

NATIONAL FOUNDATION FOR AMERICAN POLICY

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H-1B DENIAL RATES FOR FY 2020 AND THE IMPACT OF COURT DECISIONS

EXECUTIVE SUMMARY

Losses in federal court cases that declared administration actions to be unlawful forced Trump officials to change restrictive immigration policies and resulted in dramatic improvements in H-1B denial rates for companies, according to a new analysis by the National Foundation for American Policy (NFAP). The denial rate for new H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020, much lower than the denial rate of 21% through the first three quarters of FY 2020. The Trump administration managed to carry out what judges determined to be unlawful policies for nearly four years. Those policies resulted in high denial rates for H-1B petitions for initial employment of 24% in FY 2018, 21% in FY 2019 and 13% in FY 2020, compared to 6% in FY 2015. The FY 2020 denial rate would have been much higher without the recent court rulings.

H-1B petitions for “initial” employment are primarily for new employment, typically a case that would count against the H-1B annual limit. NFAP closely tracks H-1B petitions by quarter and found the denial rate for H-1B petitions for initial employment was 15% in the fourth quarter of FY 2019, compared to 1.5% in the fourth quarter of FY 2020. Absent significant changes in government policies, high denial rates are unusual since employers would be unlikely to apply for H-1B petitions for individuals who do not qualify given the time and expense.

Table 1
Denial Rate for H-1B Petitions for Initial (New) Employment: 4th Quarter FY 2020 vs. 4th Quarter FY 2019

H-1B Denial Rate (Initial Employment) 4th Quarter FY 2019	15.0%
H-1B Denial Rate (Initial Employment) 4th Quarter FY 2020	1.5%

Source: USCIS, National Foundation for American Policy. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

The denial rates for H-1B petitions for initial employment were much higher during the Trump administration than the denial rate of between 5% to 8% during FY 2010 to FY 2015. The Trump administration attempted to make its H-1B policies lawful through an interim final rule on H-1B visas issued in October 2020, but that rule was blocked for violating the Administrative Procedure Act. That regulation went even further than recent administration policies, and company and university personnel said it would have made it nearly impossible to employ H-1B visa holders.

H-1B visas are important because they generally represent the only practical way for a high-skilled foreign national, including an international student, to work long-term in the United States and have an opportunity to become an employment-based immigrant and a U.S. citizen. Ten of the top 25 employers of new H-1B visa holders had denial rates that ranged from 23% to 58% during first three quarters of FY 2020, but their denial rates for H-1B petitions for initial employment dropped to between 1% to 4% in the fourth quarter of FY 2020. Attorneys confirmed their cases approved in the fourth quarter had low rates of denial. The NFAP analysis is based on data from the U.S. Citizenship and Immigration Services (USCIS) [H-1B Employer Data Hub](#).

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Table 2
Denial Rate for H-1B Petitions for Initial (New) Employment

FISCAL YEAR	DENIAL RATE
FY 2020*	13%
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 for all four quarters of FY 2020. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

The fourth quarter of FY 2020 began on July 1, 2020. On June 17, 2020, USCIS was compelled to issue a [new policy memo](#) and withdraw a February 2018 [memo](#) on “Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites” after losing a court case and then agreeing to [a settlement](#) with the business group ITServe Alliance. In addition, USCIS rescinded the [“Neufeld” memo](#), a January 2010 memo interpreted more aggressively during the Trump administration to deny H-1B petitions when companies engaged in work at customer sites by H-1B visa holders.

The memos and their interpretation were blamed for much higher denial rates for H-1B petitions, particularly for information technology (IT) services companies. Data on H-1B denials in the fourth quarter of FY 2020 revealed the impact of the rescission of the two memos.

Another factor in the decline in the denial rate: In 2020, judges also more frequently ruled against restrictive interpretations of whether a position met the definition of an H-1B specialty occupation. For example, a [March 5, 2020, opinion](#) in federal court [was decided against USCIS](#) and its interpretation of who qualifies for a specialty occupation after the agency denied an H-1B petition for a Quality Engineer position for InspectionXpert Corporation. A December 16, 2020, [decision](#) by a panel of judges in the U.S. Court of Appeals for the Ninth Circuit concluded that USCIS’s restrictive interpretation of its regulation was arbitrary and capricious when denying an H-1B petition for a computer programmer, claiming the occupation did not meet the definition of a specialty occupation.

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. The denial rate for H-1B petitions for “continuing” employment

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was 7% in FY 2020, lower than the 12% denial rate in FY 2018 and FY 2019, due primarily to the impact of the court decision and settlement. In recent history, the 7% denial rate is still high compared to the 3% denial rate for H-1B petitions for continuing employment between FY 2011 and FY 2015.

An October 2017 [memo](#) on “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status” was blamed for much of the increase in denials for continuing employment during the Trump administration. According to a USCIS statement, “The previous policy instructed officers to give deference to the findings of a previously approved petition.” Many extensions of H-1B status were reviewed under a new standard with policies that judges later determined to be unlawful.

The list of the top 25 employers of new H-1B visa holders in FY 2020 was distorted, according to attorneys, by USCIS holding or delaying H-1B applications for many IT services companies in FY 2019 while awaiting direction from headquarters (or for other reasons) and pushing decisions on those petitions to FY 2020. That caused several IT services companies to experience an artificial increase in their approved petitions in FY 2020 compared to FY 2019.

Amazon had the most approved H-1B petitions for initial employment in FY 2020 with 4,774. Amazon also had the most new H-1B petitions approved in FY 2019. Infosys had the second most H-1B petitions approved for initial employment (3,512), followed by TCS (2,409), Cognizant (2,005), Microsoft (1,791) and Google (1,682).

H-1B petitions are counted in the fiscal year they are approved, not in the cap year in which the H-1B visa holder begins to work. USCIS often releases data that combine H-1B petitions for initial and continuing employment, which has created two problems. First, it has obscured the higher denial rate for initial employment since petitions for continuing employment are generally more numerous and have experienced lower denial rates. Second, the approvals for continuing employment for some companies are inflated by counting the same employee often multiple times. The 2015 USCIS Administrative Appeals Office decision in *Matter of Simeio Solutions* requires employers to file amended H-1B petitions in most instances where an H-1B professional works at a new work location, which particularly affects IT services and other professional companies.

The Trump administration moved aggressively against high-skilled immigration from the beginning of Donald Trump’s term. The “Buy American and Hire American” executive order was the first significant action, followed by a series of memos and directions to USCIS adjudicators that made it much more difficult for employers to gain approval for H-1B petitions. Courts ruled a number of these policies unlawful. In April 2020, a presidential proclamation blocked the entry of employment-based immigrants and nearly all categories of immigrants. A June 2020 proclamation suspended the entry of H-1B visa holders and others. (A court blocked implementation of the

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June proclamation for many employers.) In October 2020, the Department of Labor (DOL) and the Department of Homeland Security (DHS) issued highly restrictive H-1B regulations. Both were interim final rules that were blocked in court. In January 2021, DHS published a regulation to eliminate the H-1B lottery and replace it with a system to award petitions based on highest salary, which fit the administration's policy of making it more difficult for international students and IT professionals to work in the United States. In January 2021, DOL issued a final version of the H-1B wage regulation that would require employers to pay salary for H-1B visa holders by new DOL rule will require employers to pay, on average, "34% higher salaries at the Level 1 wage for biochemists and biophysicists, 29% higher for software developers and database administrators, and 28% more for computer programmers, according to a National Foundation for American Policy estimate of the new rule's impact."¹

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

¹ Stuart Anderson, "DOL H-1B Visa Wage Rule: Donald Trump's Bad Parting Gift To Immigrants," *Forbes*, January 13, 2021.

SUCCESSFUL LAWSUITS LEAD TO LARGE 4TH QUARTER DROP IN DENIAL RATE

Trump administration losses in federal court forced a change in restrictive immigration policies that resulted in dramatic improvements in H-1B denial rates for companies, according to an analysis by the National Foundation for American Policy. After judges declared administration policies to be unlawful, the denial rates declined. The denial rate for new H-1B petitions for initial employment was 1.5% in the fourth quarter of FY 2020, compared to a denial rate of 21% through the first three quarters of FY 2020 (and 21% in FY 2019 and 24% in FY 2018). Another comparison: The denial rate for H-1B petitions for initial employment, which are primarily cases selected in the annual H-1B lottery, was as high as 15% in the fourth quarter of FY 2019. (NFAP closely tracks H-1B by quarter.)

During first three quarters of FY 2020, 10 of the top 25 employers of new H-1B visa holders had denial rates that ranged from 23% to 58%, but their denial rates for H-1B petitions for initial employment dropped to between 1% to 4% in the fourth quarter of FY 2020.

Attorneys have confirmed that their cases approved in the fourth quarter had low rates of denial. Dagmar Butte of Parker Butte and Lane said she noticed the change in denials and also saw few Requests for Evidence (RFEs). In contrast, in the first quarter of FY 2020, nearly half (47.2%) of completed cases received a Request for Evidence from USCIS adjudicators.² Requests for Evidence are often expensive and time-consuming for employers.³

Vic Goel, managing partner of Goel & Anderson said the trend in low denial rates continued into the first quarter of FY 2021. “Following the decision and settlement in the ITServe Alliance case that caused the rescission of the 2010 and 2018 memos, H-1B approval rates improved substantially,” he said.⁴

The fourth quarter of FY 2020 began on July 1, 2020, which is significant since it was on June 17, 2020, as part of [a settlement](#) with the business group ITServe Alliance, that USCIS issued a [new policy memo](#) 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.

²https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q3.pdf.

³ Interview with Dagmar Butte.

⁴ Interview with Vic Goel.

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The memos and their interpretation were blamed for a large proportion of the higher denial rates for H-1B petitions, particularly for information technology (IT) services companies. The impact of the rescission of the two memos was seen in the data on H-1B denial rates in the fourth quarter of FY 2020.

Judges also have [ruled against](#) another commonly-cited reason by USCIS adjudicators to deny H-1B petitions – that the H-1B visa holder or the position to be filled did not meet the definition of an H-1B specialty occupation. District courts have ruled against USCIS in several cases, which also likely had an impact on adjudications. A court ruling that went in the Trump administration's favor was appealed to the U.S. Court of Appeals for the Ninth Circuit and the judges overturned the decision.

On December 16, 2020, a panel of judges in the Ninth Circuit “reversed the district court’s grant of summary judgment for the U.S. Citizenship and Immigration Services (USCIS), and remanded, concluding that USCIS’s denial of an H-1B temporary worker visa was arbitrary and capricious.”⁵

“Innova Solutions, Inc. (Innova) wanted to hire a citizen of India with a bachelor’s degree as a computer programmer and petitioned for an H-1B ‘specialty occupation’ visa on his behalf,” according to a summary of the opinion. “Under the relevant regulation, Innova had to establish that a ‘baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.’ Although the Department of Labor’s Occupational Outlook Handbook (OOH) provides that ‘[m]ost computer programmers have a bachelor’s degree,’ and that a bachelor’s degree is the ‘[t]ypical level of education that most’ computer programmers need, USCIS concluded that ‘the OOH does not state that at least a bachelor’s degree or its equivalent in a specific specialty is normally the minimum required.’

“The panel concluded that USCIS’s denial of the H-1B visa petition was arbitrary and capricious. First, the panel explained that there is no daylight between *typically* needed, per the OOH, and *normally* required, per the regulation, and that USCIS’s suggestion that there is “space” between these words is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The panel also explained that the regulation is not ambiguous and deference to such an implausible interpretation is unwarranted.”⁶

Still, despite the recent change, it is worth noting that for nearly four years the Trump administration, without any change in the law, was able to increase the H-1B denial rate by significant margins by issuing memos and urging or directing USCIS adjudicators to interpret regulations in a highly restrictive manner. It is now known those policies were unlawful. The H-1B denial rate for initial employment increased from between 5% to 8% between FY 2010

⁵ <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/16/19-16849.pdf>.

⁶ Ibid.

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and FY 2015 to 24% in FY 2018, 21% in FY 2019 and 13% in FY 2020. The FY 2020 denial rate would have been much higher without the recent court rulings.

Table 3
Denial Rate for H-1B Petitions for Initial Employment: First 3 Quarters FY 2020 vs. 4th Quarter FY 2020

Employer	First 3 Quarters of FY 2020 H-1B Denial Rate for Initial Employment	Fourth Quarter of FY 2020 H-1B Denial Rate for Initial Employment
Amazon	7%	1%
Infosys	58%	1%
TCS	15%	1%
Cognizant	48%	4%
Microsoft	3%	1%
Google	1%	1%
Capgemini	30%	1%
HCL America	34%	1%
IBM	12%	1%
Deloitte	23%	2%
Facebook	1%	0.2%
Accenture	28%	2%
Wipro	37%	1%
Tech Mahindra	30%	0.4%
Intel	5%	1%
Larsen & Toubro	26%	1%
Apple	4%	0.2%
Qualcomm	2%	1.5%
Ernst & Young	14%	2%
Oracle	5%	0.4%
PricewaterhouseCoopers	16%	3%
Cisco	10%	0.4%
Walmart	5%	1%
Goldman Sachs	4%	0%
Atos Syntel	39%	0%

Source: USCIS, National Foundation for American Policy. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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Table 4 demonstrates how the denial rates for H-1B petitions for initial employment were similar in the same quarters of FY 2019 and FY 2020 until the change in the fourth quarter of FY 2020. The 7% denial rate in the third quarter of FY 2020 was similar to the denial rate of 10% in the third quarter of FY 2019. (See Table 4.) That was lower than the denial rate in other quarters because the third quarter of a fiscal year (April, May and June) includes the first set of adjudications of H-1B “cap” cases – and in both FY 2019 and FY 2020, USCIS approved or denied those petitions that adjudicators decided on quickly (in April, May and June) and granted Requests for Evidence (RFEs) or held other applications for later in the fiscal year (or the following fiscal year).

Table 4
Denial Rate By Quarters in FY 2019 and FY 2020: H-1B Petitions for Initial (New) Employment

<i>1st Quarter (FY 2020)</i>	<i>1st Quarter (FY 2019)</i>	<i>2nd Quarter (FY 2020)</i>	<i>2nd Quarter (FY 2019)</i>	<i>3rd Quarter (FY 2020)</i>	<i>3rd Quarter (FY 2019)</i>	<i>4th Quarter (FY 2020)</i>	<i>4th Quarter (FY 2019)</i>
30%	32%	27%	35%	7%	10%	1.5%	15%

Source: USCIS, National Foundation for American Policy. Percentages are rounded off (except the fourth quarter of FY 2020). 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.

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 2020.⁷ That helps explain the lower denial rate in the third quarter of FY 2020.

TOP EMPLOYERS OF NEW H-1B VISA HOLDERS

The list of the top 25 employers of new H-1B visa holders in FY 2020 is skewed by USCIS holding or delaying H-1B applications for many IT services companies in FY 2019 while awaiting direction from headquarters and pushing decisions on those petitions until FY 2020, say attorneys. As a result, several IT services companies saw artificial increases in their approved petitions in FY 2020 when compared to FY 2019. H-1B petitions are counted in the fiscal year they are approved, not in the cap year in which an H-1B visa holder will start working.

Twenty of the top 25 employers of new H-1B visa holders in FY 2020 had higher denial rates than in FY 2015 (i.e., before the Trump administration). The denial rates would have been much higher if not for recent improvement for companies in the fourth quarter of FY 2020.

⁷https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q3.pdf.

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Amazon had the most approved H-1B petitions for initial employment in FY 2020 with 4,774. Amazon also had the most new H-1B petitions approved in FY 2020. Infosys had the second most H-1B petitions approved for initial employment (3,512), followed by TCS (2,409), Cognizant (2,005), Microsoft (1,791) and Google (1,682).

Table 5
Approved H-1B Petitions and Denial Rates for Initial Employment: FY 2015 vs. FY 2020

Employer	FY 2020 Approved Petitions Initial Employment	FY 2015 Approved Petitions Initial Employment	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	4,774	1,070	3%	1%	+2
Infosys	3,512	2,765	36%	2%	+34
TCS	2,409	4,771	10%	6%	+4
Cognizant	2,005	3,849	43%	8%	+35
Microsoft	1,791	970	2%	2%	+0
Google	1,682	849	1%	1%	+0
Capgemini	1,413	556	21%	5%	+16
HCL America	1,405	1,318	22%	2%	+20
IBM	1,360	1,934	9%	3%	+6
Deloitte	1,231	1,222	17%	18%	-1
Facebook	1,184	422	1%	0%	+1
Accenture	1,140	3,443	20%	4%	+16
Wipro	1,004	3,185	26%	7%	+19
Tech Mahindra	887	1,571	17%	4%	+13
Intel	788	636	2%	1%	+1
Larsen & Toubro	784	861	18%	2%	+16
Apple	748	532	1%	2%	-1
Qualcomm	557	269	2%	0.4%	+2
Ernst & Young	528	685	7%	0.3%	+7
Oracle	522	500	3%	1%	+2
PricewaterhouseCoopers	492	650	11%	1%	+10
Cisco	488	270	5%	1%	+4
Walmart	435	70	3%	3%	+0
Goldman Sachs	399	255	1%	1%	+0
Atos Syntel	380	1,057	30%	1%	+29

Source: USCIS, National Foundation for American Policy. *FY 2020 data through all four quarters 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 its related entities, and Larsen & Toubro and L&T Technology Services.

*H-1B Denial Rates For FY 2020 and the Impact of Court Decisions***H-1B PETITIONS FOR CONTINUING EMPLOYMENT**

The denial rate for H-1B petitions for “continuing” employment (primarily for existing employees) was 7% in FY 2020, lower than the 12% denial rate in FY 2018 and FY 2019. This decline in the H-1B denial rate in FY 2020 for continuing employment cases reflects the impact of the court decision and settlement. The 7% denial rate for H-1B petitions for continuing employment is more than twice as high as the 3% denial rate that prevailed between FY 2011 and FY 2015. 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 or third quarters of FY 2020. That means it was not possible for NFAP to distinguish denial rates by quarter for continuing cases.

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

FISCAL YEAR	DENIAL RATE
FY 2020*	7%
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 all four quarters of FY 2020. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

The USCIS data on H-1B petitions for continuing employment in Table 7 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.⁸ Rates can also be inflated by the need to extend H-1B professionals who have been waiting years in the employment-based green card backlog.

⁸ Interview with Vic Goel.

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Table 7
Approved H-1B Petitions and Denial Rates for Continuing Employment: FY 2015 vs. FY 2020

Employer	FY 2020 Approved Petitions Continuing Employment	FY 2015 Approved Petitions Continuing Employment	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	12,873	13,186	16%	3%	+13
Amazon	9,466	1,124	2%	1%	+1
Infosys	6,334	6,561	21%	1%	+20
TCS	6,016	4,409	10%	3%	+7
Deloitte	5,326	1,762	20%	5%	+15
Microsoft	5,209	1,857	1%	2%	-1
Google	4,138	1,460	1%	0.4%	+1
Capgemini	3,894	979	4%	3%	+1
Facebook	3,226	560	1%	0.2%	+1
Accenture	3,432	2,465	5%	1%	+4
Apple	3,134	1,160	0.4%	1%	-1
Ernst & Young	2,887	964	12%	2%	+10
HCL America	2,801	1,618	15%	2%	+13
Wipro	2,587	3,354	7%	4%	+3
Larsen & Toubro	2,532	1,311	4%	3%	+1
Intel	2,119	1,044	2%	1%	+1
Tech Mahindra	2,028	1,155	4%	2%	+2
IBM	1,913	1,930	6%	1%	+5
Oracle	1,681	904	2%	3%	-1
PricewaterhouseCoopers	1,526	732	13%	1%	+12
Cisco	1,498	873	2%	1%	+1
Atos Syntel	1,436	1,276	8%	3%	+5
Qualcomm	1,201	986	2%	2%	+0
Mphasis	1,175	558	3%	2%	+1
Walmart	1,087	321	1%	1%	+0

Source: USCIS, National Foundation for American Policy. *FY 2020 data through all four quarters 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.

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For nearly all companies, in FY 2015 the denial rates for continuing employment were typically 3% or 4%. Over the past four years, 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 released.

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.”⁹

DEMAND FOR H-1B PROFESSIONALS AT LEAST 275,000 A YEAR

The low annual limit on new H-1B visas 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 did not require completing a full application, provided 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 8.) That does not include the demand that may arise during the year or employers discouraged from registering by the low odds of obtaining an approval.

Table 8
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.

H-1B visas are essential because they generally are the only practical way for a high-skilled foreign national, including an international student, to work long-term in the United States. That is a major reason the visas are so

⁹ <https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions>.

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much in demand. If Congress were to attempt to place an annual limit close to the actual demand for new H-1B visas, the 275,000 registrants for the lottery provides a sense of the overall demand for H-1B status.

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 occupations have been less negatively affected by the economic downturn due to 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.

CONCLUSION

The evidence is that the Trump administration's success in restricting high-skilled immigration was achieved through unlawful means. Judges ruled that the USCIS policies that resulted in high H-1B denial rates were illegal. After stopping those policies, H-1B denial rates returned to their previous low levels. The Biden administration will need to decide if it wants to implement the Trump administration's restrictive policies on high-skilled immigration or focus on welcoming highly skilled individuals to America to innovate, start new businesses, create new jobs and make U.S. companies more competitive.

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Table 9
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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