

H-1B DENIAL RATES THROUGH THE SECOND QUARTER OF FY 2020

EXECUTIVE SUMMARY

The Trump administration has continued to deny H-1B petitions for foreign-born scientists and engineers at high levels, according to an analysis by the National Foundation for American Policy (NFAP). Analyzing data through the second quarter of FY 2020 finds companies continue to be denied at much higher rates than in the years prior to when Donald Trump became president and instituted new policies. All top 25 employers of new H-1B professionals had higher denial rates for H-1B petitions for initial employment in FY 2020 (through the second quarter) than in FY 2015. In June 2020, the Trump administration added to the problems of employers by issuing a [proclamation](#) to suspend the entry of foreign nationals on H-1B, L-1 and other temporary visas. The latest data and policies illustrate that despite the rhetoric there has been little effort by Trump administration officials to implement “merit-based” immigration.

Denial rates for new H-1B petitions for initial employment rose from 6% in FY 2015 to 29% through the second quarter of FY 2020. The analysis is based on data from the USCIS [H-1B Employer Data Hub](#). For reasons not explained, USCIS did not make available data for H-1B petitions for “continuing” employment in the second quarter of FY 2020.

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 follows an April 2019 NFAP [report](#), an August 2019 [study](#), an October 2019 NFAP [report](#), a February 2020 [study](#) and a May 2020 [report](#).

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

FISCAL YEAR	DENIAL RATE
FY 2020*	29%
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 the second quarter of FY 2020. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

*H-1B Denial Rates Through the Second Quarter FY 2020***WHAT DOES THE SECOND QUARTER FY 2020 DATA SHOW?**

The recent top 25 employers of new H-1B visa holders continued to have far higher denial rates in FY 2020 than in FY 2015 (i.e., prior to the Trump administration). All the top 25 employers of new H-1B professionals had higher denial rates for H-1B petitions for initial employment in FY 2020 (through the second quarter) than in FY 2015. (See Table 2.) These are the top 25 companies with the most new H-1B petitions approved for initial employment in FY 2019.

Here is what the numbers show:

- 20 of the 25 top companies had H-1B denial rates for initial employment at least 10 percentage points higher in FY 2020 (through the second quarter) than in FY 2015. That includes large technology companies such as Cisco and Google.
- The highest denial rates continue to be 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 law does not have a different standard for adjudications based on the type of firm or the location work will be performed.
- The denial rate for initial employment through the second quarter of FY 2020 when compared to FY 2015 increased by 20 percentage points or more for 10 major companies that provide IT services or other business consulting services.
- Denial rates for initial employment for H-1B petitions were generally between 1% and 5% in FY 2015 for the top employers of H-1B professionals, compared to denials rates that mostly ranged from 15% to as high as 59% through the first two quarters of FY 2020.
- In FY 2015, 16 of the 25 top companies had denial rates of 2% or lower for H-1B petitions for initial employment.

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Table 2
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	15%	1%	+14
Google	15%	1%	+14
TCS	15%	6%	+9
Microsoft	12%	1%	+11
Deloitte	41%	18%	+23
Cognizant	52%	8%	+44
Facebook	7%	0%	+7
IBM	19%	3%	+16
Apple	9%	2%	+7
Intel	9%	1%	+8
Tech Mahindra	32%	4%	+28
Capgemini	33%	5%	+28
Larsen & Toubro	27%	2%	+25
Infosys	59%	2%	+57
Cisco	13%	1%	+12
Accenture	31%	4%	+27
Qualcomm	5%	0.4%	+5
Wipro	39%	7%	+32
PricewaterhouseCoopers	20%	1%	+19
Oracle	19%	1%	+18
Ernst & Young	23%	0.3%	+23
Uber	25%	2%	+23
Walmart	16%	3%	+13
JPMorgan Chase	3%	1%	+2
HCL America	37%	2%	+35

Source: USCIS, National Foundation for American Policy. *FY 2020 data through second 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.

*H-1B Denial Rates Through the Second Quarter FY 2020***WHAT SHOULD WE EXPECT IN THE THIRD QUARTER FY 2020?**

USCIS data released for the third quarter of FY 2020 (April, May and June) does not separate initial and continuing cases but it shows a lower denial rate of 4.1%.¹ However, because USCIS combines initial and continuing cases it is not possible to know the denial rate for H-1B petitions for initial employment in the third quarter. Continuing employment cases typically have lower denial rates and there are usually many more of them, which can skew the numbers.

The third quarter of a fiscal year (April, May and June) includes the first set of adjudications of H-1B “cap” cases. In FY 2020, it includes petitions selected by lottery through the new electronic registration system. In FY 2019, the data showed USCIS approved those petitions it could quickly in April, May and June (the third quarter) and granted Requests for Evidence (RFEs) or held other applications for later in the fiscal year. The percentage of completed cases with a Request for Evidence was 26.7% in the third quarter of FY 2019, compared to 60% in the first quarter of FY 2019. In a similar vein, 20.1% of the completed H-1B cases had a Request for Evidence in the third quarter of FY 2020, compared to 47.2% in the first quarter of FY 2020. That helps explain the lower denial rate in the third quarter of FY 2020 better than a change in adjudication standards, unless the lower denial rate continues in consecutive quarters.

One of the advantages of NFAP analyzing data each quarter through the H-1B Employer Data Hub and separating out initial and continuing cases is we discovered the denial rate in the third quarter of FY 2019 was much lower, due to the explanation above. As Table 3 shows, in the third quarter of FY 2019 the denial rate for initial approvals was 10%. That was the lowest denial rate for H-1B petitions for initial employment of the four quarters, with the fourth quarter having the second lowest denial rate.

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

FISCAL YEAR	APPROVALS	DENIALS	DENIAL RATE
1 st Quarter (FY 2019)	33,366	15,345	32%
2 nd Quarter (FY 2019)	15,407	8,125	35%
3 rd Quarter (FY 2019)	39,551	4,237	10%
4 th 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.

¹ https://www.uscis.gov/sites/default/files/document/data/l129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q3.pdf.

*H-1B Denial Rates Through the Second Quarter FY 2020***WILL THE FOURTH QUARTER SHOW THE IMPACT OF RESCINDING MEMOS?**

On June 17, 2020, as part of [a settlement](#) with the business group ITServe Alliance, USCIS issued a [new policy memo](#) (on June 17, 2020) and withdrew a February 2018 [memo](#) on “Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites.” USCIS also rescinded the [“Neufeld” memo](#), issued on January 8, 2010. The Neufeld memo used a test to determine if an “employer-employee” relationship existed, including for work at customer sites by H-1B visa holders, that could be interpreted in a restrictive way.

The memos and their interpretation have been blamed for much higher denial rates for H-1B petitions, particularly for IT services companies. If the rescission of the two memos has an impact on H-1B denials, it may begin to show in the data for the fourth quarter of FY 2020 and the first two quarters of FY 2021.

“USCIS ran a second H-1B cap lottery after the FY2021 quota of 85,000 was not reached during the initial filing period,” according to the Fragomen law firm. “Employers whose H-1B registrations were selected in the second drawing will have from August 17 to November 16, 2020 to submit their petitions.”² Adjudications of those petitions would show up in data for the fourth quarter of FY 2020 and in FY 2021.

Table 4
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.

The low annual limit represents a significant restriction on the ability of employers to hire foreign nationals, particularly in high-demand technology specialties. The new electronic registration system, which does not require the completion of a full application, provides a sense of the actual demand for talent. 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 4.) That does not include demand that may arise during the year or employers discouraged from registering by the low odds of obtaining an approval.

As expected, uncertain economic conditions caused a number of employers to decide not to submit full completed H-1B applications. That explains why USCIS needed a second drawing. Still, overall, science and technology

² Weekly Update, Fragomen, August 20, 2020.

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occupations have been less negatively affected by the economic downturn as a result of the coronavirus pandemic. The types of businesses most directly affected – 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.

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. For reasons not explained on the H-1B Employer Data Hub website, USCIS did not make available data for H-1B petitions for “continuing” employment for the second quarter of FY 2020.

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.

As a result of denials for continuing employment, 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.

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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.”³

Similar to cases for initial employment, among the most recent top 25 employers with the most approved H-1B petitions for continuing employment in FY 2019, 10 companies that provide information technology or other services to businesses had denial rates of 11% or higher for H-1B petitions for continuing employment in the first quarter of FY 2020. 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.

Data for FY 2019 indicate there is less fluctuation per quarter in the denial rates for continuing employment than for H-1B petitions for initial employment. That is likely because the H-1B lottery selection process in April (now in March) for initial employment cases introduces a new element in the calendar not present in continuing employment cases, which are received throughout the year.

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

FISCAL YEAR	APPROVALS	DENIALS	DENIAL RATE
1 st Quarter (FY 2019)	43,268	9,706	18%
2 nd Quarter (FY 2019)	65,127	7,545	10%
3 rd Quarter (FY 2019)	76,764	7,474	9%
4 th 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.

³ <https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions>.

CONCLUSION

One of the challenges for Trump administration officials in implementing a policy of “merit-based” immigration may be finding foreign-born individuals they consider meritorious enough to enter the United States. Attorneys have reported that U.S. consulates in Europe are refusing O-1 visas for individuals that U.S. Citizenship and Immigration Services has found to “possesses extraordinary ability” or a “record of extraordinary achievement.”⁴

Denial rates for H-1B petitions remain at much higher levels than in the years before Donald Trump became president. These increased denial rates are the result of administration policies. It is possible additional restrictive policies on high-skilled immigration will be implemented before the end of 2020.

⁴ Stuart Anderson, “Trump Immigration Policy Now Blocks World’s Most Highly Skilled,” *Forbes*, August 12, 2020.

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Table 7
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.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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