

I-129 (H-1B, L-1, O-1, TN etc.) Denials on the Rise

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Recent data from USCIS shows a sharp increase in denials for many types of U.S. immigration filings, including a continuing trend of denials for I-129 petition filings.

The I-129 is the employment-based nonimmigrant petition filed on behalf of foreign nationals seeking temporary employment authorization in the U.S. Common employment-based nonimmigrant categories pursued through an I-129 filing include the H-1B, L-1, O-1 and TN.

Data shows that USCIS denied I-129 petitions at a rate of 22.6% in FY 2018, nearly double the denial rate of 11.9% in FY 2013. The 22.6% denial rate in FY 2018 is also a considerable increase from only two years ago in FY 2016 when it was 16.8%.

We have noticed increased scrutiny across the board for many types of filings, but I would speculate that the recent spate of I-129 denials is the result of an increase in H-1B denials.

So why the increase in denials?

With respect to H-1Bs, legacy INS promulgated regulations in 1991 at 8 CFR 214.2(h)(4)(ii)-(iii) to implement statutory language from the INA. Those regulations defining "specialty occupation" have never been revised and remain controlling today. They have not changed, and nothing has happened over the past two (2) years that grants USCIS the authority to ignore these regulations or unilaterally interpret them differently than how they were presented.

But that is exactly what USCIS has been doing recently. They are reinterpreting established law and regulations to make qualifying for H-1Bs more challenging.

In some cases, USCIS seems to establish completely new standards by reinterpreting regulations and redefining the meaning of "specialty occupation". In some cases it feels like USCIS' basis for a denial is tantamount to "Because I said so."

Congress did not imbue USCIS with "Because I said so" authority to deny H-1B petitions. USCIS must follow the applicable law and regulations and is not afforded "Because I said so" authority with its adjudications.

It will be interesting to see what FY2019 statistics show. Chances are they will highlight a continued increase in I-129 denials that needs to be addressed.

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