

# UNITED STATES

## H-1B POLICY ALERT: INCREASE IN REQUESTS FOR EVIDENCE



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### EXECUTIVE SUMMARY

While a number of high-profile immigration policy initiatives have made headlines, one of the more significant changes impacting corporate immigration that has been implemented with less fanfare is a shift in how the government is adjudicating H-1B cases. U.S. Citizenship and Immigration Services is more closely scrutinizing H-1B petitions for the types of jobs being filled, the foreign employee's qualifications, and the wages companies are offering H-1B workers.

One indication of this greater scrutiny is that the agency has sharply increased the number of requests for evidence (RFEs) whereby companies whose H-1B petitions have been accepted for processing are asked to provide additional evidence to support their case. There are different types of RFEs depending on which eligibility criteria are being scrutinized, and it is not uncommon for employers to receive multiple RFEs challenging various aspects of the same case.

BAL has seen a marked increase in RFEs for H-1B cases across all sectors, and this trend is supported by data disclosed through a Freedom of Information Act request by Reuters. According to this [new USCIS data](#), the agency issued 85,000 RFEs between Jan. 1 and Aug. 31 – a 45 percent increase over the same period last year – and the highest in eight years.<sup>1</sup> BAL Senior Counsel Jeff Gorsky was quoted in the Reuters article, pointing to an example of one mid-sized tech company that recently received six RFEs in a single day compared to just one RFE since late 2015.

This FAQ explains the recent trend and its impact on companies.

### What are RFEs and why do they matter?

USCIS may request additional evidence in cases where an adjudicator decides there is insufficient evidence to decide the case. USCIS sends a letter identifying the subject of the RFE, why the evidence is insufficient, and a list of possible evidence the employer should submit as additional support.

While the rate of RFEs has been on the rise in the past three years,<sup>2</sup> the recent uptick appears to be the result of a directed policy shift that challenges some of the basic criteria on which employers have relied in using the H-1B program.

### What is the reason for the increase in RFEs?

A focus of the Trump administration is the overall tightening of immigration regulations, including legal routes for high-skilled foreign workers. President Trump has indicated that he supports restricting H-1B visas to high-wage earners to prevent companies from undercutting American wages. A White House [policy memo](#) on March 6 directed federal agencies to enhance screening and vetting of visa applicants and rigorously enforce all existing grounds of inadmissibility, and to issue new guidance in compliance with that directive. The memo implements the directive in the April 18, 2017 Executive Order "Buy American and Hire American" to "rigorously enforce and administer" the laws governing entry into the U.S. of workers from abroad.

<sup>1</sup> "Trump Administration Red Tape Tangles Up Visas for Skilled Foreigners, Data Shows," Reuters, Sept. 19, 2017.

<sup>2</sup> See BAL News "[CIS Ombudsman annual review finds that RFE rates remain high](#)," July 21, 2015, and "[USCIS requests for evidence continue to climb](#)," July 11, 2014.

## FREQUENTLY ASKED QUESTIONS (FAQS)

Specific to H-1B visas, in April USCIS issued a memorandum that reversed a longstanding presumption that computer programming qualified as a “specialty occupation” for purposes of H-1B criteria, and puts the burden on employers to show additional evidence that a computer programming position is one in a specialty occupation. While the memorandum specifically referred to computer programmers, it further instructed adjudicators to scrutinize wage levels in Labor Condition Applications that accompany H-1B petitions and explicitly indicated that entry-level wages were “likely to contradict a claim that the proffered position is particularly complex, specialized or unique.”

### Are all companies being treated the same?

Yes. It appears that companies across the board are seeing more RFEs, so employers should not feel that they are being singled out or that they are alone in having to respond to multiple RFEs. At the same time, companies that principally use H-1B visas for entry-level workers are especially affected by RFEs that challenge those wages. Companies should note that RFEs are issued in template form and are not specific to an individual employer; all employers who are issued an RFE on a particular topic will receive a letter using the same format and language.

### Are certain jobs more likely to be subject to RFEs?

Yes. Jobs that pay entry-level wages are being closely scrutinized by USCIS and are more likely to be subject to RFEs. This is an entirely new type of RFE that is being issued for entry-level jobs across all sectors and professions, encompassing not only computer programmers, but most computer-related jobs in the tech industry, as well as accountants, financial analysts, engineers, physicians and virtually all entry-level roles.

### What are the most common types of RFEs?

Three types of RFEs are predominantly being issued: entry level wages, specialty occupations, and the right to control. While these three topics are the most common, there are many other types of RFEs and companies should not be surprised if they receive one or any combination of several RFEs.

- **Entry-level wages.** H-1B petitions must be supported by a Labor Condition Application certifying that the employee will be paid the higher of the prevailing wage for the work location or the wage paid to similarly situated U.S. workers. USCIS is challenging the appropriateness of Level I (entry-level) salaries for the proposed job duties and is requesting additional evidence that the job in fact corresponds to an entry-level position that entails only routine tasks, limited judgment and basic understanding of the occupation.
- **Specialty occupation.** Jobs filled by H-1B employees must be “specialty occupations” that require at least a bachelor’s degree (or its equivalent) in the specialty. If USCIS is not satisfied that the job requires a bachelor’s degree in the related field, the employer will be asked to provide additional evidence of the position’s minimum educational requirements.
- **Right to control.** Companies that place H-1B workers at off-site locations are being asked for additional evidence related to whether they have established an employer-employee relationship with the H-1B employee, i.e., whether they exercise control over the H-1B employee’s work in terms of right to hire, fire, pay and supervise the employee.

### How do RFEs differ from previous years?

The main difference is that RFEs are being issued at a much higher rate. Another difference is that RFEs based on Level 1 wages are a new phenomenon, as H-1B visas have always been an appropriate category for entry-level positions and the Labor Condition Application requirement is meant to satisfy H-1B wage criteria. Additionally, while RFEs regarding specialty occupations and the right to control have been issued in the past, this year they are being issued in more cases than before.

### Will all RFEs lead to denials of the H-1B petition?

It’s too early to tell. In most cases for which RFEs were issued, responses were only recently due and the petitions have not yet been adjudicated. Historically, RFEs have not typically led to denials if responses were supported by solid evidence; however, given recent policy mandates to strengthen H-1B eligibility criteria, it remains to be seen how USCIS will adjudicate these cases, and employers should be aware that higher denial rates are a possibility.

### What will happen now that premium processing has resumed?

It appears that most of the RFEs have been issued in H-1B cap cases, and BAL does not expect to see a new surge of RFEs, though some petitions that are upgraded to premium processing may be subject to RFEs and those RFEs will be sent within the 15-day guaranteed premium processing service timeframe.

## FREQUENTLY ASKED QUESTIONS (FAQS)

### **What should companies anticipate in coming months?**

Companies should anticipate longer timelines and additional costs associated with responding to RFEs and delays to business schedules. Employers should factor in several additional months for the RFE process. USCIS generally allows up to 84 days for employers to respond to an RFE. Once responses are submitted, there is no deadline for USCIS to respond, but employers can expect the agency to take two to four months to issue a decision.