Top 5 Reasons USCIS May Deny an H-1B Visa Petition and the Corresponding Winning Strategies to Get Approvals

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In fiscal year 2019, denial rates for H-1B visa petitions increased by 11% from fiscal year 2015. The lower number of H-1B approvals corresponds with more RFEs (Requests for Evidence) being issued during the time frame. In fiscal year 2019, over 65% of approved H-1B cases received an RFE. OnlineVisas received approvals for 100% of H-1B visa petitions in 2019 and 95% in 2018.

Reason 1: Specialty occupation

In analyzing denials of H-1Bs from many companies and law firms, USCIS has determined that some jobs are no longer eligible for H-1B visas because they are not specialty occupations. USCIS has taken the position that only a singular degree can provide the knowledge needed for a specialty occupation.

USCIS also determined that a college degree was too vague of a requirement. In other words, if any degree, such as a business management degree, can be the requirement, then the job is not specialized.

USCIS also decided that work experience instead of a degree is not a qualifier. USCIS no longer accepts O*NET as an authoritative source and relies solely on the more restrictive Occupational Outlook Handbook ("OOH"). Numerous positions like Computer Programmers no longer qualify as a specialty occupation because some do not have degrees.

Furthermore, USCIS has also disqualified other previously accepted positions like Quality Assurance Analysts because such position is not addressed thoroughly in OOH and does not state what degrees, if any, are required.

Winning strategies:

If a company has a choice of positions for their employees, have them select job titles that require specific degrees in the OOH such as Developers over Programmers. If you are changing jobs, amend and don't just extend positions. Make sure the duties and titles are similar to and don't contradict those used in the business documents or suggest changes as long as they are accurate. Companies can promote employees or change positions, but make sure it makes sense and is real.

If this is not possible, a job can still be specialized if the employer typically requires the same or similar degree, the industry typically requires the same or similar degree, or the job is so complex it requires a specific or related degree.

While the four criteria for specialized positions are listed as options, USCIS cites the *Defensor* case to suggest using only one, the company's requirement is not enough. Experts and/or

industry associations may evaluate the coursework and tie it to the job duties. The expert must be authorized by their university to do so. To show that your company and the industry hires people with same or similar degrees, prepare charts and collect recent want ads. Make sure the companies are similar in size to the Petitioner and that every want ad requires the same or similar position for the same job and that none of them accept work experience in place of the degree.

Reason 2: Right to control

"Right to control" is the concept that an employer must maintain when sending an employee to a third-party work location. USCIS scrutinizes the employer-employee relationship by weighing multiple factors, such as whether supervision by the Petitioner is performed on- or off-site. If the work is performed off-site, then the method and frequency of supervision are analyzed.

USCIS also evaluates the employer-employee relationship in a myriad of ways, most common are: who pays the H-1B worker, sets their hours, directs their daily tasks, is in charge of hiring and firing, provides benefits and claims the worker for tax purposes.

Winning strategies:

Add Right to Control language to your business documentation such as Itinerary, Master Services Agreements, Statements of Work, Invoices, Employee Handbook, Employment Agreement, and Letters to USCIS from vendors and end-users. Have all the parties sign as many of these documents as possible.

Supervise employees, even if off-site, and document oversight through email communication with employee and third-party, project management software and/or performance evaluations.

Reason 3: Level 1 wage

On March 31, 2017, USCIS issued a policy memorandum that put into question the qualification of Computer Programmer as a specialty occupation. In footnote six, it referenced Level 1 Wages from Labor Certification Applications.

Level One designations by the Department of Labor (DOL) for Labor Certification Applications (LCAs) were used by USCIS to issue RFEs and denials. USCIS interpreted a DOL memo definition of a Level 1 wage as an entry-level position. Adjudicators would then pose the issue that the job description was too complex for an entry-level position.

Winning strategies:

A. Analyze the DOL Memo to show the DOL adjudication of a Level 1 wage is correct. The series of factors included whether the job required experience or was a supervisory position. If the job does not require experience or is not a supervisory position, it can be designated as an entry-level position that requires the knowledge of a University degree only. Use the DOL chart.

B. Supervised position. If the position is supervised, even from the home location, it can still be a Level 1 position. This can be indicated through an organizational chart with a person with a requisite degree and experience supervising the employee. Communication, project management software, and/or performance evaluations can establish actual supervision.

C. Expert or Industry Association Analysis. Experts or officials in the industry can analyze and establish the position is entry-level. Note: Interviews of the company and the employee instead of mere analysis of the documentation is required.

D. LCA analysis is outside the scope of USCIS. It is the duty of DOL to determine wages, not USCIS. In the H-1B context, USCIS is charged only with determining whether the position is a "specialty occupation" and whether the beneficiary is qualified to carry out the duties of the position. As confirmed in the DOL regulations, "DHS determines whether the petition is supported by an LCA which corresponds with the petition, [and] whether the occupation named in the Labor Ccertification Application is a specialty occupation…" *See* 20 CFR §705(b).

Reason 4: Third-party Sites

On February 22, 2018, USCIS issued PM-602-0157 Subject: Contract and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites. . . The Memo codified the reasons for the 2017 denials and created bright-line requirements for third-party placements. This included itineraries and contracts with all the parties, with specified durations and proof of the actual work at the third-party location.

This is a serious problem for some petitioning staffing companies that may have one or more vendors between them and the end-user. Sometimes the end-user does not know of the petitioning company; other times, they have policies that they will not write third-party letters or confidential mandates cannot divulge agreements or work orders.

Winning strategies:

A. The Memo requires an itinerary; sometimes, itineraries can be signed by managers of companies and do not require legal departments to review. Make sure the itinerary is as detailed as possible with a duration as long as the LCA requests. If the company desires shorter stints with extensions, try to persuade them to issue an itinerary for a more extended period with an ability to terminate for any reason. Make sure job duties do not contradict the employment letter. Get the itinerary signed. If the vendor is unwilling to help, add a non-circumvention clause with signature lines for the vendor(s) and end-users. Even if you can't get the third-party to sign the itinerary, get the vendor and add the right to control language.

B. If you can't get a contract or letter from the end-user or third-party, obtain proof of actual work. This can include screenshots, technical documentation, milestones, or deliverables that include the employee's name and correspondence from the third-party to employee. It is not enough to just use a badge or a photograph by itself, but they are not bad additions.

Reason 5: Deference to previously approved visas

Policy Memorandum 602-0151 issued on October 23, 2017, rescinded previous guidance that gave deference to prior determinations of eligibility for H-1B visa holders filing for extensions that involved the same parties and underlying facts as the initial petition.

In other words, after USCIS introduced a series of policies with more stringent standards, they are applying them to extensions too. So, just because a visa was approved before the new policies means it can be denied if it does not comply now.

Winning strategy:

File all H-1B visas as if they have never been filed before. You may consider using a new job title and duties like Developer instead of Computer Programmer, Computer Analyst. You must be legitimate on the change. You can do this by giving the employee a promotion, codify it with a performance appraisal and make sure the job complies with the prevailing wage.