

H-1B DENIAL RATES AND NUMERICAL LIMITS AS INDICATORS OF CURRENT RESTRICTIONS

EXECUTIVE SUMMARY

The Trump administration is considering new restrictions on H-1B visas for foreign-born scientists and engineers at the same time its policies already have produced record-high H-1B denial rates and while highly restrictive numerical limits remain under U.S. law. Denial rates for new H-1B petitions for initial employment rose from 6% in FY 2015 to 30% in the first quarter of FY 2020, according to a National Foundation for American Policy (NFAP) analysis.

The 30% denial rate for initial employment is primarily for cases selected in the H-1B lottery held in April 2019 and not adjudicated until after October 1, 2019, which is the start of the first quarter of FY 2020. The denial rate for initial employment was 21% in FY 2019 and 24% in FY 2018.

All the recent top 25 employers of new H-1B visa holders had higher denial rates for H-1B petitions for initial employment in the first quarter of FY 2020 than in FY 2015. Even large technology companies, such as Apple, had much higher denial rates in the first quarter of FY 2020 than in FY 2015 (i.e., before the Trump administration).

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 analysis of H-1B data is the fifth in a series and follows an April 2019 NFAP [report](#), an August 2019 [study](#), an October 2019 NFAP [report](#) and a February 2020 [study](#). The analysis is based on data from the USCIS [H-1B Employer Data Hub](#).

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

FISCAL YEAR	DENIAL RATE
FY 2020	30%
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 2020 data through first quarter of FY 2020. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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The Trump administration may propose new immigration restrictions, potentially as part of a review initiated by an April 22, 2020, [presidential proclamation](#). Analysis shows the administration has already imposed many restrictions on employers and foreign nationals in H-1B status and low annual limits under current law block up to 190,000 foreign-born scientists and engineers a year from working in the United States.

The annual limit under the law for companies is, in effect, 85,000, which includes a 65,000-annual limit and a 20,000 exemption from the limit for individuals with a U.S. advanced degree. The 85,000 new H-1B petitions allowed each year come to only 0.05% of the U.S. labor force of approximately 165 million. For 18 consecutive years (since FY 2004) the annual supply of new H-1B visas for employers has been exhausted.

Even without other policy changes, the low annual limit represents a significant restriction on the ability of employers to hire foreign nationals, particularly in high-demand technology specialties. An indicator of the actual demand for talent came in March 2020, when U.S. Citizenship and Immigration Services (USCIS) received registrations from employers for approximately 275,000 individuals to be eligible for the annual H-1B lottery – more than 3 times the 85,000-annual limit, a gap in demand of 190,000. The sectors most directly hit by the economic downturn – airlines, restaurants and hotels – employ relatively few H-1B visa holders, while the top companies employing H-1B visa holders have a significant technology component in their businesses.

Since H-1B temporary visas are the primary way America retains talented people born abroad who are not admitted as refugees or family-sponsored immigrants, one can expect demand for the visas to continue. At U.S. universities, only approximately [20% of the full-time graduate students](#) in computer science and electrical engineering are U.S. students.

Among the findings in this analysis:

- The 30% denial rate for H-1B petitions for initial employment in the first quarter of FY 2020 is similar to the denial rate of 32% in the first quarter of FY 2019 and 35% in the second quarter of FY 2019, indicating this is a “new normal” of high denial rates compared to the 6% H-1B denial rate for such petitions in FY 2015. High denial rates should not be expected in a properly functioning immigration system, since, given the time and expense, employers generally only file cases for individuals they believe qualify for H-1B status.
- As in earlier fiscal years, the highest denials rates are for companies that provide information technology or other business services to American companies. The data indicate USCIS has established a different standard for deciding cases for companies that provide information technology (IT) services. Immigration

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law does not establish a different standard for adjudications based on the type of firm or the location work will be performed.

- The denial rate for initial employment in the first quarter of FY 2020 when compared to FY 2015 increased by 20 percentage points or more for 12 major companies that provide IT services or other business consulting services. Many of these and other companies hit by high denial rates are U.S. companies.
- The different standard for adjudications compared to recent years, as well as among different types of companies, has taken place without Congress changing the law or USCIS issuing new regulations. That has resulted in legal trouble for the Trump administration. Several court cases have been decided against U.S. Citizenship and Immigration Services.
- On March 10, 2020, U.S. District Judge Rosemary M. Collyer ruled that key U.S. Citizenship and Immigration Services memos and policies were unlawful, including those that have resulted in higher H-1B denial rates for companies that provide business services. In [*ITServe Alliance v. L. Francis Cissna*](#), the judge focused on USCIS policies interpreting an employer-employee relationship and an itinerary rule/short term approvals of H-1B petitions. Other judges have ruled against the USCIS for narrow interpretations of what qualifies as an H-1B “specialty occupation.”
- The denial rate for H-1B petitions for “continuing” employment (primarily for existing employees) was 10% in the first quarter of FY 2020, compared to denying only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017). In both FY 2018 and FY 2019, USCIS adjudicators denied 12% of H-1B petitions for continuing employment.
- A significant 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.” Many companies report being compelled to dismiss long-term, experienced employees, including individuals waiting years for an employment-based green card, whose H-1B status ended due to H-1B denials.

During its review, the administration should consider that many restrictions currently exist on H-1B visas, such as current salary requirements that mandate an H-1B professional be paid the same or higher than comparable U.S. workers as well as the low annual limits on new H-1B petitions. The administration may also wish to consider research that shows scientists and engineers in H-1B status boost employment, growth and productivity.

A [study](#) by economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin examined the last recession and found denying the entry of H-1B visa holders due to the H-1B annual limits impeded job growth for

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U.S.-born professionals. “The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries,” the economists concluded.

The economists also [examined productivity](#) and concluded, “When we aggregate at the national level, inflows of foreign STEM [science, technology, engineering and math] workers explain *between 30% and 50% of the aggregate productivity growth* that took place in the United States between 1990 and 2010.” They also found H-1B professionals were associated with higher wages for college-educated natives.

[Research](#) by Britta Glennon, an assistant professor at the Wharton School of Business at the University of Pennsylvania, found new restrictions on H-1B visas are likely to push jobs out of the United States, concluding, “[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.”

The Trump administration may seek to achieve a longstanding policy goal by further restricting the ability of employers to hire high-skilled foreign nationals, even though the president has stated he favors “merit-based” immigration and H-1B visa holders are the most highly educated foreign-born individuals admitted to the United States.

TRUMP ADMINISTRATION RESTRICTIONS AND HIGHER H-1B DENIAL RATES

The Trump administration has instituted policy changes that have made it more difficult for employers to use H-1B visas and have increased the denial rates for H-1B petitions. While proposing new restrictions, potentially as part of a review initiated by the April 22, 2020, [presidential proclamation](#), administration officials should consider restrictions USCIS has already imposed and those that exist under current law, including low annual limits on new H-1B petitions.

LOW NUMERICAL LIMITS

H-1B temporary visas are important because they are typically the only practical way a high-skilled foreign national working abroad or an international student educated in the United States can work long-term in America. They are the primary way America retains talented people born abroad who are not admitted as refugees or family-sponsored immigrants. Most employment-based immigrants (green card holders) first obtained H-1B status. At U.S. universities, only approximately [20% of the full-time graduate students](#) in computer science and electrical engineering are U.S. students. In FY 2019, 65% of H-1B visa holders possessed a master's degree or higher, [according to USCIS](#).

Table 2
H-1B Annual Limit and H-1B Registrations as Indicator of Demand

H-1B Annual Limit for Companies	March 2020 Registrations for H-1B Petitions for FY 2021	Number of Registrations in Excess of Annual Limit in March/April 2020
85,000	275,000	+190,000

Source: National Foundation for American Policy, USCIS. The figure 275,000 was the approximate number of registrations reported by USCIS.

For 18 consecutive years the annual supply of new H-1B visas for employers has been exhausted. (See Table 8 in the Appendix.) The annual limit under the law for companies is, in effect, 85,000, which includes a 65,000-annual limit and a 20,000 exemption from the limit for individuals with a U.S. advanced degree. The 85,000 new H-1B petitions allowed each year come to only 0.05% of the U.S. labor force of approximately 165 million.

Even without other policy changes, the low annual limit represents a significant restriction on the ability of employers to hire foreign nationals, particularly in high-demand technology specialties. To give a sense of the actual demand for talent, note in March 2020, USCIS received registrations from employers for approximately 275,000 individuals to be eligible for the annual H-1B lottery – more than 3 times the 85,000-annual limit. (See Table 2.) That did not

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include demand that may arise during the year or employers discouraged from registering by the low odds of obtaining an approval. While the current economic downturn related to the coronavirus pandemic has affected parts of the U.S. economy, the science and technology sector has been less negatively affected and, in some cases, demand for technical talent may have increased. The types of businesses most directly hit by the economic downturn – airlines, restaurants and hotels – employ relatively few H-1B visa holders, while the top companies employing H-1B visa holders have a significant technology component in their businesses.

REQUIRED WAGES FOR H-1B VISA HOLDERS

When hiring an H-1B professional, companies must pay the higher of the prevailing wage or actual wage paid to “all other individuals with similar experience and qualifications for the specific employment in question.”¹ Companies must also comply with a series of complex rules, including when attempting to move H-1B employees to a new location.

Research shows the legal requirement on salaries and the functioning of the U.S. labor market has resulted in H-1B visa holders being paid comparable to or higher than U.S. professionals with similar experience. The Government Accountability Office found H-1B professionals generally earn the *same* or *more* than their U.S. counterparts after comparing the median reported salaries of U.S. workers and H-1B professionals in the same fields and age groups.²

University of Maryland researchers Sunil Mithas and Henry C. Lucas, Jr. examined the skills and compensation of over 50,000 IT professionals in the United States and found foreign-born professionals in information technology (IT) earned more than their native counterparts. “[C]ontrary to popular belief, non-U.S. citizen IT professionals are not paid less compared to American IT professionals. More broadly, the evidence in this study provides indirect evidence that visa and immigration policies so far have not had any adverse impact on the wages of American IT professionals due to any relatively lower compensation of foreign IT professionals,” according to the study.³

Economists Magnus Lofstrom and Joseph Hayes with the Public Policy Institute of California researched H-1B visas and concluded, “We find that overall H-1B workers in STEM occupations have higher earnings than their otherwise

¹ Section 212(n)(1) of the Immigration and Nationality Act.

² *H-1B Visa Program: Reforms Are Needed to Minimize the Risks and Costs of Current Program*, Government Accountability Office, GAO-11-26, January 2011. To conduct the research, the GAO analyzed Current Population Survey (CPS) data on U.S. workers and information on H-1B salaries from the U.S. Citizenship and Immigration Services (USCIS) CLAIMS database.

³ S. Mithas and H.C. Lucas, “Are Foreign IT workers Cheaper? U.S. Visa Policies and Compensation of Information Technology Professionals,” *Management Science* (56:5) 2010, p. 762. Mithas and Lucas concluded, “To the extent supply of high-skill foreign IT professionals in the U.S. economy might induce skill-biased technical change (Acemoglu 1998), they not only benefit American professionals with whom they are complements by increasing the skill premium for all IT professionals, but they also create spillover effects in upstream and downstream sectors of the economy.”

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observationally similar U.S. born counterparts. In our occupation-specific analysis we find that H-1B workers in two of the five occupation groups analyzed (the largest occupation group, IT, and post-secondary education) have higher earnings than their otherwise observationally similar U.S. born counterparts. In the other three occupation groups (health, engineering and math and sciences) we fail to find convincing evidence of lower earnings among H-1B workers.”⁴ Lofstrom and Hayes found, “Overall, the data point towards a picture of comparatively highly skilled workers with earnings at least on par with those of U.S. born workers.”⁵

Some research has attempted to argue H-1B professionals are underpaid by pointing to wages listed in the Department of Labor’s database of Labor Condition Applications (LCAs). The problem with using Department of Labor data is it only lists the legal minimum an H-1B professional is paid. The legal requirement is to pay “*whichever is greater*” the “prevailing wage” or “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.”⁶

“Just because the LCA lists a Level 1 or Level 2 wage doesn’t mean the H-1B professional is being paid at Level 1 or Level 2 (or Level 3 or Level 4 for that matter),” said Kevin Miner, a partner at Fragomen. “Level 1 may be \$70,000 a year and a company can be paying the worker \$90,000 a year, but the way the Department of Labor data is presented one may assume the employer is paying no more than \$70,000 a year.” Miner points out companies list the wage level on a labor condition application based on DOL rules. “An employer has to choose the prevailing wage level based on the minimum requirements, and that establishes the prevailing wage regardless of what you are paying the H-1B employee. If a software engineer job requires a bachelor’s degree and 2 years of experience, that is a Level 1 prevailing wage under DOL’s guidance, regardless of how much above the prevailing wage the person will actually be paid.”⁷

Beyond the salary requirements, additional costs for H-1B visa holders that are not required when hiring native-born professionals include paying attorneys and government fees. Employers pay government-imposed fees and legal costs of between \$3,400 and \$16,560 for an initial H-1B petition, and \$6,300 to \$28,620 for the combined cost of an initial H-1B petition and an extension, according to an analysis by the Society for Human Resource Management (SHRM) and the [National Foundation for American Policy](#). Sponsoring an H-1B visa holder for permanent residence can be even more expensive. The uncertainty in the H-1B process also raises the cost for companies compared to hiring native-born workers.

⁴ Magnus Lofstrom and Joseph Hayes, “H-1Bs: How Do They Stack Up to U.S. Workers?” IZA Discussion Paper #6259. December 2011, pp. 14-15.

⁵ *Ibid.*, p. 15.

⁶ Section 212(n)(1) of the Immigration and Nationality Act.

⁷ Interview with Kevin Miner.

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Despite this, it still may be true that some H-1B visa holders are underpaid relative to their native-born counterparts. However, restrictive immigration policies have made the situation worse for H-1B professionals. USCIS has caused foreign nationals to become more reluctant to change jobs by increasing the denial rates for “continuing employment” and taking months to reach decisions on cases – unless an employer pays premium processing fees for quicker adjudications. (Premium processing is not always available from USCIS, including since March 20, 2020.) Individuals reluctant to change jobs because of a pending employment-based green card application would benefit from policies generally not favored by critics of H-1Bs, particularly higher immigration numbers and eliminating the per-country limit for employment-based immigrants.

H-1B DENIAL RATES: INITIAL EMPLOYMENT

More restrictive Trump administration policies have increased denials for H-1B petitions significantly, with denial rates rising from 6% in FY 2015 to 30% in the first quarter of FY 2020 for new H-1B petitions for initial employment, according to a National Foundation for American Policy analysis. The 30% denial rate is primarily for cases selected in the H-1B lottery held in April 2019 and not adjudicated until after October 1, 2019, which is the start of the first quarter of FY 2020. In FY 2019, the denial rate for initial employment was 21% in FY 2019 and 24% in FY 2018.

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.”⁸ 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’

⁸ USCIS H-1B Employer Data Hub.

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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.”⁹

Table 3 tells a remarkable story – all of the recent top 25 employers of new H-1B visa holders had higher denial rates for H-1B petitions for initial employment in the first quarter of FY 2020 than in FY 2015. Even large technology companies, such as Apple, had much higher denial rates in the first quarter of FY 2020 than in FY 2015. In the past two years, those companies generally had much lower denial rates than many other companies. Further analysis to determine potential new trends will require data on more quarters in FY 2020. (Table 3 lists employers in order by the number of new H-1B petitions approved in FY 2019.)

The 30% denial rate for H-1B petitions for initial employment in the first quarter of FY 2020 is similar to the denial rate of 32% in the first quarter of FY 2019 and 35% in the second quarter of FY 2019. The third and fourth quarters, which may have included cases most quickly approved after the April 2019 lottery, were 10% and 15% respectively, for an overall denial rate of 21% for H-1B petitions for initial employment in FY 2019. (See Table 6 in the Appendix.) This “new normal” of high denial rates for such petitions stands in contrast to the 6% H-1B denial rate in FY 2015. High denial rates should not be expected in a properly functioning immigration system, since, given the time and expense, employers generally only file cases for individuals they believe qualify for H-1B status.

As in earlier fiscal years, the highest denials rates are for companies that provide information technology or other business services to American companies. The data indicate USCIS has established a different standard for deciding 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.¹⁰

The denial rate for initial employment in the first quarter of FY 2020 compared to FY 2015 increased by 20 percentage points or more for 12 major companies that provide IT services or other business consulting services. Many of these and other companies hit by high denial rates are U.S. companies. As reported in an earlier [NFAP report](#), 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). Evidence indicates 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. The technology landscape has changed as these and similar companies are

⁹ Ibid.

¹⁰ Stuart Anderson, “IT Services Companies and Clients Bear Brunt of H-1B Crackdown,” *Forbes*, February 25, 2019.

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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.

Table 3
Denial Rates for H-1B Petitions for Initial Employment: FY 2015 vs. FY 2020

Employer	FY 2020 Denial Rate Initial Employment	FY 2015 Denial Rate Initial Employment	Change in Denial Rate in Percentage Points from FY 2015 to FY 2020
Amazon	16%	1%	+15
Google	14%	1%	+13
TCS	14%	6%	+8
Microsoft	14%	1%	+13
Deloitte	40%	18%	+22
Cognizant	60%	8%	+52
Facebook	8%	0%	+8
IBM	17%	3%	+14
Apple	8%	2%	+6
Intel	7%	1%	+6
Tech Mahindra	36%	4%	+32
Capgemini	30%	5%	+25
Larsen & Toubro	26%	2%	+24
Infosys	59%	2%	+57
Cisco	12%	1%	+11
Accenture	30%	4%	+26
Qualcomm	3%	0.4%	+3
Wipro	38%	7%	+31
PricewaterhouseCoopers	20%	1%	+19
Oracle	21%	1%	+20
Ernst & Young	23%	0.3%	+23
Uber	26%	2%	+24
Wal-Mart	18%	3%	+15
JPMorgan Chase	2%	1%	+1
HCL America	39%	2%	+37

Source: USCIS, National Foundation for American Policy. *FY 2020 data through first quarter of FY 2020. 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 by the number of new H-1B petitions approved in FY 2019.

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Denial rates are only one challenge for employers. Attorneys note Requests for Evidence can add thousands of dollars to employer costs and delay cases for months. 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 2020.¹¹

Those who follow technology closely believe that by providing technical talent, many high-skilled foreign nationals and companies that provide services help 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.”¹²

Advanced analytics and cloud computing are two common elements of digital transformation. “Digital transformation is the integration of digital technology into all areas of a business, fundamentally changing how you operate and deliver value to customers,” explains the Enterpriser’s Project, which focuses on chief information officers (CIOs). “A business may take on digital transformation for several reasons. But by far, the most likely reason is that they have to: It’s a survival issue for many. . . . Enterprise leaders have largely gotten the message – and are prioritizing accordingly. IDC forecasts that worldwide spending on technologies and services that enable digital transformation will reach \$1.97 trillion in 2022, per the (IDC) [Worldwide Semiannual Digital Transformation Spending Guide](#).”¹³

Replacing outdated legacy information technology systems is a key element of digital transformation. “An important element of digital transformation is, of course, technology,” according to the Enterpriser’s Project. “But often, it’s more about shedding outdated processes and legacy technology than it is about adopting new tech.”¹⁴ In a handful or so of cases in past years, H-1B visa holders were blamed for layoffs after some foreign nationals came on-site to manage the transition to new contracts – contracts that went out for bid and, industry professionals note, would have resulted in layoffs or at least a transfer of personnel whether or not the entity awarded the contract employed some H-1B visa holders. In retrospect, these cases should have been recognized as attempts by companies to undertake digital transformations, transformations that unfortunately can leave longtime employees trained primarily on legacy systems in untenable career situations. Ongoing training efforts for such employees before being placed in these situations would offer the best career protection.

¹¹ See here:

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

¹² Anderson, “IT Services Companies and Clients Bear Brunt of H-1B Crackdown.”

¹³ <https://enterpriseproject.com/what-is-digital-transformation>.

¹⁴ Ibid.

JUDGES RULE AGAINST TRUMP ADMINISTRATION ON H-1B VISAS

The different standard for adjudications compared to recent years, as well as among different types of companies, has taken place without Congress changing the law or USCIS issuing new regulations. That has resulted in legal trouble for the Trump administration. Several court cases have gone against U.S. Citizenship and Immigration Services.

On March 10, 2020, U.S. District Judge Rosemary M. Collyer ruled that key U.S. Citizenship and Immigration Services memos and policies were unlawful, particularly those that resulted in higher H-1B denial rates for information technology services companies. In [*ITServe Alliance v. L. Francis Cissna*](#), the judge focused on USCIS policies interpreting an employer-employee relationship and an itinerary rule/short term approvals of H-1B petitions.¹⁵

Employer-Employee Relationship: Beginning in 2018, USCIS started denying H-1B petitions under the theory that a contractor did not meet the definition of an employer if an H-1B professional performed work at a client's site. Judge Collyer wrote, "The current USCIS interpretation of the employer-employee relationship requirement is inconsistent with its regulation, was announced and applied without rulemaking, and cannot be enforced."

The USCIS interpretation was inconsistent with the USCIS regulations because, as plaintiff's attorneys pointed out, USCIS used the Department of Labor's definition of an employer and that definition reads: "Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee..." (Emphasis added.) The "or" proved pivotal.

"All an employer has to do now, because of the judge's ruling, is one of the following: hire, pay, fire or otherwise control the H-1B professional and then it will be considered a valid employer-employee relationship," said Jonathan Wasden, a partner with Wasden Baniyas, LLC who argued the plaintiff's case.¹⁶

Itinerary Rule and Short Approvals: Under the Trump administration, USCIS also began denying H-1B petitions unless an employer could list every contract or other work that would be performed while in H-1B status. It also approved H-1B petitions for periods as short as a [single day](#).

Plaintiffs in the *ITServe Alliance* case argued Congress never required applications to contain exhaustive lists of future work. The American Competitiveness and Workforce Improvement Act of 1998 states that employers could,

¹⁵ See Stuart Anderson, "Court Invalidates Key Trump Administration H-1B Visa Policies," *Forbes*, March 11, 2020.

¹⁶ *Ibid*.

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if necessary, retain an H-1B employee during “nonproductive” periods as long as a company paid the H-1B visa holder. Judge Collyer ruled, “The USCIS requirements that employers (1) provide proof of non-speculative work assignments (2) for the duration of the visa period is not supported by the statute or regulation and is arbitrary and capricious as applied to Plaintiffs’ visa petitions.”¹⁷

“After the decision, USCIS cannot approve H-1B petitions for a day or a week anymore because the judge definitively found that they were based on the itinerary/specific work rule, and she invalidated those rules,” said Bradley Baniyas, a partner with Wasden Baniyas, LLC. Wasden said that since the case was decided in the District of Columbia an employer that believes an H-1B petition was unjustly denied in ways connected to Judge Collyer’s opinion could file a case in the District of Columbia. Since the opinion was issued in March 2020, it is too soon to know if it will have an impact on H-1B denial rates.

H-1B Specialty Occupation: In four recent cases, judges ruled against a restrictive interpretation of what qualifies as an H-1B specialty occupation. The USCIS interpretation of a specialty occupation has contributed to higher denial rates. In a case brought by InspectionXpert Corporation (IXC), a judge [rejected the USCIS assertion](#) that it could deny an H-1B petition because the position could be filled by someone with a degree in more than one discipline, such as different types of engineering degrees.¹⁸

In three other cases, judges also ruled USCIS has adopted an unlawfully narrow definition of a specialty occupation. USCIS had issued a memo to adjudicators that stated an H-1B could be denied if not everyone working in particular type of job has a bachelor’s degree or a degree in a specific specialty.

Wasden, whose firm represented Taylor Made Software, said, “What this means going forward is that the first step of specialty occupation adjudication should be streamlined. If the DOL Occupational Outlook Handbook shows the majority of U.S. workers in the field have a degree in the specific specialty, then the position will qualify. Then the agency moves on to the second step and determines beneficiary qualifications.”¹⁹

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.”²⁰ That regulation could be issued in light of the recent review ordered on temporary visas in the presidential proclamation.

¹⁷ Ibid.

¹⁸ Stuart Anderson, “Judge Slaps Down USCIS In Significant H-1B Visa Court Case,” *Forbes*, March 9, 2020.

¹⁹ Stuart Anderson, “Judges Slap Down USCIS Again On H-1B Visas,” *Forbes*, April 8, 2020.

²⁰ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=1615-AC13>.

H-1B Denial Rates and Numerical Restrictions as Indicators of Current Restrictions

Table 4
Denial Rates for H-1B Petitions for Continuing Employment: FY 2015 vs. FY 2020

Employer	FY 2020 Denial Rate Continuing Employment	FY 2015 Denial Rate Continuing Employment	Change in Denial Rate in Percentage Points from FY 2015 to FY 2020
Cognizant	28%	3%	+25
Deloitte	19%	5%	+14
TCS	11%	3%	+8
Amazon	4%	1%	+3
Infosys	32%	1%	+31
Microsoft	2%	2%	<i>no change</i>
Google	2%	0.4%	+2
Capgemini	8%	3%	+5
Larsen & Toubro	7%	3%	+4
Wipro	13%	4%	+9
Accenture	12%	1%	+11
Ernst & Young	13%	2%	+11
Apple	0.3%	1%	-1
HCL America	28%	2%	+26
Facebook	1%	0.2%	+1
Intel	2%	1%	+1
Tech Mahindra	5%	2%	+3
IBM	9%	1%	+8
Oracle	2%	3%	-1
Cisco	3%	1%	+2
PricewaterhouseCoopers	17%	1%	+16
Wal-Mart	1%	1%	<i>no change</i>
Randstad Technologies	2%	2%	<i>no change</i>
Syntel	16%	3%	+13
Qualcomm	3%	2%	+1

Source: USCIS, National Foundation for American Policy. *FY 2020 data through first quarter of FY 2020. 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 denial rate for H-1B petitions for “continuing” employment (primarily for existing employees) was 10% in the first quarter of FY 2020, compared to denying only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017). In both FY 2018 and FY 2019, USCIS adjudicators denied 12% of H-1B petitions for continuing employment.

As a result of these denials, 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.

A significant 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.”²¹

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

FISCAL YEAR	DENIAL RATE
FY 2020*	10%
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 2020 data through first quarter of FY 2020. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

²¹ <https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions>.

H-1B Denial Rates and Numerical Restrictions as Indicators of Current Restrictions

Similar to cases for initial employment, among the most recent top 25 employers with the most approved H-1B petitions for continuing employment, 10 companies that provide information technology or other services to businesses had denial rates of 11% or higher. These companies showed a significant increase in denial rates compared to FY 2015, when denial rates for continuing employment were typically 3% or 4%. 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 the first quarter of FY 2020.

CONCLUSION: RESTRICTIONS PUSH JOBS OUT OF THE U.S.

The Trump administration may seek to achieve a longstanding policy goal by further restricting the ability of employers to hire high-skilled foreign nationals, even though the president has stated he favors “merit-based” immigration and H-1B visa holders and international students on STEM Optional Practical Training (OPT) are the most highly educated foreign-born individuals admitted to the United States.

In doing so, the administration should consider the many existing restrictions on H-1B visas, including current salary requirements that mandate an H-1B professional be paid the same or higher than comparable U.S. workers and the low annual limits on new H-1B petitions.

The administration may also wish to consider research that shows scientists and engineers in H-1B boost employment, growth and productivity.

A [study](#) by economists Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin examined the last recession and found denying the entry of H-1B visa holders due to the annual limits harmed job growth for U.S.-born professionals. “The number of jobs for U.S.-born workers in computer-related industries would have grown at least 55% faster between 2005-2006 and 2009-2010, if not for the denial of so many applications in the recent H-1B visa lotteries. Our highest estimate shows that computer firms could have possibly added more than three times more jobs for U.S.-born workers than they actually did during that period without all the unsuccessful H-1B visa applications,” the economists concluded.²²

[Research](#) by Peri, Shih and Sparber discovered that H-1B visa holders aided productivity growth, an important element of economic growth, and also encouraged higher wages for U.S. professionals. They found a 1% rise in

²² Giovanni Peri, Kevin Shih, Chad Sparber and Angie Marek Zeitlin (June 2014), *Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages During the Great Recession*, Partnership for a New American Economy.

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employment of foreign-born scientists and engineers “increases college-educated native wage growth between 5.6 and 9.3 percentage points.”²³

The economists also examined productivity and concluded, “When we aggregate at the national level, inflows of foreign STEM [science, technology, engineering and math] workers explain *between 30% and 50% of the aggregate productivity growth* that took place in the United States between 1990 and 2010.”²⁴

New restrictions on H-1B visas is likely to push more jobs out of the United States. 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.”²⁵ 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. Glennon concluded, “[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.”²⁶

²³ Giovanni Peri, Kevin Shih, and Chad Sparber, “STEM Workers, H-1B Visas, and Productivity in US Cities,” *Journal of Labor Economics*, Vol. 33, No. S1, US High-Skilled Immigration in the Global Economy (Part 2, July 2015), pp. S225-S255.

²⁴ Ibid.

²⁵ Britta Glennon, *How Do Restrictions on High-Skilled Immigration Affect Offshoring? Evidence from the H-1B Program*, Carnegie Mellon University, May 2019.

²⁶ Ibid.

APPENDIX

Table 6
Denial Rate By Quarters in 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. 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.

Table 7
Denial Rate By Quarters in 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. 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.

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Table 8
NEW H-1B PETITIONS ISSUED AGAINST THE H-1B CAP BY FISCAL YEAR

<u>Year</u>	<u>CAP*</u>	<u>#Issued</u>	<u>#Unused</u>
1992	65,000	48,600	16,400
1993	65,000	61,600	3,400
1994	65,000	60,300	4,700
1995	65,000	54,200	10,800
1996	65,000	55,100	9,900
1997	65,000	65,000	0
1998	65,000	65,000	0
1999	115,000	115,000	0
2000	115,000	115,000	0
2001	195,000	163,600	31,400
2002	195,000	79,100	115,900
2003	195,000	78,000	117,000
2004	65,000	65,000	0
2005	65,000	65,000	0
2006	65,000	65,000	0
2007	65,000	65,000	0
2008	65,000	65,000	0
2009	65,000	65,000	0
2010	65,000	65,000	0
2011	65,000	65,000	0
2012	65,000	65,000	0
2013	65,000	65,000	0
2014	65,000	65,000	0
2015	65,000	65,000	0
2016	65,000	65,000	0
2017	65,000	65,000	0
2018	65,000	65,000	0
2019	65,000	65,000	0
2020	65,000	65,000	0
2021	65,000	65,000	0

Source: Dept. of Homeland Security; National Foundation for American Policy. *Does not include exemptions from cap.

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