National Foundation for American Policy

March 12, 2014

Contact: Stuart Anderson, 703-351-5042, press@nfap.com

New Report: L-1 Denial Rates for High Skill Foreign Nationals Continue to Increase at USCIS

Arlington, Va. – 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, according to a new report released by the National Foundation for American Policy (NFAP), an Arlington, Va-based' policy research group.

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.

The report, "L-1 Denial Rates for High Skill Foreign Nationals Continue to Increase," is available at www.nfap.com.

"Preventing companies from transferring their own employees into the United States discourages job creation, innovation and investment from taking place in America," said Stuart Anderson, executive director, National Foundation for American Policy, and former head of policy and counselor to the Commissioner of the INS (August 2001 to January 2003).

Time-consuming Requests for Evidence (RFE) from adjudicators for L-1B petitions 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).

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." 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. In February 2012, the National Foundation for American Policy released a report detailing the high denial rates and Requests for Evidence from USCIS adjudicators. 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.

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.

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.

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. 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 2009, the denial rate of new L-1B petitions for Indians increased to 22.5 percent even though there had been no change in the regulations. In contrast, for Canada, the UK, China and other countries the denial rate in FY 2009 ranged from 2.9 to 5.9 percent for new L-1B petitions. 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.

Table 2
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.

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.

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. "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."

"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."

About the National Foundation for American Policy

Established in the Fall 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, former U.S. Senator and Energy Secretary Spencer Abraham 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.

2111 Wilson Blvd., Suite 700, Arlington, VA 22201
phone: (703) 351-5042   fax: (703) 351-9292   www.nfap.com