

H-1B DENIAL RATES THROUGH THE SECOND QUARTER OF FY 2021

EXECUTIVE SUMMARY

Due to the Trump administration’s losses in federal court, denial rates for H-1B petitions were much lower during the first two quarters of FY 2021 (most of which took place during the Trump administration) than during the same period in FY 2020, according to an analysis by the National Foundation for American Policy (NFAP). Judicial decisions that found the Trump administration’s actions to be unlawful and a legal settlement forced Trump officials to change restrictive immigration policies and resulted in dramatic improvements in H-1B denial rates for companies beginning in the fourth quarter of FY 2020. The denial rate for new H-1B petitions for initial employment was 7.1% through the first two quarters of FY 2021 (which is from October 1, 2020, to March 31, 2021), compared to a denial rate for initial employment of 28.6% through the first two quarters of FY 2020 (before policies changed).

H-1B petitions for “initial” employment are primarily for new employment, typically a case that would count against the H-1B annual limit. The NFAP analysis is based on data from the U.S. Citizenship and Immigration Services (USCIS) [H-1B Employer Data Hub](#). In the fourth quarter of FY 2020, the denial rate for new H-1B petitions for initial employment was 1.5%, much lower than the denial rate of 21% through the first three quarters of FY 2020, or the 15% denial rate in the fourth quarter of FY 2019. (See this January 2021 NFAP [report](#) on *H-1B Denial Rates for FY 2020 and the Impact of Court Decisions*.)

**Table 1
Denial Rate for H-1B Petitions for Initial (New) Employment: FY 2021 vs. FY 2020**

Fiscal Year	Approvals	Denials	Denial Rate
FY 2021 (First Two Quarters)	39,501	3,040	7.1%
FY 2020 (First Two Quarters)	38,150	15,341	28.6%

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

The Trump administration’s 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 court rulings that led to low denial rates in the fourth quarter of FY 2020. In retrospect, the Trump administration managed to carry out what judges determined to be unlawful policies for nearly four years, illustrating the limitations of relying on the court system to prevent restrictive immigration policies.

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 vacated for violating the Administrative Procedure Act. Company and university personnel said the regulation would have made it nearly impossible to employ H-1B visa holders.

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H-1B policy changes have been costly for employers. In 2015, USCIS began a policy that required employers to file amended petitions whenever they received a new labor condition application (LCA) from the Department of Labor. USCIS used an Administrative Appeals Office (precedent decision on a petition filed by Simeio Solutions to bind adjudicators to the new policy. An NFAP analysis estimates the USCIS policy has cost employers approximately \$600 million a year, or more than \$3 billion, in legal and filing fees since 2015.

The denial rate for H-1B petitions for “continuing” employment (primarily for existing employees) was 3% in the first two quarters of FY 2021, compared to 7% in FY 2020 and as high as 12% in FY 2018 and FY 2019. USCIS denied only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017).

The denial rates discussed in the report are separate from the large number of H-1B registrations rejected each year because of the low numerical limit under U.S. immigration law. In March 2021, employers [filed 308,613 H-1B registrations](#) for cap selection for FY 2022, but only 85,000 H-1B petitions could be chosen under the law, which means over 72% of H-1B registrations for high-skilled foreign nationals were rejected even before an adjudicator evaluated the application.

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.

*H-1B Denial Rates Through the Second Quarter of FY 2021***UNDERSTANDING THE DECLINE IN H-1B DENIAL RATES**

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 the 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.

Table 2
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 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’s](#) 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 the agency denied an H-1B petition for a computer programmer by claiming the occupation did not meet the definition of a specialty occupation.

The denial rates for H-1B petitions for initial employment were between 5% to 8% during FY 2010 to FY 2015, much lower than during the Trump administration. (See Table 3.)

H-1B Denial Rates Through the Second Quarter of FY 2021

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 past administration policies, and company and university personnel said it would have made it nearly impossible to employ H-1B visa holders.

U.S. District Judge Jeffrey S. White vacated the rule [in an order on December 1, 2020](#). The Trump administration argued that the unemployment rate allowed the Department of Homeland Security and the Department of Labor to bypass the normal rulemaking process. Judge White, citing data from the National Foundation for American Policy, wrote, “The statistics presented regarding pandemic-related unemployment still indicate that unemployment is concentrated in service occupations and that a large number of job vacancies remain in the areas most affected by Rules: computer operations which require high-skilled workers.” During oral arguments and in a declaration, plaintiffs’ attorney Paul Hughes discussed an [NFAP analysis](#) that found hundreds of thousands of active job vacancy postings in computer occupations in the United States as of October 2, 2020.¹

DATA FOR THE SECOND QUARTER OF FY 2021

All of the top employers of new H-1B visa holders experienced denial rates for H-1B petitions for initial employment that were lower during the first two quarters of FY 2021 than during the same period in FY 2020. These represent the top 25 companies with the most new H-1B petitions approved for initial employment in FY 2020.²

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

FISCAL YEAR	DENIAL RATE
FY 2021*	7%
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 2021 data through the second quarter of FY 2021. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

¹ Stuart Anderson, Trump Immigration Loss: Judge Declares H-1B Visa Rules Unlawful,” *Forbes*, December 2, 2021.

² Data for the first two quarters of FY 2020 were unavailable for Goldman Sachs and Atos Syntel.

H-1B Denial Rates Through the Second Quarter of FY 2021

Table 4
Denial Rates for H-1B Petitions for Initial Employment (First 2 Quarters): FY 2021 vs. FY 2020

Employer	FY 2020 Denial Rate Initial Employment*	FY 2021 Denial Rate Initial Employment*	Change in Denial Rate in Percentage Points from FY 2020 to FY 2021
Amazon	15%	4%	-11
Infosys	59%	5%	-54
TCS	15%	7%	-8
Cognizant	52%	8%	-44
Microsoft	12%	5%	-7
Google	15%	2%	-13
Capgemini	33%	8%	-25
HCL America	37%	7%	-30
IBM	19%	7%	-12
Deloitte	41%	11%	-30
Facebook	7%	2%	-5
Accenture	31%	6%	-25
Wipro	39%	8%	-31
Tech Mahindra	32%	8%	-24
Intel	9%	4%	-5
Larsen & Toubro	27%	3%	-24
Apple	9%	4%	-5
Qualcomm	5%	4%	-1
Ernst & Young	23%	8%	-15
Oracle	19%	5%	-14
PricewaterhouseCoopers	20%	6%	-14
Cisco	13%	5%	-8
Walmart	16%	4%	-12
Goldman Sachs	n/a	4%	n/a
Atos Syntel	n/a	3%	n/a

Source: USCIS, National Foundation for American Policy. *FY 2020 and FY 2021 data through second quarter of each fiscal year. 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 2020. The denial rate for Goldman Sachs and Atos Syntel through the first two quarters of FY 2020 was not available.

H-1B Denial Rates Through the Second Quarter of FY 2021

Table 4 shows companies that supply information technology services experienced the largest declines in their denial rates in the first two quarters of FY 2021 as compared to the same period in FY 2020, with 9 companies showing denial rates for H-1B petitions for initial employment that were at least 24 percentage points lower in FY 2021. However, other types of companies also saw improvements: Amazon’s H-1B denial rate for initial employment was 11 percentage points lower in the first two quarters of FY 2021 as compared to the same period in FY 2020, while Google’s was 13 percentage points lower.

MORE THAN 70% OF H-1B PETITIONS ARE REJECTED WITHOUT ADJUDICATION

In the United States, H-1B visas are essential because they typically represent the only practical way for high-skilled foreign nationals, including international students, to work long-term in America. However, numerical restrictions on high-skilled temporary visas block most foreign-born applicants from working in America in a given year.³

In March 2021, employers [filed 308,613 H-1B registrations](#) for cap selection for FY 2022 for only 85,000 H-1B petitions (65,000 plus a 20,000-exemption for individuals with an advanced degree from a U.S. university). That means over 72% of H-1B registrations for high-skilled foreign nationals were rejected even before an adjudicator evaluated the application.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.

**Table 5
H-1B Annual Limit and H-1B Registrations as Indicator of Demand**

H-1B Annual Limit for Companies	March 2021 Registrations for H-1B Petitions for FY 2022	Number of Registrations in Excess of Annual Limit in March/April 2021
85,000	308,613	+223,613

Source: National Foundation for American Policy, USCIS. The figure 308,613 was the number of registrations reported by USCIS.

³ See Stuart Anderston, Testimony before the House Immigration and Citizenship Subcommittee, July 13, 2021.

⁴ That is separate from policies during the Trump administration that [courts](#) found to be [unlawful](#) and which resulted in [denial rates for H-1B petitions](#) for initial employment as high as 24% in FY 2018. *H-1B Denial Rates for FY 2020 and the Impact of Court Decisions*, NFAP Policy Brief, National Foundation for American Policy, January 2021.

*H-1B Denial Rates Through the Second Quarter of FY 2021***H-1B PETITIONS FOR CONTINUING EMPLOYMENT**

The denial rate for H-1B petitions for “continuing” employment (primarily for existing employees) was 3% in the first two quarters of FY 2021, compared to 7% in FY 2020 and as high as 12% in FY 2018 and FY 2019. USCIS denied only 3% of H-1B petitions for continuing employment in FY 2015 (and only 5% as recently as FY 2017). 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, which prevents comparison between the same period in FY 2020 and FY 2021.

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

FISCAL YEAR	DENIAL RATE
FY 2021*	3%
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 2021 data through first quarter of FY 2021. 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 had reported 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 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

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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.”⁵

In April 2021, the Biden administration [rescinded the October 2017 memo](#). “USCIS is issuing policy guidance in the [USCIS Policy Manual](#) instructing officers to give deference to prior determinations when adjudicating extension requests involving the same parties and facts unless there was a material error, material change, or new material facts,” according to USCIS.⁶

A COSTLY USCIS POLICY REQUIRING AMENDED H-1B PETITIONS

In 2015, USCIS began a policy that required employers to file amended petitions whenever they received a new labor condition application (LCA) from the Department of Labor. USCIS used an Administrative Appeals Office (AAO) precedent decision on a petition filed by Simeio Solutions to bind adjudicators to the new policy. A [recent lawsuit](#) by the business group ITServe Alliance has challenged the USCIS action and labeled it unlawful, including because it was not established through a regulation subject to notice and comment.⁷

An NFAP analysis estimates the USCIS policy has cost employers approximately \$600 million a year, or more than \$3 billion, in legal and filing fees since 2015. NFAP concluded employers filed nearly 700,000 more H-1B petitions for continuing employment in the five years after the *Matter of Simeio Solutions* decision than in the five years before. The cost estimate is based on H-1B filing fees (\$1,960), premium processing (\$1,410) and legal fees (\$1,500). The \$3 billion estimate is conservative since it does not include H-1B petitions filed in FY 2021. Moreover, it rests on the assumption that only 75% of employers paid for premium processing between FY 2016 and FY 2020, although attorneys believe the percentage was likely much higher due to the length of USCIS adjudications and the potential for employers to fall out of status without a timely decision.

CONCLUSION

Denial rates for H-1B petitions appear to have returned to more traditional levels after court decisions and a legal settlement ended the Trump administration’s H-1B policies found to be unlawful. Still, those policies imposed significant costs on employers, visa holders and the economy, likely contributing to more work and talent moving to other countries.

⁵ <https://www.uscis.gov/news/news-releases/uscis-updates-policy-ensure-petitioners-meet-burden-proof-nonimmigrant-worker-extension-petitions>.

⁶ <https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-on-deference-to-previous-decisions>.

⁷ Stuart Anderson, “Lawsuit Aims To Overturn Costly H-1B Visa Policy,” *Forbes*, August 17, 2021.

H-1B Denial Rates Through the Second Quarter of FY 2021

**Appendix: 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
2022	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

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. Advisory Board members include Columbia University economist Jagdish Bhagwati, Cornell Law School professor Stephen W. Yale-Loehr, Ohio University economist Richard Vedder and former INS Commissioner James 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.
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