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Latest Data Show H-1B Visas Being Denied At High Rates



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Donald Trump signs the "Buy American and Hire American" executive order on April 18, 2017, which ... [+] GETTY

U.S. Citizenship and Immigration Services (USCIS) is denying H-1B petitions at historically high rates, according to the latest government data. While H-1B data in the third quarter showed a change from earlier in the year, analysis indicates this change has little to do with any relaxation in the Trump administration's restrictive immigration policies.

“Denial rates for H-1B petitions have increased significantly, rising from 6% in FY 2015 to 24% through the third quarter of FY 2019 for new H-1B petitions for initial employment,” according to a new National Foundation for American Policy (NFAP) [analysis](#). “To put this in perspective, between FY 2010 and FY 2015, the denial rate for ‘initial’ H-1B petitions never exceeded 8%, while today the rate is three times higher.”

The denial rates for H-1B petitions for initial employment (primarily for new employees) have increased for nearly all leading companies—particularly for information technology (IT) services companies, whom it appears government officials have singled out for the most restrictive policies. Out of the 27 companies examined in the NFAP analysis, 12 companies that provide professional or information technology services to U.S. companies had denial rates over 30% through the first three quarters of FY 2019. In contrast, most of these companies had denial rates between 2% and 7% in FY 2015.

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

FISCAL YEAR	DENIAL RATE
FY 2019	24%
FY 2018	24%
FY 2017	13%
FY 2016	10%

FY 2015

Source: Source: USCIS, National Foundation for American Policy. *FY 2019 data through the third quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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Petitions for “initial employment” are primarily cases that count against the H-1B annual limit of 65,000 and the 20,000 exemption from the limit for foreign nationals who received advanced degrees from U.S. universities. USCIS defines an “initial” H-1B petition as “new employment or new concurrent employment” and a “continuing” H-1B petition as “continuing employment [with the same employer], change of employer and amended petitions.”

Denial rates also are high for H-1B petitions for continuing employment, which, as noted, are used primarily for existing employees. An October 2017 [USCIS memo](#) made it less likely adjudicators would approve applications for H-1B visa holders to extend their status. The denials have ended the U.S. careers of thousands of people, forcing them to leave the country.

“In the first three quarters of FY 2019, USCIS adjudicators denied 12% of H-1B petitions for ‘continuing’ employment, compared to denying only 3% of H-1B petitions for

continuing employment in FY 2015 (and only 5% as recently as FY 2017),” according to the National Foundation for American Policy report. “Between FY 2009 and FY 2017 the denial rate on H-1B petitions for continuing employment never exceeded 6%.”

Table 2: Denial Rate for H-1B Petitions for Continuing Employment

FISCAL YEAR	DENIAL RATE
FY 2019	12%
FY 2018	12%
FY 2017	5%
FY 2016	4%
FY 2015	3%

Source: Source: USCIS, National Foundation for American Policy. *FY 2019 data through the third quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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The reason for the increase in H-1B denial rates is clear: USCIS has changed the standards for approving H-1B petitions without promulgating new regulations or

Congress passing a new law. “USCIS has raised the legal standard they use to decide whether enough evidence has been presented with petitions to approve them, without any legal authority to do so and without any notice to the public,” William Stock, a founding member of Klasko Immigration Law Partners, LLP, told me in an interview.

USCIS documents [released in September 2019](#), following a Freedom of Information Act (FOIA) lawsuit filed by the American Immigration Lawyers Association, show it is unlikely the agency has adhered to the law. “What the documents do not say is more important than what they say,” Jonathan Wasden, a partner with Wasden Banias LLC, commented in an interview at the time the documents were released. “Their most controversial policies (overreaching into Department of Labor regulations, requiring guaranteed work assignments and the employer-employee rule) lack . . . support. It appears that the agency made dramatic changes to H-1B policy without grounding those changes in any law.”

Table 3: FY 2019 Denial Rate for 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%
OVERALL FY 2019	88,324	27,707	24%

Source: USCIS National Foundation for American Policy, FY 2019 data through the third quarter of FY 2019. Denial rates rounded.

Source: USCIS, National Foundation for American Policy. FY 2019 data through the third quarter of FY 2019. Percentages are rounded off. Data extracted and analyzed from USCIS H-1B Employer Data Hub.

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The “initial employment” cases USCIS decided during the third quarter of FY 2019 are primarily cases selected in the H-1B lottery that was held in April 2019 (for individuals who started working in FY 2020). According to the NFAP analysis, there was a denial rate of 10% for initial employment cases in the third quarter of FY 2019, which was lower than the denial rates of 32% and 35% in the first and second quarters of FY 2019.

“While there was a ‘decline’ in the denial rate for H-1B petitions for ‘initial’ employment during the third quarter of FY 2019, that does not reflect a relaxation in restrictive administration policies but can be explained by USCIS adjudicators approving the most easily approvable cases selected in the April 2019 ‘lottery’ for H-1B petitions that count against the annual limit—and issuing other cases Requests for Evidence (RFEs),” notes the NFAP study.

USCIS reports the agency completed a lower percentage of cases without an RFE in May and June 2019 (months that are part of the third quarter) than at any other time during the year. USCIS does not distinguish between “initial” and “continuing” employment cases when reporting its RFE data. However, it can take several weeks for employers to respond to and receive a decision on cases with an RFE, meaning USCIS would not have adjudicated such cases during the third quarter of FY 2019.

“Based on how the agency processes cases, this data suggests the environment has not improved for employers,” said Lynden Melmed, a partner at Berry Appleman & Leiden and former Chief Counsel for USCIS, in an interview. “‘Cream of the crop’ cases would have been approved during that time period, but cases where the government issued an RFE would likely not show up in that data set because they would not be decided until much later.”

Melmed notes it appears USCIS denied up to 10% of H-1B petitions for initial employment without issuing a Request for Evidence. He thinks that may mean adjudicators are giving companies fewer opportunities to cure deficiencies in their applications.

It is worth noting that the denial rate for H-1B petitions for continuing employment (for existing employees) remained relatively stable (and high) at 10% in the second quarter of FY 2019 and 9% in the third quarter.

One can anticipate a higher denial rate for initial employment cases when statistics for the fourth quarter of FY 2019 become public.

The evidence indicates the Trump administration remains committed to making it more difficult for foreign-born scientists and engineers to work in America. In the coming months, one should expect additional measures to make the process more challenging for employers and the foreign-born individuals they seek to hire.

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