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USCIS Issues Top 10 Reasons for H-1B Denials

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U.S. Citizenship and Immigration Services (USCIS) has published a breakdown of the top 10 reasons it issued requests for evidence (RFEs) for H-1B petitions in fiscal year (FY) 2018. The list lends some context to recent USCIS reports showing that RFEs and denial rates are continuing to climb under the Trump administration, especially for H-1Bs. This information is particularly insightful as we head into H-1B filing season for FY 2020, as it shows which factors USCIS considers key to establishing eligibility for an H-1B visa.

The following is a list of the top 10 reasons USCIS issued an RFE in response to an H-1B petition in FY 2018. The reasons are listed from most common to least common. It is worth noting that RFEs may be issued for multiple reasons.

1. Specialty Occupation

The most common reason for an employer to receive an RFE in response to an H-1B petition was for failure to "establish that the position qualifies as a specialty occupation."

In order to qualify for an H-1B visa, the petition must demonstrate to USCIS that the position sought is a specialty occupation by providing evidence that the job is one that requires not only the understanding and application of a highly specialized body of knowledge but also that it normally requires at least a bachelor's degree, or its equivalent, in a particular specialty. In recent years, USCIS has narrowed its interpretation of what qualifies as a specialty occupation, often challenging positions with job duties that do not appear complex enough to require a bachelor's degree or the equivalent. USCIS recommends that employers provide a list of duties, roles, responsibilities, and educational and experience requirements necessary to perform the job. The job description should provide a link between the work to be performed and the educational requirements for the position.

2. Employer-Employee Relationship

USCIS also issued RFEs to petitioning employers that failed to "establish that they had a valid employer-employee relationship with the [H-1B] beneficiary."

An employer must be able to demonstrate that it will maintain the right to control the H-1B beneficiary's work for the duration of the requested period of employment. This is particularly important when the H-1B beneficiary will be placed at a third-party worksite. An employer may submit copies of the employment contract and/or offer letter detailing the terms and conditions of the employment as proof that it will maintain a valid employer-employee relationship with the H-1B beneficiary.

3. Availability of Work (Off-Site)

USCIS also issued RFEs to petitioning employers that failed to establish that the H-1B beneficiary, working at a third-party worksite, would be engaged in specific, non-speculative work assignments in a specialty occupation for the requested period of employment.

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USCIS requires employers to prove that the H-1B beneficiary will be engaged in actual and ongoing work in a specialty occupation for the requested period of employment. The work cannot be anticipated or based on prospective contracts. To prove a steady workflow exists, an employer may provide copies of signed contracts, detailed work assignments, and work orders signed by end-user clients, among other things.

4. Beneficiary Qualifications

USCIS issued RFEs to petitioning employers that failed to "establish that the [H-1B] beneficiary was qualified to perform services in a specialty occupation."

An employer must prove that the H-1B beneficiary has the required credentials to work in the specialty occupation. Generally, an employer must show that the H-1B beneficiary holds at least a bachelor's degree in the specialty field or, in the alternative, the H-1B beneficiary has sufficient training, experience, or licensure to engage in the specialty occupation. If the H-1B beneficiary does not have a bachelor's degree in the specialty field, an employer may consider getting a combined education and experience evaluation for a related field of study to corroborate the beneficiary's qualifications to fill the position. USCIS also suggests that employers include a statement explaining how the unrelated degree relates to the job offered to the H-1B beneficiary.

5. Maintenance of Status

USCIS issued RFEs to petitioners that failed to establish that the H-1B beneficiary had "properly maintained [his or her] current status."

This usually indicates that USCIS has identified an issue or deficiency in the H-1B beneficiary's previous status. To resolve this issue, the beneficiary may provide copies of previous Forms I-94, Form I-797 approval notices, paystubs, employment verification letters, and travel itineraries, among other things.

6. Availability of Work (In-House)

USCIS issued RFEs to petitioning employers that failed to establish that they had specific, non-speculative work assignments in a specialty occupation for H-1B beneficiaries to be placed in-house for the entire period of requested employment.

The analysis, for this reason, is the same as that for off-site work, but it applies to H-1B beneficiaries who will work in-house.

7. LCA Corresponds to the Petition

USCIS also issued RFEs to petitioning employers that failed to "establish that they obtained a properly certified Labor Condition Application (LCA)" from the U.S. Department of Labor that corresponds to the position in question.

The LCA must properly correspond with the position offered to the H-1B beneficiary, specifically in regard to the job title and wage level selected by the employer. USCIS suggests that employers provide a detailed description of the skills, education and experience required to perform the job.

8. AC21 and the Six-Year Limit

USCIS issued RFEs to petitioning employers that failed to "establish that the beneficiary was eligible for AC21 benefits or was otherwise eligible for an H-1B extension," as it appeared that the H-1B beneficiary had reached the six-year limit.

AC21 refers to the American Competitiveness in the Twenty-first Century Act of 2000, which allows H-1B extensions beyond six years (the maximum period of stay in H-1B status). In order receive an extension, the H-1B beneficiary must show either (1) that he or she is the beneficiary of a pending labor certification that was filed more than a year ago and is thus eligible for a one-year extension; or (2) that the labor certification and Form I-140 have been approved but no visas are currently available, meaning he or she is eligible for a three-year extension. An employer may submit copies of the approved labor certification or Form I-140 to prove that the H-1B beneficiary qualifies for an extension. It may also submit entry and exit stamps and trip itineraries to recapture a beneficiary's time spent outside the United States.

9. Itinerary

USCIS issued RFEs to petitioning employers that failed to submit a detailed "itinerary with a petition that requires

services to be performed in more than one location. The itinerary must include the dates and locations of the services to be provided."

An employer is required to submit an itinerary with its H-1B petitions documenting the dates and locations of the services to be provided, including all third-party worksites. While not required, a more detailed itinerary may also serve as evidence that the employer has non-speculative employment.

10. Fees

USCIS issued RFEs to petitioning employers that failed to pay all of the required H-1B filing fees.

This sounds simple enough, but the fee structure for H-1Bs is actually fairly complex. H-1B fees include the American Competitiveness and Workforce Improvement Act of 1998 fee, which varies in both amount and applicability, depending on the size of the company, how many H-1B employees the company has, and the nature of the H-1B filing.