CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THE REAL REASON FOR L-1B VISA DENIAL RATES BEING HIGHER FOR INDIAN NATIONALS

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A study issued by the National Foundation For American Policy confirms what we attorneys who work in the trenches have feared most. It was already been assumed that an L-1B case for an Indian national will face much higher scrutiny, and one was always prepared to put in a lot more work into such a case, only to expect that the case could still be denied. The NFAP report entitled *L-1 Denial Rates Increase Again For High Skill Foreign Nationals* now confirms that Indian nationals face the highest refusal rates in the L-1B visa program.

The L-1B visa allows the transfer of a specialized knowledge employee from an overseas entity to a related US entity. This visa should allow US companies to quickly transfer employees in order to remain globally competitive. Instead, the overall denial rate, according to NFAP report, was 35%. Prior to 2008, the overall denial rate was under 10%

Alarmingly, the denial rate for employees coming from India was 56% in 2014 while the denial rate for employees transferred from all other countries was only 13%. The following table from the NFAP report comparing denial rates is very stark and speaks for itself:

L-B DenialRates by Country: FY 2012-2014

Country of Origin	Total	Denials	Denial Rate
Indian Nationals	25,296	14,104	56%
Canadian Nationals	10,692	424	4%
British Nationals	2,577	410	16%
Chinese Nationals	1,570	347	22%
Japanese Nationals	1,145	171	15%
German Nationals	1,100	161	15%

French Nationals	753	140	19%
Mexican Nationals	740	157	21%

Source: USCIS; National Foundation for American Policy.

Immigration attorneys knew it in their bones that when they file an L-1B petition on behalf of an Indian national, however meritorious, it is likely to result in a Request for Evidence, and potentially a denial. USCIS examiners change the goal posts to the point that it has become frustratingly ridiculous. We now have the NFAP report to thank for confirming our worst fears.

Take the example of a company that legitimately produces a software application for the financial industry. It is a proprietary product of the company, and is branded as such. Over the years, the company has developed a loyal client base for this product. The product is upgraded frequently. An employee of the company who has worked on the development of this product in India needs to be transferred to the US so that she can train sales staff in the United States, and also assist in customization upgrades based on each client's unique needs. This individual should readily qualify for the intra-company transferee L-1B visa as she has specialized knowledge of the company's proprietary software product. This is what the L-1B visa was designed for by Congress. Still, there is still going to be a likelihood of refusal of the L-1B visa for this Indian national employee. Even if the L-1B was previously approved, the renewal or extension request of L-1B status may fail. Indeed, the NFAP report confirms that "U.S. Citizenship and Immigration Services adjudicators are more likely to deny a case for an extension of L-1B status than an initial application." The report goes on to correctly observe: "This seems counterintuitive, since the individual whose status is being extended typically has already worked in the United States for three years and is simply continuing work."

A prior blog describes a common example for denying an otherwise meritorious L-1B visa application of an Indian national:

In the denial, USCIS acknowledged that the company had a proprietary product and that the employee had knowledge of its proprietary product. However, USCIS stated that this failed to meet the definition of "specialized knowledge" because the company had failed to demonstrate that it was the only company in the industry that provided its service. To the reasonable person, such a denial seems absurd; such a policy could render obsolete the entire category of specialized knowledge and certainly undermines the capitalist values that inspired the L-1B "specialized

knowledge" visa category in the first place. If the L-1B "specialized knowledge" category requires a showing that a business is the only one in the industry to provide a service, no business with a competitor would be able to transfer a worker to the U.S. under the L-1B "specialized knowledge" category. Coca-Cola would be unable to bring in a worker with knowledge of its proprietary product because Pepsi provides a similar service. A showing that an industry is the only one of its kind to provide a service is clearly not a requirement for showing "specialized knowledge", but, unfortunately, denials for failing to demonstrate the existence of "specialized knowledge" are often the result of absurd interpretations of the L-1B "specialized knowledge" category requirements.

So let's try to find out why the refusal rate for Indian nationals is higher than others. Some will justify that since there are more L-1B visa applicants from India, the refusal rate will be proportionately higher. True, but this does not explain why the refusal rate for Indians is 56% while the refusal rate of the next highest number of L-1B visa applications, Canadians, is only 10%. Another argument is that the L-1B visa is seen as a way to get around the H-1B annual cap, and again, since there are more Indian nationals applying for the H-1B visa who did not qualify, it is okay to get tough on their L-1B visa applications. This too is a spurious justification. It is perfectly appropriate for an employer to try to file an L-1B visa for an employee who is qualified for that visa, notwithstanding the fact that he did not make it under the H-1B visa lottery. A person can be eligible for more than one visa classification.
Another justification is that the L-1B visa, like the H-1B visa, is used to facilitate outsourcing. In other words, US workers are replaced by L-1B visa workers who are paid less, and the jobs eventually get transferred to India. One can understand the concern about US workers being replaced by foreign workers, but this does not explain why a company which has a proprietary product that is sold to US financial services clients should get adversely impacted with an arbitrary denial of its L-1B visa application for a specialized knowledge employee.

Moreover, even if an Indian heritage IT firm, accused of outsourcing, wishes to bring in L-1B specialized knowledge employees, it is incumbent upon the USCIS to still meritoriously and objectively determine whether they qualify under the specialized knowledge criteria for the L-1B visa. As explained in a prior blog, the success of the Indian IT global model has led to a backlash in the same way that Japanese car makers were viewed in the late 1980s. There is no doubt that

corporations in the US and the western world rely on Indian IT, which keeps them competitive. This vendetta, spurred on by the likes of Senator Grassley who is the new Chair of the Senate Judiciary Committee and even left leaning think tanks like the Economic Policy Institute, to deny L-1B visa applications of Indian nationals have unwittingly prepared the way for a massive dislocation of the American economy which will no longer be able to benefit from the steady supply of world class talent that the Indian IT providers have always supplied at prices that American business and its consumers could afford. What has gone unnoticed is the fact that the ability of American companies to maintain their competitive edge has been due in no small measure, to the very Indian IT global model that the US government now seeks to destroy. One can also recall Senator Schumer's infamous slip of tonguewhen he referred to Indian IT companies as "chop shops" instead of job shops at the time Congress outrageously raised the filing fees for certain L-1 and H-1B employers (to fund a couple of drones on the Mexican border), as if job shops is not enough of a pejorative. Gary Endelman adds in an e mail to the author "that the overly restrictive view of the L-1B discourages international trade and investment and that, by discouraging Indian migration to the USA, the USCIS actually expands the wage differential between India and the USA, thereby increasing outsourcing rather than limiting it."

Indians are already disadvantaged in the US immigration system. As a result of the per country limits in the employment-based (EB) preferences, those born in India have to wait much longer for their green cards than others. In fact, Indian born beneficiaries of EB third preference I-140 petitions may need to wait decades before they can apply for green cards. Then, Indian three year degrees, and even other qualifications on top of the degree, do not get the same level of recognition than degrees from other countries. As a result, many who could qualify for the EB-2 now have to wait for a lifetime in the EB-3 for their green cards while their children age out, and may not be able to derivatively get the green card with their parents. It is even becoming harder to obtain an equivalency based on a three year degree. The latest revelation that the L-1B refusal rates for Indians is the highest, despite the fact that the claim is meritorious and the denial often happens at the renewal stage (after it was previously approved), only leads to one conclusion. It is discrimination. A mindset has crept into the system that L-1B visa applicants from India are undesirable, and ways are then found to deny the application. The NFAP report

is a wakeup call for fair minded people to question such discriminatory practices and to work towards a more just immigration system for people from all countries.