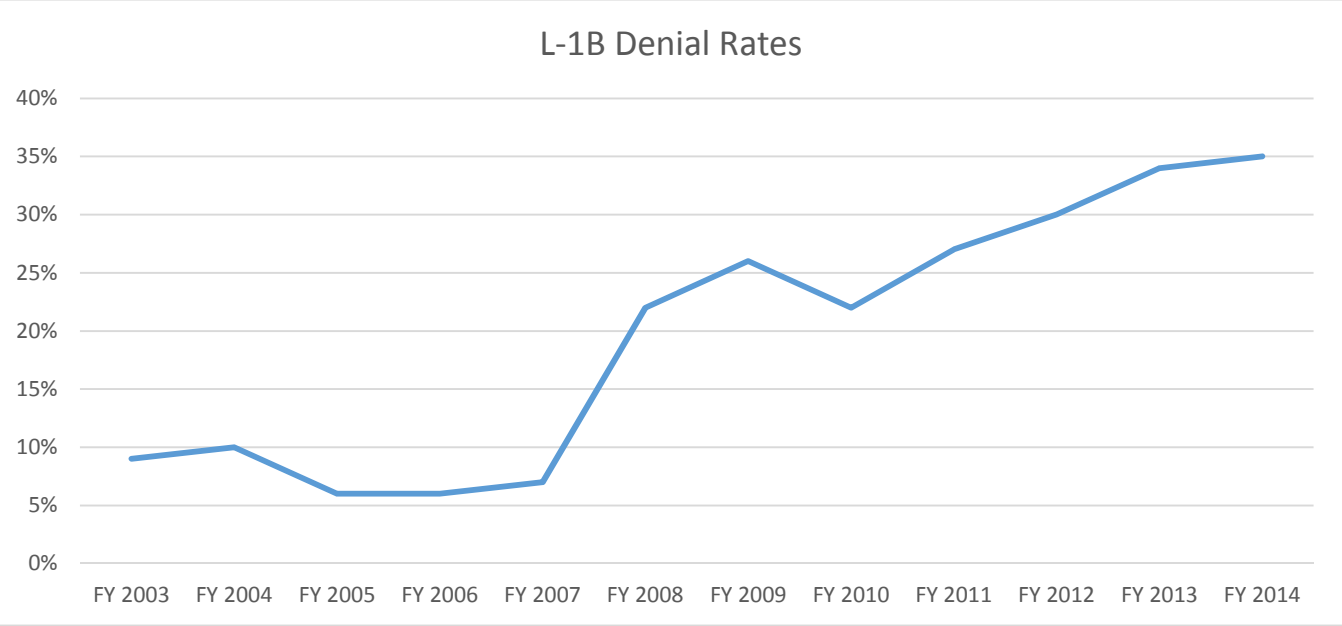
Country of Origin	Total	Denials	Denial Rate
Indian Nationals	25,296	14,104	56%
Canadian Nationals	10,692	424	4%
British Nationals	2,577	410	16%
Chinese Nationals	1,570	347	22%
Japanese Nationals	1,145	171	15%
German Nationals	1,100	161	15%
French Nationals	753	140	19%
Mexican Nationals	740	157	21%

Source: USCIS; National Foundation for American Policy.

Denial Rates for L-1B Petitions

Before 2008, denial rates for L-1B petitions were below 10 percent. Since FY 2008, denial rates have been over 20 percent, and now over 30 percent. Figure 1 and Table 1 show denial rates for L-1B petitions rose from 6 percent in FY 2006 to 35 percent in FY 2014, despite no change in the regulation on L-1Bs. (Denial rates are calculated using the total approvals and denials in a year.) The data from USCIS combine denials for both new (initial) cases for L-1B and "extensions," which are a renewal of status for people already working in the United States in L-1B status.

Figure 1



Source: USCIS, National Foundation for American Policy.

L-1 Denial Rates Increase Again for High Skill Foreign Nationals

According to the data, the number of applications received by USCIS (receipts) dropped by 23 percent between FY 2012 and FY 2014, raising the issue of whether USCIS denials have discouraged U.S. employers from transferring individuals into the United States. (See Table 4.) If that is the case, then it is likely the denials have encouraged more work to be done outside of America, where the employees are staying put, rather than coming to the United States to work alongside U.S. workers. It is important to note that individuals in L-1B status already work for the company before coming to America.

Table 4
L-1B Data for FY 2012 to FY 2014

FISCAL YEAR	RECEIPTS	APPROVALS	DENIALS	REQUEST FOR EVIDENCE (RFE)
FY 2014	14,515	10,354	5,648	7,134
FY 2013	17,688	11,911	6,246	8,070
FY 2012	18,735	14,080	6,068	8,637

Source: USCIS, CIS Consolidated Operational Repository (CISCOR). Data obtained by NFAP from FOIA request of USCIS. Note: Cases received in one fiscal year may be decided in another fiscal year.

The breakdown of data for initial and extension applications reveals a surprising finding: U.S. Citizenship and Immigration Services adjudicators are more likely to deny a case for an extension of L-1B status than for an initial application. This seems counterintuitive, since the individual whose status is being extended typically has already worked in the United States for three years and is simply continuing that work. The data show that in FY 2014, USCIS adjudicators denied 41 percent of extension applications for L-1B status vs. 32 percent for initial L-1B applications.[8] Similarly, in FY 2013, 41 percent of extensions were denied vs. 30 percent of initial L-1B applications. In FY 2012, USCIS denied 35 percent of extensions and 27 percent of initial L-1B cases.[9] (See Tables 5 and 6.)

Table 5
Initial L-1B Applications

FISCAL YEAR	Denials	Denial Rate
FY 2014	2,777	32%
FY 2013	2,813	30%
FY 2012	2,887	27%

Source: USCIS; National Foundation for American Policy.

[8] USCIS provided the breakdown of initial and extension applications. Additional calculations based on those breakdowns were performed by the National Foundation for American Policy to obtain percentage rates.
[9] Ibid.

Table 6
Extensions of L-1B Applications

FISCAL YEAR	Denials	Denial Rate
FY 2014	2,807	41%
FY 2013	3,364	41%
FY 2012	3,075	35%

Source: USCIS; National Foundation for American Policy.

REQUESTS FOR EVIDENCE

In recent years, high rates of "Requests for Evidence" or RFEs have accompanied the increase in denial rates. USCIS adjudicators use Requests for Evidence to obtain more information in lieu of making an immediate decision on a petition. Employers have noted an RFE can result in months of delays for an application, affecting costs and potentially delaying projects and harming the ability to fulfill terms of a contract. Based on NFAP calculations of USCIS data, between FY 2012 and FY 2014, 65 percent of Indian L-1B petitions experienced a Request for Evidence, compared to 3 percent of cases involving Canadians, 35 percent British, 44 percent Chinese, 33 percent Japanese, 37 percent German, 36 percent French and 40 percent Mexican.[10]

Table 7
USCIS Rate of Requests for Evidence for L-1B Petitions

Year	Request for Evidence Rate for L-1B Petitions
FY 2003	16%
FY 2004	2%
FY 2005	9%
FY 2006	9%
FY 2007	17%
FY 2008	49%
FY 2009	35%
FY 2010	44%
FY 2011	63%
FY 2012	43%
FY 2013	44%
FY 2014	45%

Source: USCIS; National Foundation for American Policy. RFE percentage for FY 2012 and FY 2013 calculated from total of approvals and denials, which results in a lower percentage for RFE's than using receipts. For FY 2003 to FY 2011, USCIS provided the RFE rate.

[10] National Foundation for American Policy calculations based on USCIS data provided for FY 2012 through FY 2014.

L-1 Denial Rates Increase Again for High Skill Foreign Nationals

In FY 2014, the Request for Evidence rate remained at a high rate of 45 percent of L-1B petitions. As recently as FY 2004, USCIS adjudicators requested additional evidence for L-1B petitions in only 2 percent of the cases.[11] (See Table 7.) Employer groups say their members generally find cases are approved after complying with the Requests for Evidence but it creates unnecessary costs and causes long delays.[12] The USCIS Ombudsman noted Requests for Evidence can delay service delivery and product development.[13]

Table 8
Requests for Evidence: L-1B Petitions (FY 2012 to FY 2014)

Fiscal Year	RFEs	RFE Rate
FY 2014	7,134	45%
FY 2013	8,070	44%
FY 2012	8,637	43%

Source: USCIS, CIS Consolidated Operational Repository (CISCOR). Data obtained by NFAP from FOIA request.

Table 9 and 10 provide a breakdown of Requests for Evidence on L-1B petitions for both initial applications and extensions (renewals for those working here already in L-1B status). The data indicate that in FY 2014, the Request for Evidence rate for extension applications was 40 percent and 49 percent for initial applications. In FY 2013, USCIS adjudicators issued Requests for Evidence in 45 percent of the cases for both extension and initial L-1B applications. In FY 2012, adjudicators issued Requests for Evidence in 46 percent of initial applications ultimately decided upon vs. 40 percent of extension applications. (The RFE rate is calculated based on cases decided in a fiscal year for the breakdown of initial and extension applications provided by USCIS.)

Table 9
Initial Applications: Requests for Evidence for L-1B Petitions (FY 2012 to FY 2014)

Fiscal Year	RFEs	RFE Rate
FY 2014	4,282	49%
FY 2013	4,306	45%
FY 2012	4,930	46%

Source: USCIS; National Foundation for American Policy.

[11] The Request for Evidence rate is the percentage of applications (approved and denied) in a year in which an adjudicator formally requested additional evidence from an employer. RFE rates are rounded off. NOTE: USCIS data obtained from a 2014 FOIA request by the American Immigration Lawyers Association indicated a Request for Evidence rate of 46 percent in FY 2013 but the 2015 FOIA request received by the National Foundation for American Policy indicates a 44 percent rate for FY 2013, listing fewer RFEs in FY 2013. USCIS provided no explanation for the small difference.

[12] Re: Docket No. USCIS-2014-0014, Notice of Request for Information, January 29, 2015, signed by American Immigration Lawyers Association, Business Roundtable, Compete America Coalition, Council for Global Immigration, FWD.us, HR Policy Association, Information Technology Industry Council, National Association of Home Builders, National Association of Manufacturers, National Venture Capital Association, Partnership for a New American Economy, Society for Human Resource Management, Semiconductor Industry Association, Silicon Valley Leadership Group, TechNet, and U.S. Chamber of Commerce.

[13] *Annual Report 2014*, Citizenship and Immigration Services Ombudsman, Department of Homeland Security, June 27, 2014.

Table 10
Extension Applications: Requests for Evidence for L-1B Petitions (FY 2012 to FY 2014)

Fiscal Year	RFEs	RFE Rate
FY 2014	2,765	40%
FY 2013	3,656	45%
FY 2012	3,554	40%

Source: USCIS; National Foundation for American Policy.

CONCLUSION

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."[14]

Few would argue it is the role of U.S. Citizenship and Immigration Services adjudicators to second guess whether U.S. employers should move employees around the globe to serve clients or develop products. Yet intentionally or otherwise this "second guessing" has taken place. 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.[15]

[14] Interview via email with Blake Chisam.
[15] Re: Docket No. USCIS-2014-0014, Notice of Request for Information, January 29, 2015.

L-1 Denial Rates Increase Again for High Skill Foreign Nationals

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."[16]

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."[17]

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.

[16] Interview with Robert Deasy via email.
[17] Interview with Lynden Melmed via email.

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