NATIONAL FOUNDATION FOR AMERICAN POLICY

NFAP POLICY BRIEF» AUGUST 2019

H-1B DENIAL RATES: ANALYSIS OF H-1B DATA FOR FIRST TWO QUARTERS OF FY 2019

EXECUTIVE SUMMARY

Denial rates for H-1B petitions have increased significantly, rising from 6% in FY 2015 to 33% through the second quarter of FY 2019 for new H-1B petitions for initial employment, according to a National Foundation for American Policy (NFAP) analysis of U.S. Citizenship and Immigration Services (USCIS) data. Between FY 2015 and FY 2018 the denial rate for new H-1B petitions quadrupled from 6% to 24%. To put this in perspective, between FY 2010 and FY 2015, the denial rate for initial H-1B petitions never exceeded 8%, while today the rate is 4 times higher. This analysis of H-1B data is an update of an April 2019 report on H-1B denial rates. The 33% denial rate for new H-1B petitions for initial employment through the second quarter of FY 2019 represents an increase from a 32% denial rate for new H-1B petitions in the first quarter of FY 2019. The data are through March 31, 2019, and do not reflect cases selected in the H-1B lottery held in April 2019.

The data obtained from analyzing the new USCIS H-1B Employer Data Hub show employers have continued to experience difficulty gaining approval for existing H-1B visa holders, including current employees seeking to extend status. In the first two quarters of FY 2019, USCIS adjudicators denied 14% of H-1B petitions for "continuing" employment, compared to denying only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% of such petitions as recently as FY 2017). Given the time and expense involved with filing H-1B petitions, employers generally only file cases for individuals they believe qualify for H-1B status, which is why high denial rates should not be expected.

Table 1
Denial Rate: H-1B Petitions for Initial (New) Employment

FISCAL YEAR	DENIAL RATE
FY 2019*	33%
FY 2018	24%
FY 2017	13%
FY 2016	10%
FY 2015	6%
FY 2014	8%
FY 2013	7%
FY 2012	5%
FY 2011	7%
FY 2010	8%
FY 2009	15%

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the second quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

USCIS defines an "initial" petition as "new employment," typically a case that would count against the H-1B annual limit, or "new concurrent employment." The agency defines a "continuing" petition as "continuing employment [with the same employer], change of employer and amended petitions."

The combined denial rate for H-1B petitions for continuing employment of 14% for the first two quarters of FY 2019 is the highest since FY 2009 and more than 4 times higher than the denial rate for such petitions in FY 2015. (See Table 3.) While the denial rate for continuing employment remains historically high compared to earlier years, NFAP analysis finds the denial rate for H-1B petitions for continuing employment declined from 18% in the 1st quarter of FY 2019 to 10% in the second quarter of FY 2019, for a combined rate of 14% for such petitions through the second quarter.[1] Without more data it is not possible to know if this is a trend. The full-year data for FY 2019, available after September 30, 2019, will provide greater insight into H-1B approvals and denials.

For H-1B petitions for initial employment, the denial rate was 32% in the first quarter of FY 2019 and 35% in the second quarter, for a combined denial rate of 33% for the first two quarters. As noted, the FY 2018 denial rate of 24% for H-1B petitions for initial employment represented a four-fold increase in the denial rate compared to FY 2015. There were about twice as many cases for initial employment decided in the first quarter as in the second quarter of FY 2019 but there were more cases decided in the second quarter than during the first quarter of FY 2019 for continuing employment (approximately 66,000 vs. 43,000).

Denials have increased because USCIS and its adjudicators have raised the standard of proof for approving an H-1B petition without any new law or regulation that would permit the agency to do so legally, according to attorneys and employers. The new policies began in April 2017, after Donald Trump issued the "Buy American and Hire American" executive order. An H-1B visa is generally the only practical way for a high-skilled foreign national, including a recent international student, to work long-term in the United States.

In October 2017, one of the first actions of the new USCIS director was to issue a memo on "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status," which has likely been responsible for many of the denials in continuing employment cases.[2]

All of the 27 companies USCIS has identified as the top employers of H-1B visa holders, including many of America's best-known companies, saw an increase in their H-1B denial rates for initial employment between FY

[1] All percentages in this report are rounded off.
[2] https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions.

2015 and FY 2019.[3] Amazon, Microsoft and Apple, JPMorgan Chase and others saw increases in their denial rates for initial employment between FY 2015 and the first two quarters of FY 2019.

At least 9 companies that provide professional or information technology (IT) services to other U.S. companies had denial rates for H-1B initial employment that exceeded 40% through the second quarter of FY 2019, even though these same companies had denial rates of between 4% and 8% for H-1B petitions for initial employment in FY 2015.

Between FY 2009 and FY 2017 the denial rate on H-1B petitions for continuing employment never exceeded 6%. Yet in FY 2018, due to new USCIS policies, the denial rate increased to 12%, before continuing upwards to 14% through the second quarter of FY 2019. All but two of the 27 top employers of H-1B visa holders experienced an increase in denials for H-1B petitions for continuing employment between FY 2015 and the second quarter of FY 2019.

Only approximately 20% of the full-time graduate students at U.S. universities in computer science and electrical engineering are U.S. students, according to the National Science Foundation. New technologies, increased research and development and efforts to improve company competitiveness by enhancing digital platforms, usually through the work of outside IT services companies, continue to increase the demand for technical talent in America.[4]

If the goal of the Trump administration is to make it much more difficult for well-educated foreign nationals to work in America in technical fields, then USCIS is accomplishing that goal. As noted previously, whether the actions of USCIS are serving the best interests of the United States is a question that remains open for debate.

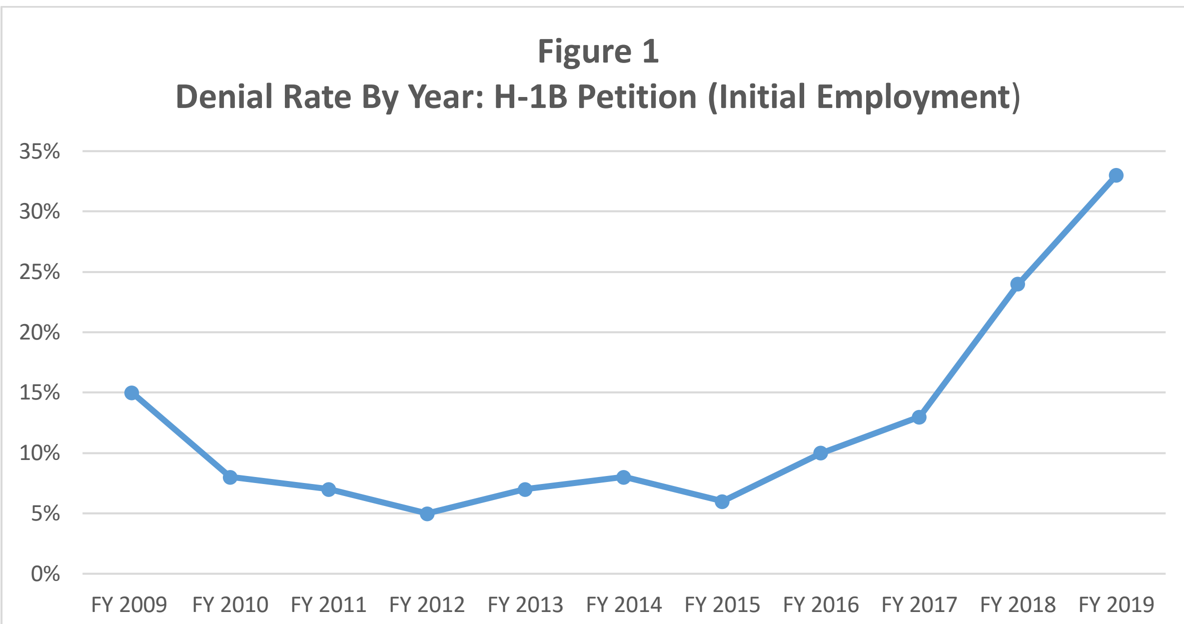
---

[3] A list of top H-1B employers in FY 2018 can be found here: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1B-quarterly-requests-for-evidence-2015-2019-Q1-top-30-employers.pdf.

[4] *The Importance of International Students to American Science and Engineering*, NFAP Policy Brief, National Foundation for American Policy, October 2017.

DENIALS OF INITIAL H-1B PETITIONS

As Table 1 shows, the denial rate for initial H-1B petitions has risen from 6% in FY 2015 to 24% in FY 2018 and 33% through the second quarter of FY 2019. Cases for initial employment in the two first quarters of FY 2019 would be primarily cases selected in the April 2018 lottery that were not completed by USCIS until after October 1, 2018 (the start of FY 2019), though could also be "new concurrent employment" (i.e., an existing H-1B visa holder with additional employment). Between FY 2010 and FY 2015, the denial rate for H-1B petitions for initial employment never exceeded 8%, while today the rate is 4 times higher.



Source: USCIS, National Foundation for American Policy. *FY 2019 data through the second quarter of FY 2019. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

In categorizing an "initial" petition in the H-1B Employer Data Hub, USCIS uses the following definition: "*Initial Approval/Denial*: H-1B petitions with 'New employment' or 'New concurrent employment' selected on Part 2, Question 2 of the Form I-129 whose first decision is an approval/denial." [5] For companies, most H-1B petitions for "new employment" would be cases that count against the annual H-1B "cap" of 65,000 and the 20,000 exemption from the annual limit for individuals with graduate degrees or higher from U.S. universities.

Attorneys note that the denial rates have risen to high levels without changes to the law or new USCIS regulations. "One thing that is clear to me is that the data backs up what employers have been saying for the last two years:

[5] USCIS H-1B Employer Data Hub.

H-1B Denial Rates

USCIS has raised the legal standard they use to decide whether enough evidence has been presented with petitions to approve them, without any legal authority to do so and without any notice to the public," said William Stock, a founding member of Klasko Immigration Law Partners, LLP.[6]

Jonathan Wasden, who has filed lawsuits against USCIS on behalf of employers, believes the system for petitioning for high-skilled foreign nationals has broken down due to administration policies. "USCIS has systematically rewritten the rules on H-1B visas, without following the law, and destroyed any sense of predictability in the system." He finds the agency biased in its decisions against information technology services companies. "Providing proof of the exact projects the employee will work on for three years going forward accounts for many denials for these firms." He points to the increase in denials for both services companies and large tech companies as proof USCIS has changed the way it adjudicates what qualifies as a "specialty occupation."[7]

USCIS issued a Request for Evidence (RFE) in 60% of "completed" cases in the first quarter of FY 2019 and for the first three quarters of FY 2019 the agency issued an RFE in approximately 40% of cases with "completions," according to USCIS.[8] A Request for Evidence increases delays and such requests can cost employers up to $4,500 in additional legal expenses.[9] The top reasons USCIS cites for an RFE is "The petitioner did not establish that the position qualifies as a specialty occupation . . . The petitioner did not establish that they had a valid employer-employee relationship with the beneficiary, [and] . . . The petitioner did not establish they have specific and non-speculative qualifying assignments in a specialty occupation for the entire time requested in the petition."[10] Lawsuits have challenged USCIS denials based on these and other grounds.

Table 2 shows large increases in the denial rate for H-1B petitions for initial employment for leading companies. At least 9 companies that provide professional or IT services to other U.S. companies, including Accenture, Ernst & Young and others, had an increase of over 40 percentage points in their denial rate for new H-1B petitions between FY 2015 and the first two quarters of FY 2019. Denial rates for several companies exceeded 40% in FY 2018 and the first two quarters of FY 2019, even though these same companies had initial H-1B petition denial rates of between 4% and 8% in FY 2015.[11]

---

[6] Interview with William Stock.
[7] Interview with Jonathan Wasden.
[8] Link to RFE data can be found here: https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/H-1B_Quarterly_Request_for_Evidence_RFE_FY2015-FY2019_Q3.pdf.
[9] *Employer-Paid H-1B Visa Fees for College Scholarships and Job Training*, NFAP Policy Brief, National Foundation for American Policy, April 2019.
[10] "Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued For H-1B Petitions in Fiscal Year 2018," USCIS.
[11] NFAP numbers are similar but not idential to a top 30 list USCIS released for FY 2018 due to NFAP including subsidiaries.

Table 2
Denial Rate of H-1B Petitions for Initial Employment: FY 2015 vs. FY 2019

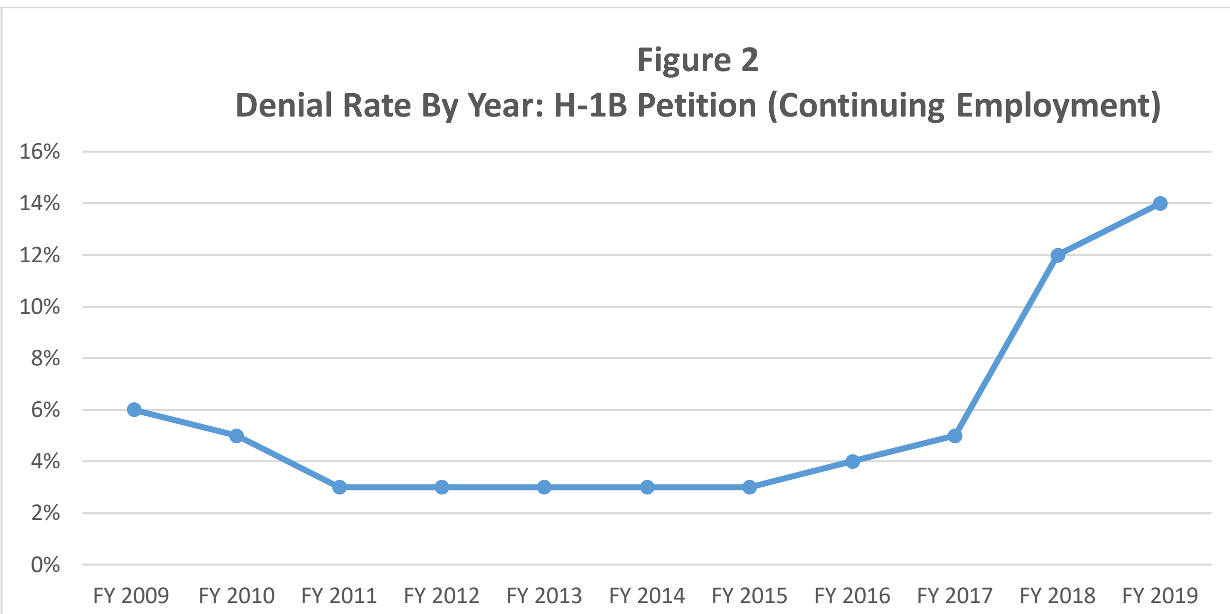
Employer	FY 2015 Denial Rate (Initial Employment)	FY 2019 Denial Rate (Initial Employment)	Change in Denial Rate in Percentage Points from FY 2015 to FY 2019
Amazon	1%	8%	*+7*
Microsoft	1%	13%	*+12*
Intel	1%	8%	*+7*
Google	1%	6%	*+5*
Ernst & Young	0% (0.3%)	43%	*+43*
Apple	1%	7%	*+6*
Facebook	0%	5%	*+5*
Deloitte	18%	60%	*+42*
Tech Mahindra Americas	4%	48%	*+44*
TCS	6%	37%	*+31*
Cognizant	8%	56%	*+48*
Larsen & Toubro	2%	21%	*+19*
Accenture	4%	50%	*+45*
Wal-Mart	3%	15%	*+12*
IBM	3%	33%	*+30*
Cisco	1%	9%	*+8*
JPMorgan Chase	1%	14%	*+13*
Cummins	2%	15%	*+13*
Wipro	7%	60%	*+53*
Capgemini	5%	60%	*+55*
HCL America	2%	27%	*+25*
Mphasis	2%	22%	*+20*
Mindtree	3%	5%	*+2*
PricewaterhouseCoopers	1%	28%	*+27*
Infosys	2%	46%	*+44*
Syntel	1%	56%	*+55*
Randstad Technologies	6%	16%	*+10*

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the second quarter of FY 2019. Data extracted and analyzed from USCIS H-1B Employer Data Hub. Percentages are rounded off. Note: IBM and IBM Private India were combined, as were Amazon and Amazon Corporate, and Larsen & Toubro and L&T Technology Services. Employers listed in order of number of initial H-1B petitions approved in FY 2018.

All 27 companies listed in Table 2, including many of America's best-known companies, saw an increase in their H-1B denial rates for initial employment between FY 2015 and FY 2019. The story is similar for continuing employment cases. (See Table 4).

DENIALS OF H-1B PETITIONS FOR CONTINUING EMPLOYMENT

In categorizing a "continuing" petition in the H-1B Employer Data Hub, USCIS uses the definition: "*Continuing Approval/Denial*: H-1B petitions with anything other than 'New employment' or 'New concurrent employment' selected on Part 2, Question 2 of the Form I-129, whose first decision is an approval/denial. This includes, for example, continuing employment, change of employer, and amended petitions."[12]



Source: USCIS, National Foundation for American Policy. *FY 2019 data through the second quarter of FY 2019. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

Attorney William Stock has seen many cases of denials when a current H-1B visa holders tries to change employers. The result is H-1B professionals are more reluctant to change jobs, limiting labor mobility and making them more vulnerable to abuse or less likely to leave an employer for a better opportunity.

[12] USCIS H-1B Employer Data Hub.

H-1B Denial Rates

In the first two quarters of FY 2019, USCIS adjudicators denied 14% of H-1B petitions for "continuing" employment, compared to denying only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017). Between FY 2009 and FY 2017 the denial rate on H-1B petitions for continuing employment never exceeded 6%. Yet in FY 2018, due to new USCIS policies, the denial rate increased to 12%, before continuing upwards to 14% through the first two quarters of FY 2019.

In October 2017, the new USCIS director issued a memo on "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status." The memo has likely been responsible for many of the denials in continuing employment cases. "The previous policy instructed officers to give deference to the findings of a previously approved petition, as long as the key elements were unchanged and there was no evidence of a material error or fraud related to the prior determination," noted a USCIS statement. "The updated policy guidance rescinds the previous policy."[13]

Table 3
Denial Rate: H-1B Petitions for Continuing Employment

FISCAL YEAR	DENIAL RATE
FY 2019*	14%
FY 2018	12%
FY 2017	5%
FY 2016	4%
FY 2015	3%
FY 2014	3%
FY 2013	3%
FY 2012	3%
FY 2011	3%
FY 2010	5%
FY 2009	6%

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the first two quarters of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

[13] https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions.

Table 4
Denial Rate of H-1B Petitions for Continuing Employment: FY 2015 vs. FY 2019

Employer	FY 2015 Denial Rate (Continuing Employment)	FY 2019 Denial Rate (Continuing Employment)	Change in Denial Rate in Percentage Points from FY 2015 to FY 2019
Amazon	1%	3%	*+2*
Microsoft	2%	2%	*no change*
Intel	1%	6%	*+5*
Google	0% (0.4%)	1%	*+1*
Ernst & Young	2%	18%	*+16*
Apple	1%	1%	*no change*
Facebook	0% (0.2%)	2%	*+2*
Deloitte	5%	37%	*+32*
Tech Mahindra Americas	2%	18%	*+16*
TCS	3%	28%	*+25*
Cognizant	3%	28%	*+25*
Larsen & Toubro	3%	11%	*+8*
Accenture	1%	16%	*+15*
Wal-Mart	1%	6%	*+5*
IBM	1%	24%	*+23*
Cisco	1%	2%	*+1*
JPMorgan Chase	1%	3%	*+2*
Cummins	1%	4%	*+3*
Wipro	4%	24%	*+20*
Capgemini	3%	23%	*+20*
HCL America	2%	22%	*+20*
Mphasis	2%	13%	*+11*
Mindtree	2%	11%	*+9*
PricewaterhouseCoopers	1%	20%	*+19*
Infosys	1%	28%	*+27*
Syntel	3%	25%	*+22*
Randstad Technologies	3%	4%	*+1*

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the first two quarters of FY 2019. Data extracted and analyzed from USCIS H-1B Employer Data Hub. Percentages are rounded off. Note: IBM and IBM Private India were combined, as were Amazon and Amazon Corporate, and Larsen & Toubro and L&T Technology Services. Employers listed in order of number of initial H-1B petitions approved in FY 2018.

The large increase in denials for continuing employment has extracted a human cost. "I have worked with several member companies from ITSERVE Alliance and seen how employees who have mortgages, car payments, kids in school, and deeply established roots in this country are heartlessly shown the door," said attorney Jonathan Wasden. "USCIS is creating default in mortgages, car loans, etc., and is also chilling future investment by H-1B employees. Why should someone buy a house if USCIS is going to kick them out of the country in six months?"[14]

Nearly all 27 companies in Table 4 experienced an increase in denials for H-1B petitions for continuing employment between FY 2015 and the first two quarters of FY 2019. The denial rates for several companies for continuing employment cases were only 2% or 3% in FY 2015 and rose to over 30% in FY 2019. These are for applications typically filed to extend the stay of existing employees. Companies also saw increases in their denial rates for H-1B petitions for continuing employment between FY 2018 and the first two quarters of FY 2019.

CONCLUSION

If the goal of the Trump administration is to make it much more difficult for well-educated foreign nationals to work in America in technical fields, then USCIS is accomplishing that goal. If the administration's goals include more international students attending non-U.S. universities and making their careers someplace other than America, and for U.S. companies to transfer more work and plans for growth to Canada and elsewhere, then those goals are also being accomplished.[15] Whether the actions of USCIS are serving the best interests of the United States remains open for debate.

[14] Interview with Jonathan Wasden.
[15] "Another Record Year for Canadian International Education," Canadian Bureau for International Education, Press Release, February 15, 2019; Rani Molla, "Canada is Becoming a Tech Hub. Thanks Donald Trump," *Recode*, March 19, 2019.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

Established in 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. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James Ziglar. 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. Twitter: **@NFAPResearch**