NATIONAL FOUNDATION FOR AMERICAN POLICY

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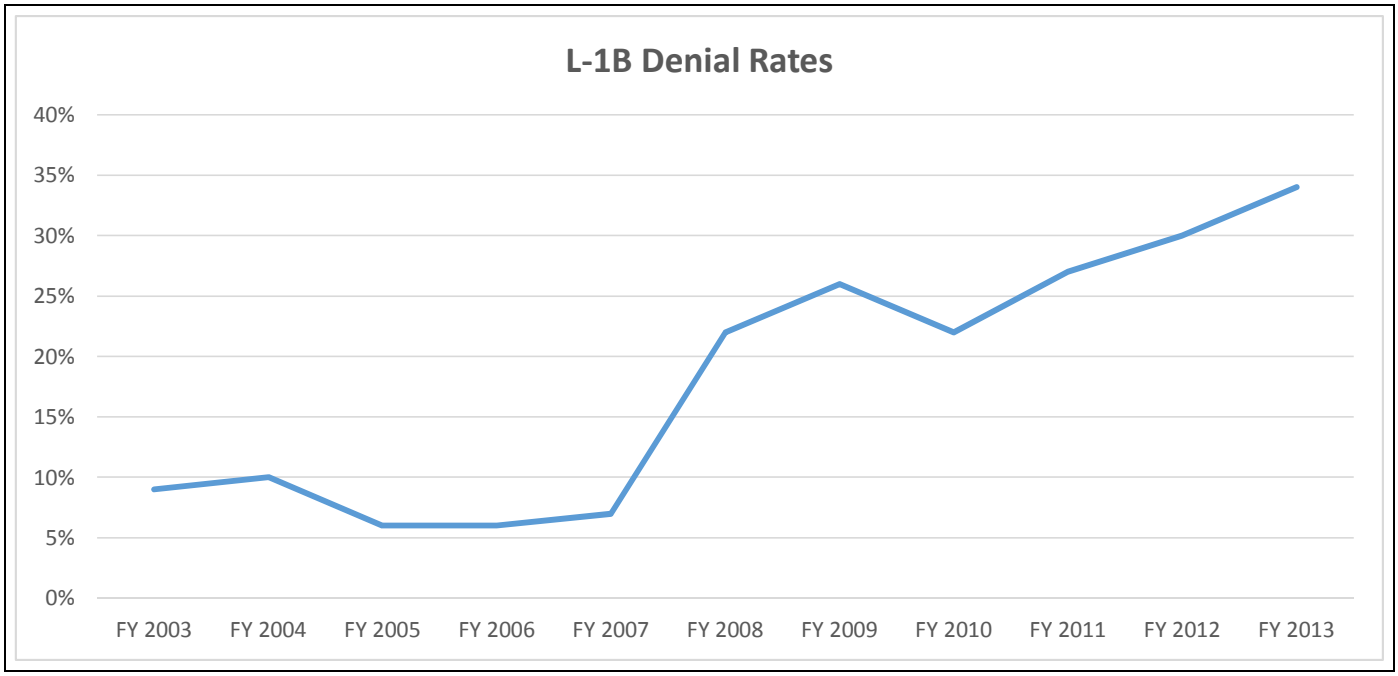
L-1 DENIAL RATES FOR HIGH SKILL FOREIGN NATIONALS CONTINUE TO INCREASE

EXECUTIVE SUMMARY

In FY 2012 and 2013, U.S. Citizenship and Immigration Services (USCIS) increased its already historically high rate of denials for L-1B petitions, a visa category used by employers to transfer highly skilled employees into America. USCIS actions directly affect the ability of employers to increase jobs, innovation and production inside the United States. While as recently as FY 2006 the denial rate for L-1B petitions was 6 percent, the denial rate for L-1B petitions rose to 34 percent in FY 2013, after rising to 30 percent in FY 2012 – a more than five-fold increase in the rate of denials despite no new regulation changing the adjudication standard. (The increase in denial rates, particularly of Indian nationals, started in FY 2008, as detailed in an earlier NFAP report.) Time-consuming Requests for Evidence (RFE) from adjudicators for L-1B petitions also continued at a high level – 46 percent in FY 2013. That means in 2013 about half of petitions to transfer in employees with specialized knowledge were either denied or delayed by U.S. Citizenship and Immigration Services adjudicators. U.S. Citizenship and Immigration Services released the 2012 and 2013 data in response to a Freedom of Information Act (FOIA) request filed by the American Immigration Lawyers Association (AILA).

Figure 1



Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy; Data run for all nationalities Of Citizenship and Immigration Services Consolidated Operational Repository (CISCOR). Note: Data include both initial applications and renewals and are calculated by USCIS by measuring approvals and denials in a category in a year. USCIS labels its data fiscal year. Data for FY 2012 and FY 2013 obtained from AILA FOIA request of USCIS.

BACKGROUND

L-1B status to transfer an employee with "specialized knowledge" into the United States can be valid for 5 years. "Specialized knowledge" for an L-1B petition is defined in the law as "special knowledge of the company product and its application in international markets" or "an advanced level of knowledge of processes and procedures of the company."[1] To obtain permission to transfer an employee with "specialized knowledge" in L-1B status into the United States an employer, in most cases, must first obtain an individual petition approval from U.S. Citizenship and Immigration Services and, in general, then use that approved petition to obtain a visa from a U.S. post abroad for the employee to gain entry to America. (The employee must have worked at least one year abroad for the employer.) Some employers qualify to apply for "blanket" petitions from U.S. Citizenship and Immigration Services. That allows employers to pre-certify the qualifying corporate relationship and for employees then to file directly for L-1 visas with consulates abroad, documenting their qualifications or credentials in the process.

Denial rates for L-1B petitions increased in FY 2012 and FY 2013 – *after* U.S. Citizenship and Immigration Services officials pledged in early 2012 to develop new proposed guidance, for public review and comment, in order to update and modernize the understanding of the specialized knowledge definition. The new proposed guidance never materialized and, in the eyes of employers and their attorneys, the situation has continued to provide inconsistent decision-making and the high levels of denials and Requests for Evidence have continued in the past two years.[2] In February 2012, the National Foundation for American Policy released a report detailing the high denial rates and Requests for Evidence from USCIS adjudicators.[3] USCIS eventually released its own data publicly, though the agency released less than what had been obtained by NFAP. USCIS released the 2012 and 2013 data after the American Immigration Lawyers Association submitted a request through the Freedom of Information Act.

U.S. Citizenship and Immigration Services adjudicators possess the power to approve or deny petitions to work in America. The significant increase in denial rates and Requests for Evidence in recent years illustrates how difficult USCIS adjudicators have made it for companies to transfer their own employees internally within a company to work in America. In a highly competitive global marketplace, the consequence is that companies become more likely to move work out of the United States – or decide not to invest here in the first place – to avoid the difficulties of the U.S. immigration system.

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[1] As cited in Daryl Buffenstein and Bo Cooper, *Business Immigration Law & Practice*, vol. 1, (Washington, D.C.: American Immigration Lawyers Association, 2011), p. 863.
[2] USCIS did issue a July 2, 2013 policy memorandum (PM-602-0086) explaining to adjudicators that decisions of the Administrative Appeals Office (AAO) that are not precedents do not "modify agency guidance or practice," which means adjudicators should not apply the 2008 GST Case, a non-precedent AAO decision with a restrictive view of specialized knowledge, to L-1B petitions in general.
[3] *Analysis: Data Reveal High Denial Rates For L-1 and H-1B Petitions at U.S. Citizenship and Immigration Services*, NFAP Policy Brief, National Foundation for American Policy, February 2012.

"It is very difficult for companies to make business decisions when there is so much uncertainty in the L-1 visa process," according to Lynden Melmed, partner, Berry Appleman & Leiden and former chief counsel at USCIS. "A company is going to be unwilling to invest in a manufacturing facility in the U.S. if it does not know whether it can bring its own employees into the country to ensure its success. A better dialogue between the agency and business groups is long overdue."[4]

Robert Deasy, senior director of liaison and information at the American Immigration Lawyers Association, has examined examples of Requests for Evidence and has found a disturbing pattern. "When immigration attorneys have found certain types of Requests for Evidence they decided in the next cycle of applications to supply that material in the next set of initial applications to prevent problems. But then they would receive new Requests for Evidence from adjudicators asking for different information. After adjusting again and providing that new type of information ahead of time in new applications they found adjudicators requesting yet another set of information. It makes one feel there is some type of concerted effort going on."[5]

Table 1
L-1B Denial Rates: FY 2003 to FY 2013

Fiscal Year	L-1B Denial Rates
FY 2003	9%
FY 2004	10%
FY 2005	6%
FY 2006	6%
FY 2007	7%
FY 2008	22%
FY 2009	26%
FY 2010	22%
FY 2011	27%
FY 2012	30%
FY 2013	34%

Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy; Data run for all nationalities of Citizenship and Immigration Services Consolidated Operational Repository (CISCOR). Note: Data include both initial applications and renewals and are calculated by USCIS by measuring approvals and denials in a year. USCIS labels its data fiscal year but CISCOR states the calendar year is used for data on I-129 petitions. Data for FY 2012 and FY 2013 obtained from AILA FOIA request of USCIS.

As reported in a previous NFAP Policy Brief, employers report the time lost due to the increase in denials and Requests for Evidence has cost millions of dollars in project delays and contract penalties, while aiding

[4] Interview with Lynden Melmed via email.
[5] Interview with Robert Deasy via email.

competitors that operate exclusively outside the United States – beyond the reach of U.S. Citizenship and Immigration Services adjudicators and U.S. consular officers. (The data in this report include only petitions at USCIS, not decisions made at consular posts.)

Given the resources involved, employers are selective about who they sponsor. The high rate of denials (and Requests for Evidence) is from a pool of applicants selected by employers because they believe the foreign nationals meet the standard for approval, making the high rate of denials difficult to defend. Denying employers the ability to transfer in key personnel or gain entry for a skilled professional or researcher harms innovation and job creation in the United States, encouraging employers to keep more resources outside the country to ensure predictability.

DENIAL RATES FOR L-1B PETITIONS

Figure 1 and Table 1 show denial rates for L-1B petitions rose from 6 percent in FY 2006 to 34 percent in FY 2013, despite no change in the regulation on L-1Bs. In FY 2012, the denial rate had risen to 30 percent, from 27 percent in FY 2011. The denial rates for L-1B petitions were at 26 percent in FY 2009, 22 percent in FY 2010 and 27 percent in FY 2011.[6] In other words, before 2008, denial rates were below 10 percent. Since FY 2008, denial rates have been over 20 percent, and now over 30 percent. (These include denials for both new (initial) cases for L-1B and extensions of individuals already working in the United States in L-1B status.) Despite requests for additional data, USCIS has not provided a breakdown of approvals and denials for nationals by country for both initial and extension (renewal) cases. However, both information from companies and data previously received by NFAP indicate denials are more prevalent for employees born in India.

Companies believe that denials either at U.S. Citizenship and Immigration Services or at consulates, particularly involving Indian nationals, share the common attribute of new (unwritten) standards that go beyond the statute and regulations. As reported previously, employers say it has become difficult to plan projects and personnel placement in light of the shifting adjudications landscape. In short, the uncertainty means employers are unclear which cases are likely to be approved, which denied, and which likely to undergo a lengthy Request for Evidence.

Employers say that at times they believe applicants are rejected for L-1B status if a particular consular officer or an adjudicator believes a company could not possibly have more than three to five people with specialized knowledge in a particular area. Nothing in the statute or regulations indicates “specialized knowledge” need be numerically restricted to a handful of people in a company. In fact, in companies employing thousands of people

[6] USCIS. In data obtained for FY 2011 and earlier, USCIS data were labeled fiscal year in its data but CISCOR states the calendar year is used for data on I-129 petitions for L-1, H-1B, and O-1 petitions. Denial rates are calculated using the total approvals and denials in the category in a year.

in highly specialized fields and product lines, it would not even be feasible to operate in most circumstances if specialized knowledge was restricted to three or four people at a time in a specific subject area, product or service.

Another type of denial, employers say, comes from USCIS adjudicators and consular officers requiring a standard of "extraordinary ability" be met to permit the transfer of employees into the United States with specialized knowledge. Requests for Evidence for L-1B petitions have included asking whether the individual received a patent. And companies note that even patent holders have been denied L-1B petitions under the new, arbitrary standards.

Table 2
L-1B Data for FY 2012 and FY 2013

FISCAL YEAR	RECEIPTS	APPROVALS	DENIALS	REQUEST FOR EVIDENCE (RFE)
FY 2012	18,740	14,180	6,068	8,688
FY 2013	17,723	11,944	6,242	8,363

Source: of Citizenship and Immigration Services Consolidated Operational Repository (CISCOR). Data for FY 2012 and FY 2013 obtained from AILA FOIA request of USCIS. Note: Cases received in one fiscal year may be decided in another fiscal year.

REQUESTS FOR EVIDENCE

Along with increased denials employers have seen a continuation of high rates of "Requests for Evidence" or RFEs, which are used by USCIS adjudicators to obtain more information in lieu of making an immediate decision on a petition. Employers have noted an RFE can result in months of delays for an application, affecting costs and potentially delaying projects and harming the ability to fulfill terms of a contract.

In FY 2012, the Request for Evidence rate remained at a high rate of 43 percent of L-1B petitions. The rate rose to 46 percent in FY 2013. As recently as FY 2004, USCIS adjudicators requested additional evidence for L-1B petitions in only 2 percent of the cases. (See Table 3.)

If the Request for Evidence rate remains high it would negate much of the benefit of even an improvement in denial rates, since employers would still need to undergo potentially months of uncertainty and additional costs without decisions being made on the transfer or employment of key personnel.

L-1 Denial Rates for High Skill Foreign Nationals Continue to Increase

The Request for Evidence rate for L-1B petitions (to transfer employees with specialized knowledge) rose from 17 percent in FY 2007 to 49 percent in FY 2008 and reached what analysts would see as an astonishing level of 63 percent rate in FY 2011.[7]

Table 3
USCIS Rate of Requests for Evidence for L-1B Petitions

Year	Request for Evidence Rate for L-1B Petitions
FY 2003	16%
FY 2004	2%
FY 2005	9%
FY 2006	9%
FY 2007	17%
FY 2008	49%
FY 2009	35%
FY 2010	44%
FY 2011	63%
FY 2012	43%
FY 2013	46%

Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy; Data run of Citizenship and Immigration Services Consolidated Operational Repository (CISCOR). Note: USCIS labels its data fiscal year but CISCOR states the calendar year is used for data on I-129 petitions for L-1, H-1B, and O-1 petitions. Data for all nationalities. Data for FY 2012 and FY 2013 obtained from AILA FOIA request of USCIS. RFE percentage for FY 2012 and FY 2013 calculated from total of approvals and denials, which results in a lower percentage for RFE's than using receipts. For FY 2003 to FY 2011, USCIS provided the RFE rate.

THE FOCUS ON INDIAN NATIONALS

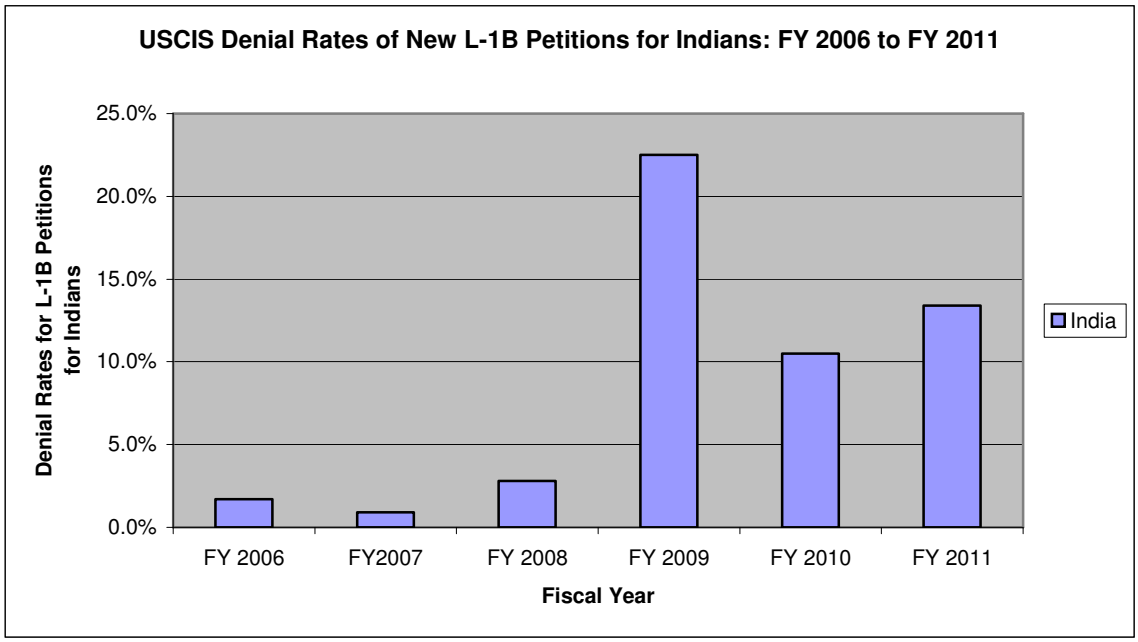
Based on an NFAP examination of data for FY 2011 and earlier, it appears much of the increase in the denial rate has been focused on Indian nationals.[8] U.S. Citizenship and Immigration Services denied more new L-1B petitions for Indians in FY 2009 (1,640) than in the previous 9 fiscal years combined (1,341 denials between FY 2000 and FY 2008).

In FY 2006 the L-1B denial rate of new (initial) petitions (not extensions) for Indians was 1.7 percent, falling to 0.9 percent in FY 2007, and then rising to 2.8 percent in FY 2008. However, in FY 2009, the denial rate of new L-1B

[7] The Request for Evidence rate is the percentage of applications (approved and denied) in a year in which an adjudicator formally requested additional evidence from an employer.
[8] In the past, the official government response to the issue of denials has been to suggest that since the United States issues many visas in general in India and Indians receive a large percentage of the L-1 visas or H-1B petitions issued each year that means there is nothing wrong with the petition and visa approval process. However, simply because India has a large pool of skilled professionals that employers find desirable to hire (or transfer) tells us nothing in particular about whether individual cases are decided properly and whether standards for approval have changed substantially.

petitions for Indians increased to 22.5 percent even though there had been no change in the regulations.[9] USCIS did not release country-specific data for FY 2012 and FY 2013 but interviews with employers and attorneys indicate the problems with receiving approvals for L-1B petitions involving Indian nationals have continued.

Figure 2



Source: U.S. Citizenship and Immigration Services; National Foundation for American Policy (analysis of data). Data run of Citizenship and Immigration Services Consolidated Operational Repository (CISCOR). Data in figure 2 are only for Indians and for new petitions, not extensions.

Concern that L-1B petitions for Indians have been singled out might be alleviated if the data showed other countries have experienced similar increases in the rate of denial for L-1B petitions with U.S. Citizenship and Immigration Services. However, the data show that while other foreign nationals experienced an increase in denial rates for new L-1B petitions starting in FY 2009, those denial rate increases were far lower than for Indian nationals.

[9] All data in the report from USCIS. The data on country-specific approvals and denials, which focuses on (new) initial applications for L-1, were run separately by USCIS and may not correspond precisely with the other data run highlighted in this report (overall denial rates, not country-specific) that include renewals. According to the Department of Homeland Security, denial rates are calculated by utilizing the number of approvals and denials in a fiscal year. The number of receipts in a year should not be used because cases received in one fiscal year may not be processed in the same fiscal year, according to DHS. Also, USCIS data are based on the country of birth of the applicant. While this naturally corresponds to the location of the foreign national in the vast majority of the cases there are instances were an individual born in one country may not be applying for a transfer for work from the country of birth. These factors should not affect USCIS data that use the same methodology over the time period examined.

From FY 2008 to FY 2009, the denial rate for new L-1B petitions for employees of Indian origin increased eight-fold – from 2.8 percent to 22.5 percent – while the denial rate for Canadians rose only from 2.0 percent in FY 2008 to 2.9 percent in FY 2009. The denial rate doubled or tripled for China, France, Germany, Japan and the United Kingdom in FY 2009, but all within a range of 4.1 percent to 5.9 percent, compared to India's FY 2009 denial rate of 22.5 percent. Moreover, the denial rate for France, Japan and the United Kingdom dropped back in FY 2010 to a level similar to the denial rates for those countries in FY 2008.

CONCLUSION

The wait for green cards (permanent residence) can span years or even decades, which means obtaining temporary status is essential for international students, skilled foreign nationals abroad, and others seeking to work legally in the United States. The primary temporary categories for skilled individuals to work in America are H-1B, which are for foreign nationals with the equivalent of a bachelor's degree or higher working in a specialty occupation, and L-1, which allows an employer to transfer an employee into the United States who has worked at least one year abroad for the employer."[10]

The continuing high rate of denials and Requests for Evidence for L-1B petitions has a negative impact on the ability of companies to make products and services in the United States and compete globally. "During the time covered by the newly released data, the law didn't change, while the economy only became more global," said Blake Chisam, former chief counsel of the House Ethics Committee and a partner at the Fragomen law firm. "Yet, somehow, the immigration agency managed both to change the rules and complicate the process, without, once again, giving the regulated community even an inkling of its expectations or the reasons for its behavior. The costs and consequences to global businesses of having to guess – and second guess – about how the agency will act with respect to the specialists who drive their businesses is staggering."[11]

The question remains: Have U.S. Citizenship and Immigration Services adjudicators or their supervisors been attempting to prevent the movement of people in the global economy? If so, that should not be their role and the consequences for increasing jobs, investment and innovation on U.S. soil have not been good.

[10] U.S. Citizenship and Immigration Services. O-1A is used (less commonly) for "individuals with an extraordinary ability in the sciences, education, business, or athletics."
[11] Interview via email with Blake Chisam.

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, former U.S. Senator and Energy Secretary Spencer Abraham, Ohio University economist Richard Vedder, former INS Commissioner James Ziglar and other prominent individuals. 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.