

National Foundation for American Policy

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New Research: Unlawful Policies Under Trump Administration Fueled High Denial Rates for H-1B Petitions

H-1B Denial Rates Drop to 1.5% in Fourth Quarter of FY 2020 After Courts Ruled Trump H-1B Policies Were Unlawful

Arlington, Va. – 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), a nonpartisan policy research group. 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.

The study, “H-1B Denial Rates For FY 2020 and the Impact of Court Decisions,” can be found at <https://nfap.com/>.

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](#).

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 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 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."

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](#).

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.

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.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Cornell Law School professor Stephen W. Yale-Loehr and former INS Commissioner James W. Ziglar. Over the past 24 months, NFAP's research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post* and other major media outlets. The organization's reports can be found at www.nfap.com. Twitter: [@NFAPResearch](https://twitter.com/NFAPResearch)

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