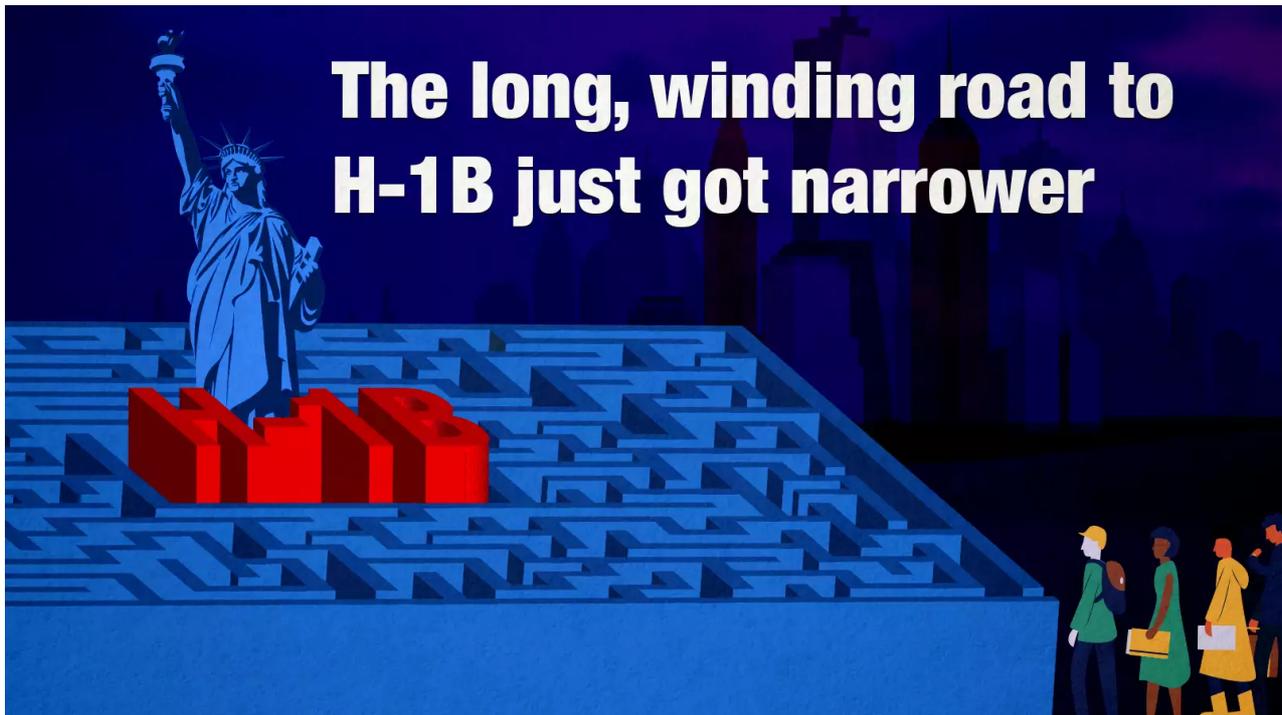


The long, winding road to H-1B just got narrower

TOI timesofindia.indiatimes.com/business/india-business/the-long-winding-road-to-h-1-b-just-got-narrower/articleshow/70751436.cms



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TNN

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TOI lays threadbare the road to get an H-1B visa, or even help win a lawsuit if it gets rejected

Judges at a US district court recently gave contrary decisions in two separate but similar lawsuits, both challenging the denial of an H-1B visa. What construes 'specialty occupation' and eligibility for an H-1B, is currently a hot topic of discussion. Immigration specialists are calling this the tale of two cases — both involving Indian citizens who wanted to pursue their American dream.

Usha Sagarwala and Subhasree Chatterjee both faced rejection of their H-1B applications that were filed by their sponsoring employer. Sagarwala already held an H-1B, but was changing jobs. This required that her new employer repeat the process of an H-1B approval. Chatterjee's case, meanwhile, was of an initial H-1B application. In both instances, US Citizenship and Immigration Services (USCIS), which adjudicates H-1B applications, held the two job positions were not 'specialty occupations' and hence not eligible for an H-1B visa.



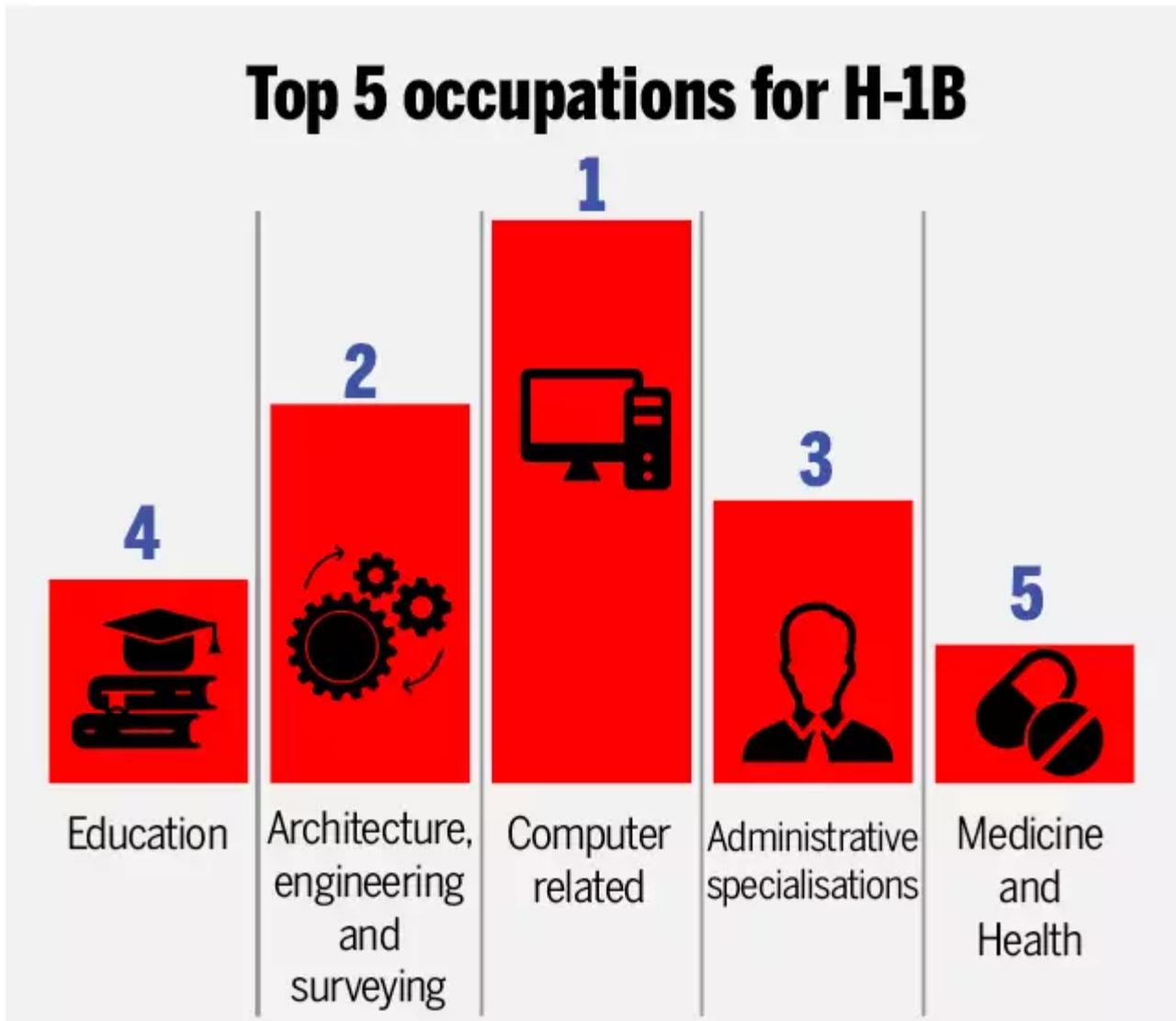
Eligibility requirements for an H-1B visa

Any one of the following criteria are (is) to be met:

- * The individual must have completed at least a US bachelor's or higher degree (or equivalent foreign degree) in the speciality occupation
- * Hold a license, registration or certification – as applicable, to fully practise the speciality occupation
- * Have education, training or progressively responsible experience in the speciality that is equivalent to the completion of the degree

The H-1B job transfer application was for a 'quality assurance (QA) analyst', where Sagarwala would be placed at a third-party worksite. Chatterjee was undergoing her optional practical training (OPT) at LexisNexis. International students, hailing from the science, technology, engineering, mathematics (STEM), who have qualified from a US university are entitled to work, post study, of up to three years under OPT. On OPT's completion, the company wanted to hire her as a 'data analyst'. When the H-1B applications were rejected, both parties pursued a lawsuit against USCIS. While Sagarwala failed, Chatterjee came up trumps. So, what went wrong? In brief, HSK Technologies, which would be Sagarwala's new employer, could not prove the position of 'quality assurance analyst' was a speciality occupation. The district court's order states: "To prove the QA Analyst position was complex, HSK Technologies submitted only a one-page list of duties and the most complex-sounding were heavy on jargon. The company failed to provide any explanation of what those responsibilities entailed. Meanwhile, the evidence from other employers in the industry indicated that for similar jobs, some employers required a bachelor's degree in a specific specialty, but that others did not."

Immigration and Nationality Act as a job that requires theoretical and practical application of a body of highly specialised knowledge. Further, the occupation should require a bachelor's or higher degree in that specific field of specialisation, or its equivalent.



Each category has a wide range of types of expertise and in most cases the evidence sought is to determine whether the job is unique and specialised and whether the individual has the required education and expertise

For Chatterjee, the judge remarked, "The mountain of evidence LexisNexis submitted to support the H-1B application more than meets the preponderance of the evidence standard." The court held Chatterjee had the specialised skills for these duties and the requisite educational requirements.

The last few action plans of US president Trump, including the latest unveiled mid-May, have reiterated the plan to further tighten the definition of 'specialty occupation' so as to obtain the "best and brightest workers". This is in furtherance of the hard-line approach under the president's Buy-American, Hire American executive order. Immigration advocates say a change in definition will require Congress approval. Thus, for now, the existing definition continues.

Yet, while adjudicating H-1B applications, USCIS has trained its harsh spotlight on the job's nature – Is it a 'specialty occupation' that qualifies for an H-1B visa?

USCIS while processing applications digs deeper and calls for additional evidence to



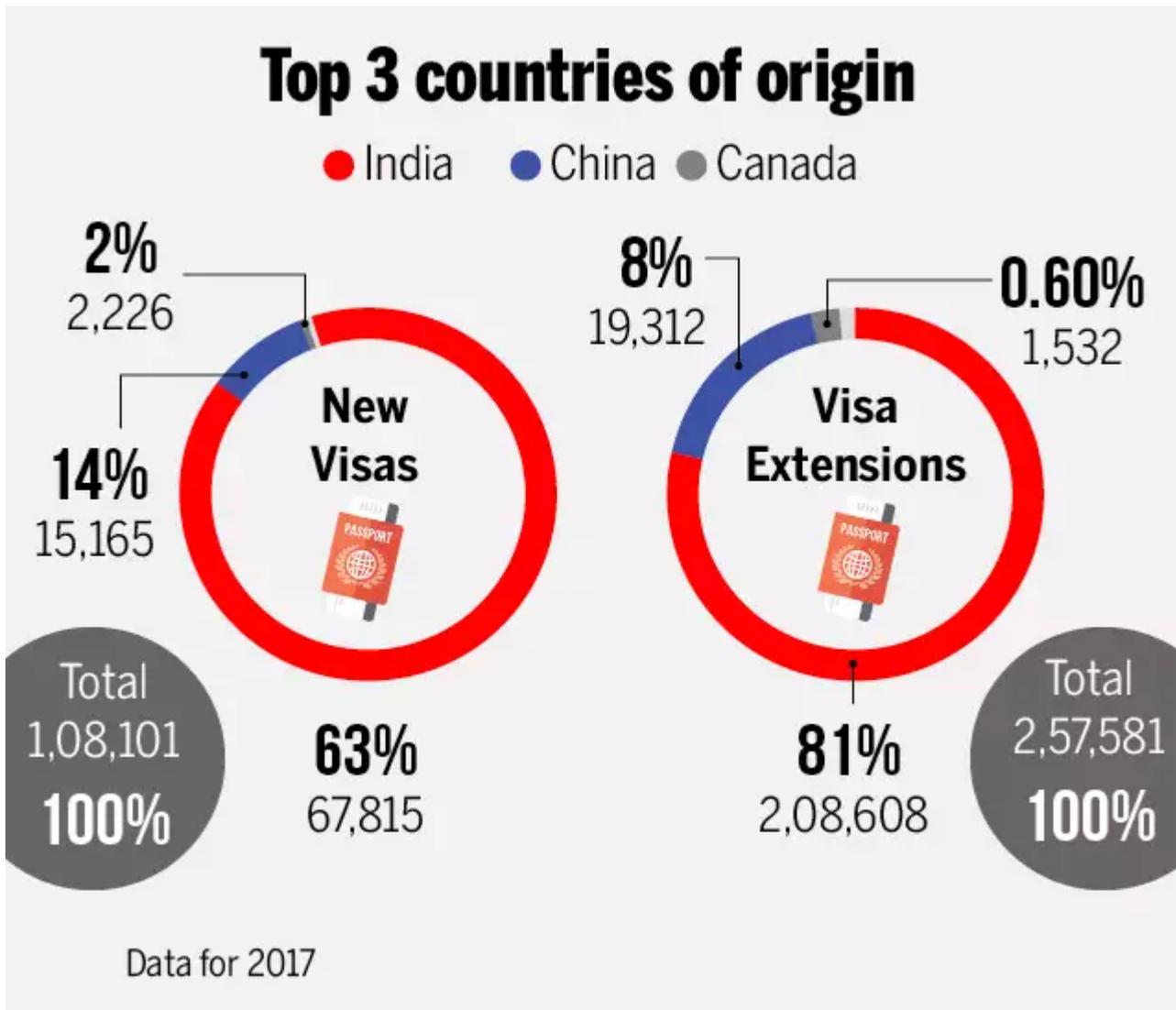
The applicant is the sponsoring company, the potential employee or continued employee is termed the beneficiary

Steep rise in H-1B denial and the all-important RFE

H-1B visas are an important mode for Indians to be able to work in the US. The tech sector is heavily dependent on these visas for its workforce, despite several large companies increasing the number of local (American) hires.

Nearly 75% of the aggregate H-1B visa applications for new jobs and visa extensions (for continued jobs) that were approved during fiscal 2017 (ending September 2017), were given to those born in India. While country-wise data of later years is not available, local hiring may have led to only a slight drop.

In 2017, over 75% of H-1Bs were allotted to Indians...



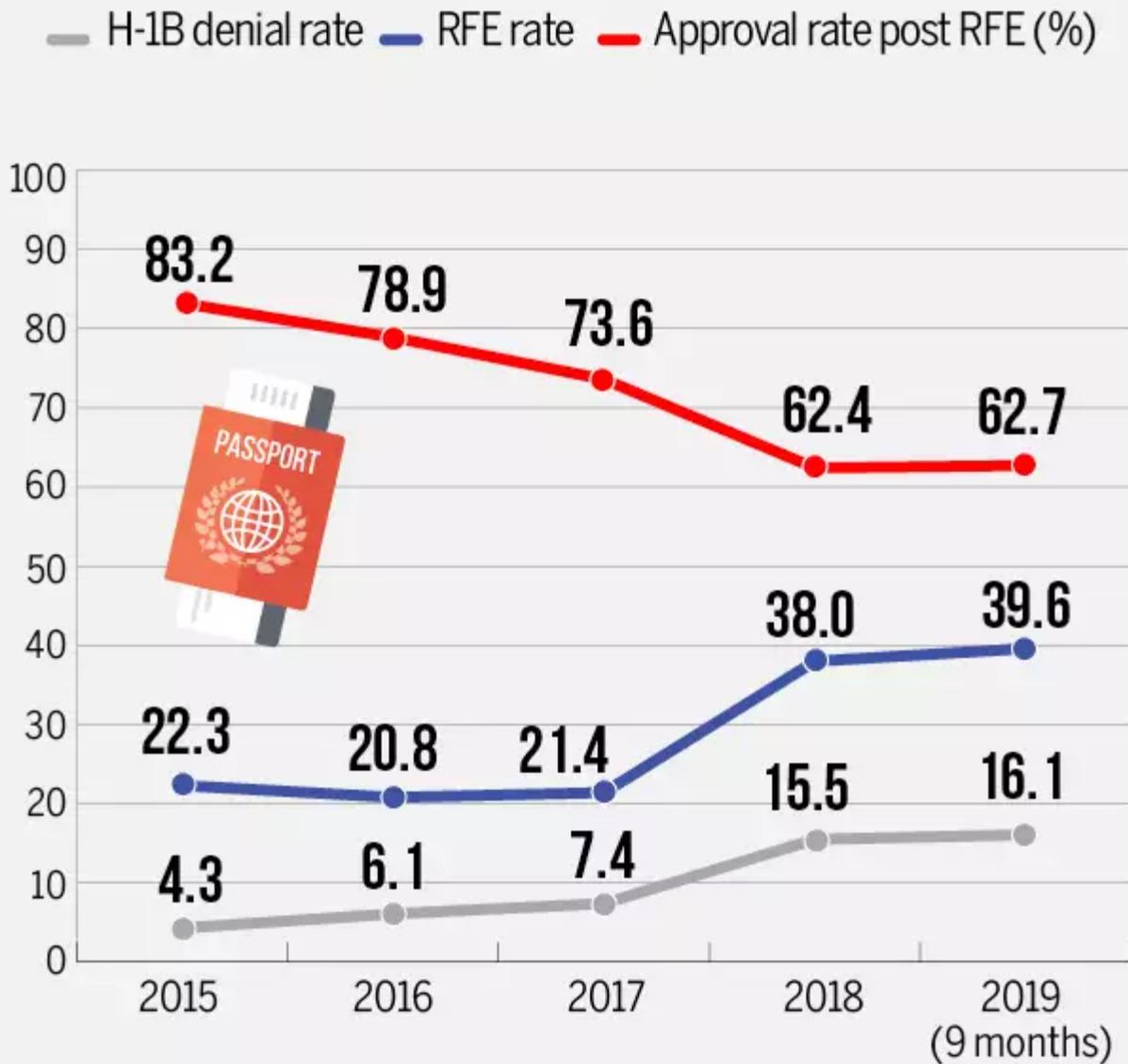
Source: *Characteristics of H-1B speciality occupation workers (April 2018 release by USCIS)*

The steep rise in refusal of H-1B applications is understandably causing anxiety. Latest USCIS data for fiscal 2019's three quarters show the trend of high denial rate of H-1B applications, and RFEs, continues. From October 1, 2018, to June 30, 2019, the H-1B denial rate was 16.5%; contrast this with a mere 4.3% in fiscal 2015.

RFEs were sought in nearly 40% of applications; the RFE rate some years ago was 22%. The low approval rate post-RFE, is causing more anxiety for sponsoring employees and potential aspirants.

While 83% of applications were approved in fiscal 2015 after additional evidence was sought – in the three quarters of 2019, it has declined to 63%.

Rising denials for H-1B and lower approvals post RFE



David Nachman, New Jersey-based managing attorney at NPZ Law Group says, "In the late 1980s when we filed H-1B applications, all we had to prove was that the individual had an equivalent of US bachelor's degree. In 1991, the term 'specialty occupation' came into being. However, the standard was the same – you only needed to prove the equivalent of a US bachelor's degree."

Policy memos and RFEs have practically narrowed the definition of 'specialty occupation' and created a new animal for H-1B interpretation, he adds.

On the high rate of H-1B denials, Arlington-based Rajiv Khanna, managing attorney at Immigration.com, states: "Many of the denials handed out by USCIS appear to be pretextual rather than meritorious." Several sponsoring employers and visa applicants have approached courts. "Lawsuits against the USCIS for specialty occupation issues and related H-1B issues are based entirely upon the record that the sponsoring employer has built before the USCIS. The court looks at this record, the documents to substantiate the claim of specialty occupation, to decide whether denying the H-1B application was a wrong decision," explains Khanna.

TOP 5 TO-DOS TO GET AN H-1B VISA

What can help substantiate a job is a specialty occupation, be it a new job, a visa extension for the same job, or a case of job transfer? Veteran immigration attorneys weigh in...

EDUCATION

If one can find a good description of the occupation in the Occupational Outlook Handbook (OOH) that states a degree in a specialised field is required, half the battle is won. The problem is most descriptions in OOH provide a range of degrees that can qualify a person for the position. For these, one needs to demonstrate the degree the employer requires is an essential pre-requisite for performance of that particular position |

Cyrus Mehta, New York

Fact that other companies have hired individuals with similar background, say, same specialised degree, for a similar occupation in the same industry strengthens the case |

David Nachman, New Jersey

PROPER CLASSIFICATION

Make sure case is presented under appropriate standard category generally considered specialty occupation. In IT industry, systems analysis is a job position for both software engineer and a system analyst. USCIS treats a software engineer (also known as software developer), as a specialty occupation, but not the latter |

Rajiv Khanna, Arlington

Conversely, the OOH's descriptions for Computer Programmers and Computer Systems Analysts are not quite as precise, which conveniently provides USCIS the ambiguity necessary for it to dilute a specialty occupation finding |

Ashwin Sharma, Florida

HIGHER WAGES

USCIS takes cognisance whether wage level is commensurate with the level of complexity a job-position entails. Thus, higher-paid a position, better the odds of establishing a specialty occupation |

Ashwin Sharma

DETAILED DESCRIPTION OF DUTIES

The employer must detail duties to show they are specialised, complex and unique. Sponsoring employer should demonstrate how a specified degree equips candidate to carry out these specialised duties |

Cyrus Mehta

Context of job must be clearly brought out, such as the nature and scale of work involved. Working on a mission-critical \$10M project is most likely both quantitatively and qualitatively different from working on a \$200k low-priority project |

Rajiv Khanna

DOCUMENTATION

One or more expert opinions by professors attesting to the complexity of the proffered job duties, end-client and vendor statements confirming the specialty nature of the job-position are useful |

Ashwin Sharma