NFAP POLICY BRIEF » FEBRUARY 2020

H-1B APPROVED PETITIONS AND DENIAL RATES FOR FY 2019

EXECUTIVE SUMMARY

More restrictive Trump administration policies have increased denials for H-1B petitions significantly, with denial rates rising from 6% in FY 2015 to 21% in 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.

In FY 2019, USCIS adjudicators denied 21% of H-1B petitions for "initial" employment and 12% of H-1B petitions for "continuing" employment. The 12% denial rate for continuing employment was the same in both FY 2018 and FY 2019, indicating there has been little change in USCIS policies over the past year. The 12% denial rate for continuing employment remains historically high – 4 times higher than the denial rate of only 3% for H-1B petitions for continuing employment as recently as FY 2015. The 21% denial rate in FY 2019 for initial employment was slightly lower than the 24% denial rate for such cases in FY 2018, but still far higher than the 6% denial rate for initial employment in FY 2015.

H-1B petitions for "initial" employment are primarily for new employment, typically a case that would count against the H-1B annual limit. H-1B petitions for "continuing" employment are usually extensions for existing employees at the same company or an H-1B visa holder changing to a new employer.

This is the first time data for all four quarters of FY 2019 have become available and can be separated into initial and continuing employment. Separating out the data provides a much clearer picture of adjudications than the usual way USCIS reports data combining the two types of cases, which understates the denial rate for initial employment. There are approximately twice as many cases for continuing employment as initial employment, and continuing cases (primarily for existing employees) have lower denial rates. This analysis of H-1B data is the fourth in a series and follows an April 2019 NFAP report, an August 2019 study and an October 2019 NFAP report. The analysis is based on data from the USCIS H-1B Employer Data Hub.

Among the findings in this analysis:

- H-1B denial rates have risen for nearly all major companies. However, the data show USCIS has established a different standard for adjudicating cases involving companies that provide information technology and other services to businesses. The denial rate for H-1B petitions (initial employment) for at least 9 major companies that provide IT services or other consulting services reached over 30% in FY 2019. In comparison, technology product companies, such as Apple, had far lower denial rates for initial employment, ranging between 2% and 7%, although these rates were generally higher than in FY 2015.

- USCIS has changed the standards for adjudications without a change in the law or new USCIS regulations. In particular, USCIS is treating H-1B petitions differently based on whether an employee will perform work at a customer's site. The denial rate for initial employment increased by 20 percentage points or more for at least 10 major companies between FY 2015 and FY 2019.

- Historical data indicate the Trump administration has changed the standards for adjudications. The denial rate for H-1B petitions for initial employment was 6% in FY 2015 and as low 5% in FY 2012, compared to 24% in FY 2018 and 21% in FY 2019. Similarly, the denial rate for H-1B petitions for continuing employment was 3% between FY 2011 and FY 2015, and rose to 12% in FY 2018 and FY 2019. A USCIS memo instructing adjudicators to no longer give deference to prior determinations put many long-time employees at risk of being forced to leave the United States after an H-1B petition is denied.

- Tech talent has contributed to the success of leading U.S. technology companies, which have experienced rapid growth and require greater numbers of technology professionals to continue growing and innovating. Amazon, Google and Apple were among the top employers for new H-1B petitions in FY 2019.

- New H-1B petitions (for initial employment) for the top 7 Indian-based companies declined by 64% between FY 2015 and FY 2019. The 7 companies had only 5,428 H-1B petitions for initial employment approved in FY 2019, accounting for 6% of the 85,000 H-1B petitions for companies (or 0.003% of the U.S. labor force). Denials may have contributed to this decline but the primary reason for the drop in H-1B visas is a choice by companies to build up their domestic workforce in the United States and rely less on visas. Moreover, these and similar companies are part of an industry trend when servicing clients to use more digital services, such as cloud computing, "bots" and artificial intelligence, which require fewer workers.

- Since FY 2004, the annual limit of 65,000 H-1B petitions and the 20,000 exemption from that limit for individuals with an advanced degree from a U.S. university has been exhausted every fiscal year. The 85,000 new H-1B petitions allowed each year come to only 0.05% of the U.S. labor force of approximately 164 million.

- In addition to higher denial rates under the Trump administration, USCIS data show the percentage of completed cases with Requests for Evidence (RFEs) increased from 22.3% in FY 2015 to 40.2% in FY 2019. Employers say Requests for Evidence are costly and time-consuming.

In 2020, the Trump administration is expected to introduce a new H-1B regulation that will make it more difficult for employers to hire high-skilled foreign nationals in the United States.

UNDERSTANDING THE DATA

The data analyzed in this report are from the 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." *Cases are counted in the fiscal year USCIS decides them.* NFAP analyses differ from USCIS's presentation of the data by separating out initial employment (mostly new employees) and continuing employment (mostly an extension for existing employees) to allow a clearer picture of adjudications.

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."[1] 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.

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."[2]

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

FISCAL YEAR	DENIAL RATE
FY 2019*	21%
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 all four quarters of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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[1] USCIS H-1B Employer Data Hub.
[2] Ibid.

Table 2
Approved H-1B Petitions and Denial Rates for Initial Employment: FY 2015 vs. FY 2019

Employer	FY 2019 Approved Petitions Initial Employment	FY 2015 Approved Petitions Initial Employment	FY 2019 Denial Rate Initial Employment	FY 2015 Denial Rate Initial Employment	Change in Denial Rate in Percentage Points from FY 2015 to FY 2019
Amazon	3,575	1,070	4%	1%	+3
Google	2,707	849	4%	1%	+3
TCS	1,742	4,771	31%	6%	+25
Microsoft	1,706	970	6%	1%	+5
Deloitte	1,680	1,222	37%	18%	+19
Cognizant	1,598	3,849	56%	8%	+48
Facebook	1,534	422	3%	0%	+3
IBM	1,256	1,934	26%	3%	+23
Apple	1,155	532	2%	2%	*no change*
Intel	1,014	636	3%	1%	+2
Tech Mahindra	954	1,571	37%	4%	+33
Capgemini	815	556	45%	5%	+40
Larsen & Toubro	773	861	14%	2%	+12
Infosys	767	2,765	35%	2%	+33
Cisco	690	270	7%	1%	+6
Accenture	656	3,443	42%	4%	+38
Qualcomm	652	269	5%	0.4%	+5
Wipro	609	3,185	47%	7%	+40
PricewaterhouseCoopers	573	650	21%	1%	+20
Oracle	563	500	11%	1%	+10
Ernst & Young	497	685	18%	0.3%	+18
Uber	491	48	7%	2%	+5
Wal-Mart	468	70	4%	3%	+1
JPMorgan Chase	433	303	8%	1%	+7
HCL America	412	1,318	33%	2%	+31

Source: USCIS, National Foundation for American Policy. *FY 2019 data through all four 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.

KEY CONCLUSIONS FROM FY 2019 DATA ON H-1B PETITIONS

Several conclusions can be drawn from analyzing all four quarters of USCIS data for FY 2019 on H-1B petitions for both initial employment (primarily for new employees) and continuing employment (mostly for existing employees).

First, while nearly all major companies have seen higher denial rates under Trump administration policies, the data indicate USCIS has established a different standard for adjudicating cases for companies that provide information technology (IT) services. This is the case even though, as attorneys point out, immigration law does not indicate a different standard for adjudications based on the type of firm or the location work will be performed.[3] Table 2 illustrates that at least 9 major companies that provide IT services or other consulting services to U.S. businesses had denial rates for initial employment over 30% in FY 2019. These are companies that may need H-1B employees to perform work at customer sites to service contracts. In contrast, technology product companies, such as Apple, where employees generally stay in one location, had denial rates for initial employment of between 2% and 7%.

Second, the different standards for adjudications have happened without Congress changing the law or USCIS issuing new regulations. The denial rate for initial employment in FY 2019 compared to FY 2015 increased by 20 percentage points or more for 10 major companies that provide IT services or other business consulting services. (It was also higher in FY 2019 than in FY 2015 for other companies but to a lesser extent.) "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," William Stock, a founding member of Klasko Immigration Law Partners, has noted.[4] Jonathan Wasden, an attorney with Wasden Banias, said the types of cases where USCIS is likely to issue a denial now include agency interpretations that have changed what qualifies as a "specialty occupation" as well as cases where employers are asked to provide proof of the projects an employee will work on for three years going forward.[5]

Third, the historical data also support the view the Trump administration has changed the standards of adjudications. Table 1 shows the denial rate for H-1B petitions for initial employment was 6% in FY 2015 and as low 5% in FY 2012, compared to 24% in FY 2018 and 21% in FY 2019.

Fourth, the top employers of new H-1B visas in FY 2019 were leading technology companies that have experienced rapid growth and require greater numbers of people with tech talent to fuel that growth, including Amazon, Google and Apple, all of which have passed a market capitalization of $1 trillion. It is not surprising that U.S. technology

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[3] Stuart Anderson, "IT Services Companies and Clients Bear Brunt of H-1B Crackdown," *Forbes*, February 25, 2019.
[4] Interview with William Stock.
[5] Interview with Jonathan Wasden.

companies employ many foreign nationals, since at U.S. universities only approximately 20% of full-time graduate students in computer science and electrical engineering are U.S. students.[6] In short, much of the labor pool technology companies select from is made up of foreign nationals.

Fifth, in the past some policymakers argued (incorrectly) that Indian-based companies garnered "most" of the new H-1B petitions. Government statistics show this was not the case but it is even less true today. USCIS data show the number of new H-1B petitions (for initial employment) for the top 7 Indian-based companies declined by 64% between FY 2015 and FY 2019. The 7 companies – TCS, Infosys, Wipro, HCL America, Larsen & Toubro, Tech Mahindra and Mindtree – had only 5,428 H-1B petitions for initial employment approved in FY 2019, accounting for 6% of the 85,000 H-1B petitions for companies. Denials may have contributed to this decline but, as noted in previous NFAP reports, the primary reason for the drop in H-1B visas is a choice by companies to build up their domestic workforce in the United States and rely less on visas. In addition, these and similar companies are part of an industry trend when servicing clients to use more digital services, such as cloud computing, "bots" and artificial intelligence, which require fewer workers.[7] Companies say, in general, there is a need for fewer workers to service clients than in the past.

Table 3
Denial Rate FY 2019: H-1B Petitions for Initial (New) Employment

FISCAL YEAR	APPROVALS	DENIALS	DENIAL RATE
1st Quarter (FY 2019)	33,366	15,345	32%
2nd Quarter (FY 2019)	15,407	8,125	35%
3rd Quarter (FY 2019)	39,551	4,237	10%
4th Quarter (FY 2019	44,643	7,926	15%
OVERALL FY 2019	132,967	35,633	21%

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the third quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub. Approvals and denials include petitions filed for individuals employed at universities and non-profit and government research institutes, which are exempt from numerical limits.

Sixth, denial rates are only one challenge for employers. USCIS data show the percentage of completed cases with Requests for Evidence (RFEs) increased from 22.3% in FY 2015 to 40.2% in FY 2019. The RFE rate reached 60% during the first quarter of FY 2019, and was 47.2% during the first quarter of FY 2020.[8] Requests for Evidence can

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

[7] "A bot is a software application that is programmed to do certain tasks," according to Cloudflare. Ananya Bhattacharya and Itika Sharma Punit, "Indian IT Firms Have Been Preparing for Changes in H-1B Visa Laws for Nearly a Decade, *Quartz India*, February 3, 2017.

[8] See here:
https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q1.pdf.

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add thousands of dollars to employer costs and delay cases for months. Denial rates in a single quarter may not reveal a broader trend, since cases issued RFEs could be delayed for months.

Table 4
Approved H-1B Petitions and Denial Rates for Continuing Employment: FY 2015 vs. FY 2019

Employer	FY 2019 Approved Petitions Continuing Employment	FY 2015 Approved Petitions Continuing Employment	FY 2019 Denial Rate Continuing Employment	FY 2015 Denial Rate Continuing Employment	Change in Denial Rate in Percentage Points from FY 2015 to FY 2019
Cognizant	11,868	13,186	25%	3%	+22
Deloitte	6,121	1,762	28%	5%	+23
TCS	5,873	4,409	19%	3%	+16
Amazon	5,247	1,124	3%	1%	+2
Infosys	4,749	6,561	31%	1%	+30
Microsoft	3,569	1,857	2%	2%	no change
Google	3,347	1,460	2%	0% (0.4%)	+2
Capgemini	2,880	979	19%	3%	+16
Larsen & Toubro	2,722	1,311	9%	3%	+6
Wipro	2,522	3,354	18%	4%	+14
Accenture	2,464	2,465	15%	1%	+14
Ernst & Young	2,412	964	18%	2%	+16
Apple	2,314	1,160	1%	1%	no change
HCL America	2,068	1,618	24%	2%	+22
Facebook	2,021	560	2%	0% (0.2%)	+2
Intel	1,978	1.044	3%	1%	+2
Tech Mahindra	1,912	1,155	14%	2%	+12
IBM	1,703	1,930	21%	1%	+20
Oracle	1,442	904	0.2%	3%	+3
Cisco	1,408	873	3%	1%	+2
PricewaterhouseCoopers	1,162	732	25%	1%	+24
Wal-Mart	1,048	321	4%	1%	+3
Randstad Technologies	1,038	535	4%	3%	+1
Syntel	1,031	1,276	26%	3%	+23
Qualcomm	968	986	4%	2%	+2

Source: USCIS, National Foundation for American Policy. *FY 2019 data through all four 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.

DENIALS OF H-1B PETITIONS FOR CONTINUING EMPLOYMENT

The USCIS data on H-1B petitions for continuing employment in Table 4 contain an important caveat – the approvals for continuing employment for some companies are inflated by counting the same employee often multiple times, according to attorneys. Employers, such as IT services companies, must file an amended petition for every H-1B professional who moves to a new project at a new work location. The policy is due to the 2015 USCIS Administrative Appeals Office decision in Matter of Simeio Solutions that requires an employer to file an amended H-1B petition in most instances where an H-1B professional is relocated to a new work location. "The key point to bear in mind is that each of these approvals does not represent a unique individual as an employer could conceivably file several petitions in a year for a professional who works on projects that last just a few months," said Vic Goel, managing partner of Goel & Anderson.[9]

In both FY 2018 and FY 2019, USCIS adjudicators denied 12% of H-1B petitions for "continuing" employment (primarily for existing employees), compared to denying only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017). As a result, many companies report being forced to dismiss long-term, experienced employees, including individuals waiting years for an employment-based green card, whose H-1B status ended because USCIS denied an application for an extension. In some cases, companies have transferred employees to another location. When that was not possible, employees were let go.

Table 5
Denial Rate: H-1B Petitions for Continuing Employment

FISCAL YEAR	DENIAL RATE
FY 2019*	12%
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 all four quarters of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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[9] Interview with Vic Goel.

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A major reason for the increase in denials for continuing employment is that 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, according to attorneys. "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."[10]

Table 6 shows the denial rate for H-1B petitions for continuing employment in FY 2019 was consistent the last three quarters of FY 2019 at 10%, 9% and 11%. It is likely these types of cases will be denied at a similar rate in FY 2020.

Table 6
Denial Rate FY 2019: H-1B Petitions for Continuing Employment

FISCAL YEAR	APPROVALS	DENIALS	DENIAL RATE
1st Quarter (FY 2019)	43,268	9,706	18%
2nd Quarter (FY 2019)	65,127	7,545	10%
3rd Quarter (FY 2019)	76,764	7,474	9%
4th Quarter (FY 2019)	71,197	9,155	11%
OVERALL FY 2019	256,356	33,880	12%

Source: USCIS, National Foundation for American Policy. *FY 2019 data through the third quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub. Approvals and denials include petitions filed for individuals employed at universities and non-profit and government research institutes, which are exempt from numerical limits.

Similar to cases for initial employment, among the top 25 employers with the most approved H-1B petitions for continuing employment, 11 companies that provide information technology or other services to businesses had denial rates of 15% or higher. These companies showed an increase in the denial rates of 14 percentage points or higher compared to FY 2015. Product companies, which primarily employ H-1B visa holders in a single location, showed much smaller increases in their denial rates between FY 2015 and FY 2019.

CONCLUSION

In a properly functioning immigration system, denial rates should be low if the standards are consistent over the years, since employers generally only file cases for individuals they believe qualify for H-1B status. High denial rates should not be expected. After three years, the evidence indicates a key goal of the Trump administration is to make it more difficult for well-educated foreign nationals to work in America in science and engineering fields. One

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

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consequence is that the since 2016, the number of Indians immigrating to Canada has more than doubled, rising from 39,340 in 2016 to 85,585 in 2019, a more than 117% increase, according to a National Foundation for American Policy analysis of Immigration, Refugees and Citizenship Canada data. "Canada is benefiting from a diversion of young Indian tech workers from U.S. destinations, largely because of the challenges of obtaining and renewing H-1B visas and finding a reliable route to U.S. permanent residence," according to Peter Rekai, founder of the Toronto-based immigration law firm Rekai LLP.[11]

Research by Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, concluded, "Restrictive H-1B policies could not only be exporting more jobs and businesses to countries like Canada, but they also could be making the U.S.'s innovative capacity fall behind."[12] In response to being unable to hire high-skilled foreign nationals, U.S. companies increase their hiring overseas, which causes more innovation by foreign nationals to take place in other countries, benefiting those nations. "[A]ny policies that are motivated by concerns about the loss of native jobs should consider that policies aimed at reducing immigration have the unintended consequence of encouraging firms to offshore jobs abroad," according to Glennon.[13]

In the United States, by providing technical talent, many high-skilled foreign nationals increase the competitiveness of American companies. "Digital transformations and digital platforms are just starting to take off and, as we look into the near future, the current skill shortages are going to grow as the demand for digital and IT skills explodes," said Everest Group CEO Peter Bendor-Samuel. "If this administration wanted to harm U.S. competitiveness, then restricting access to this vital labor would be an excellent approach."[14]

A rule on H-1B visas is on the Trump administration's regulatory agenda in 2020 that would "revise the definition of specialty occupation . . . and revise the definition of employment and employer-employee relationship."[15] That means policies may become more restrictive for employers of high-skilled foreign nationals.

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[11] Stuart Anderson, "Immigrants Flock to Canada, While U.S. Declines," *Forbes*, February 18, 2020.
[12] Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, Carnegie Mellon University, May 2019.
[13] Ibid.
[14] Anderson, "IT Services Companies and Clients Bear Brunt of H-1B Crackdown."
[15] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1615-AC13.

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