



Final Settlement Agreement in *MadKudu v. USCIS* Provides U.S. Employers Who Qualify a Second Chance for Approval of Their H-1B Market Research Analyst Petitions

Frequently Asked Questions¹ October 28, 2021

Background

The *MadKudu v. USCIS*² class action was filed to challenge U.S. Citizenship and Immigration Services' denial of market research analyst H-1B petitions. The four U.S. employer plaintiffs sought relief for themselves and others whose petitions had been denied based on USCIS' determination that the Department of Labor's Occupational Outlook Handbook entry for market research analysts does not establish that the occupation is a "specialty occupation" under the first regulatory criterion in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)—and but for this determination USCIS would have approved the H-1B petitions.

After the court certified a class, and plaintiffs filed a motion for summary judgment, the parties entered into settlement negotiations. The negotiations included a stipulation to an amended class definition. On October 19, 2021, the court certified the amended class definition and approved the settlement agreement.

Frequently Asked Questions

This compilation of frequently asked questions is intended to highlight terms and conditions of the settlement agreement for U.S. employers who may be *MadKudu* class members and their attorneys. It is not a substitute for reviewing the text of the settlement agreement, which can be accessed [here](#).

1. Who is a member of the MadKudu class?

Any U.S. employer who, during the time period from January 1, 2019 through October 19, 2021, filed a petition (Form I-129, Petition for a Nonimmigrant Worker) with USCIS for an H-1B classification for a market research analyst, and

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² Case No. 5:20-cv-02653 (N.D. Cal.).

- USCIS denied the petition based on a finding that the Occupational Outlook Handbook (OOH) entry does not establish that the occupation is a specialty occupation, and thus does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(i), and
- But for this finding by USCIS, the petition would be approved.

Please note that the class definition and the terms of the settlement agreement, such as how USCIS determines whether to reopen and approve a request to reopen submitted pursuant to the *MadKudu* settlement, are based on the OOH entry for market research analysts and the H-1B regulations in existence on October 19, 2021, the date that the court approved the settlement agreement. (The versions in existence on October 19, 2021, also were in existence during the period from January 1, 2019 through October 19, 2021.)

2. By when should a class member apply?

Class members should apply *as soon as possible* after USCIS issues its announcement with directions for class members. Class members will have **180 days** in which to request that USCIS reopen their denied H-1B petitions for market research analyst—with the first day being the day that USCIS issues its announcement. However, as discussed in #5 below, USCIS will not reopen and approve the H-1B petition unless there is time left on the certified Labor Condition Application (LCA) that was submitted with the petition.

USCIS will attempt to prioritize reopening requests that have an LCA expiring in less than 90 days after the reopening request is properly filed with USCIS. The earlier in the 180-day period that a class member files, the better the possibility that there will be sufficient time left on the certified LCA for an approval, which the class member could follow with a timely-filed petition for an extension of the beneficiary’s H-1B status. For example, even if only 30 days remained on the certified LCA when USCIS approved the reopened petition, the class member should be able to timely-file for an extension of the beneficiary’s H-1B status.

3. Where does a class member apply?

By no later than November 2, 2021, USCIS will announce on its website, www.uscis.gov, the directions for submitting a request to reopen. These directions will include the filing location(s).

4. What must be filed?

- Cover sheet identifying the filing as a motion to reopen by a claimed class member.
- Form I-290B. Select motion to reopen on the form. **There is no filing fee.**
- A statement by the claimed class member that includes all of the following information:
 - The receipt number for the market research analyst H-1B petition that USCIS denied.
 - The received date must be within the time period from January 1, 2019 through October 19, 2021 to be a member of the *MadKudu* class.
 - Specific wording: “The petitioner requests reopening” of the petition.

- Confirm that the offer of employment as stated in the petition remains valid.
- If the petitioner wants a new start date and/or a new end date for the H-1B validity period, so state and identify the new date(s).
 - The new date(s) requested must be within the validity period of the certified LCA submitted with the denied petition.
- A copy of the USCIS denial of the H-1B petition to demonstrate class membership.
 - If the petitioner had an appeal of the denial dismissed by the USCIS Administrative Appeals Office (AAO), the petitioner must submit a copy of the **AAO decision**, *not* the Service Center denial from which the petitioner appealed. (Note that the Settlement Agreement, beginning at § II.D.2 and thereafter, includes an AAO decision when it refers to a “denial.” These FAQs also will now refer to both as a “denial.”)
- If the denial does not include the date that the petitioner filed the H-1B petition, then the petitioner must include a copy of the USCIS receipt notice for the H-1B petition which has a receipt date during the time period from January 1, 2019 through October 19, 2021 to demonstrate class membership.
 - We recommend including a copy of the receipt notice with all requests to reopen to make it easier for USCIS to confirm the date the H-1B petition was filed.
- Other requirements to demonstrate class membership:
 - USCIS found the job to be in the market research analyst occupation.
 - USCIS considered the OOH entry for market research analysts.
 - USCIS found that the market research analyst was not a specialty occupation under the first regulatory criterion, which is 8 C.F.R. § 214.2(h)(4)(iii)(A)(i).
 - The only basis for USCIS’ denial of the H-1B petition was that the position (job) was not in a specialty occupation. For example, if USCIS also denied the H-1B petition because the agency found that the beneficiary did not meet the petitioner’s requirements for the job, then that H-1B petition denial would not qualify for reopening.
 - **Tip** for demonstrating the other requirements listed above: Look for text in the denial and cite to the relevant text.
- Although not explicitly required, we also recommend including a copy of the certified LCA submitted with the denied H-1B petition since (1) USCIS will not reopen and approve the H-1B petition unless time remains on the certified LCA and (2) USCIS will only grant a request for a new start date and/or end date if the date(s) requested are within the validity period of the certified LCA. See #5 below.

5. What standard will USCIS use to determine whether to reopen and approve a denied H-1B petition after a request to reopen is filed?

USCIS will reopen and approve a denied H-1B petition if:

- The petitioner is a class member. Requirements include:
 - The denied H-1B petition was filed during the time period from January 1, 2019 through October 19, 2021.
 - In denying the H-1B petition:

- USCIS determined that the job was in the market research analyst occupation; and
- USCIS considered the OOH entry for market research analysts and the H-1B regulations in effect on October 19, 2021, the date that the court approved the settlement agreement; and
- USCIS denied the petition under the first regulatory criterion, which is 8 C.F.R. § 214.2(h)(4)(iii)(A)(i), based on finding that the petitioner had not established that the job was in a specialty occupation; and
- The only basis for the denial was that the position (job) was not in a specialty occupation.

AND

- Time remains on the certified LCA submitted with the denied H-1B petition.

If USCIS finds class membership and time left on the certified LCA, then USCIS must reopen and re-adjudicate the H-1B petition pursuant to the standard in § II.C.1 of the settlement agreement. When re-adjudicating, if an issue of fraud or willful misrepresentation comes to USCIS' attention, the agency will reopen and send the petitioner a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). It is not practicable for us to address all of the aspects of § II.C.1 in this FAQ, but we point out the following:

- The OOH entry for market research analysts as it exists on October 19, 2021 (the date the court approved the settlement agreement) meets the first regulatory criterion, which is 8 C.F.R. § 214.2(h)(4)(iii)(A)(i), as it exists on October 19. But USCIS also must agree that the job the petitioner offered is within the market research analyst occupation or the agency would not make the determination as to the first regulatory criterion. If the record shows that the petitioner considers a person to be qualified for its job based on less than a bachelor's degree in a specialized field directly related to the job, then the job does not meet the statutory and regulatory definitions of specialty occupation at 8 U.S.C. § 1184(i)(1) and 8 C.F.R. § 214.2(h)(4)(ii), and USCIS would again deny the H-1B petition.
 - Two examples that do not meet the definition of specialty occupation:
 - If a petitioner accepts a bachelor's degree in a generalized field of study without a minor, major, concentration or specialization in market research, marketing, or research methods, or
 - If a petitioner accepts a bachelor's degree in a field of study unrelated to the job.
 - If a petitioner accepts a bachelor's or higher degree in business administration with an official minor, major, concentration or specialization in market research, marketing, or research methods, as annotated on a transcript, diploma, or other official document from the registrar of the institution of higher education, then this type of degree is not a generalized degree, and the petitioner's job may be in a specialty occupation. The settlement agreement also identifies acceptable alternatives when the petitioner demonstrates that an official document is unavailable.

- If the petitioner accepts a bachelor’s or higher degree in communications, statistics, computer and information technology, and/or social science and the petitioner demonstrates that an official minor, major, concentration or specialization in market research, marketing, or research methods is necessary to perform the job duties, then the petitioner’s job may be in a specialty occupation. The requirements for demonstrating an official document or alternatives are the same as for the business administration degree.
- If the denied H-1B petition involved the same parties and facts on which USCIS approved a prior H-1B petition, USCIS must follow the deference guidance issued on April 27, 2021, <https://www.uscis.gov/news/alerts/uscis-issues-policy-guidance-on-deference-to-previous-decisions>. USCIS should defer to the prior approval unless there was a material error, material change, or new material fact(s).

6. When may USCIS reject a reopening request?

If USCIS determines that the petitioner is not a *MadKudu* class member.

7. When may USCIS deny the request without asking for additional evidence?

If there is no time remaining on the certified LCA submitted with the denied H-1B petition. If USCIS characterizes the lack of remaining time as not meeting the *MadKudu* class definition, that would be an error. However, lack of remaining time is a separate basis to deny reopening, so the outcome would be the same—the H-1B petition would not be reopened and approved.

8. What will USCIS do next if the agency decides that the petitioner is a *MadKudu* class member, and that there is time remaining on the certified LCA, but after re-adjudication does not agree that the position (job) is in a specialty occupation?

If USCIS intends to deny the reopened H-1B petition, then the agency must issue a NOID that identifies the ground for denial and give the *MadKudu* class member 30 days from the notice date to respond. See #10 below for more details on timelines.

9. What if USCIS decides after re-adjudication to approve the H-1B petition and the petitioner requested a new start and/or end date for the H-1B validity period?

If the dates requested are within the time period specified in the certified LCA submitted with the denied H-1B petition, USCIS must grant the petitioner’s request. (Reminder: USCIS will not reopen and re-adjudicate unless there is time remaining on the certified LCA.)

10. What are the timelines for petitioners and USCIS?

- USCIS will post its announcement with directions for *MadKudu* class members by no later than November 2, 2021. Class members must file their requests to reopen within **180**

days—with the first day being the date that USCIS announces its directions for filing. But class members should file as early as possible.

- USCIS will decide a reopening request within 90 days of the agency’s receipt of the physical files at the adjudicating office, if timely filed and if, at the time of filing, there is any time remaining on the period specified in the certified LCA submitted with the denied H-1B petition. USCIS will attempt to prioritize reopening requests for petitions with LCAs expiring less than 90 days after class members properly filed their reopening requests with the agency.
- A class member shall have **30 days** from the notice date to respond to a NOID. USCIS will decide the request within **60 days** of the agency’s receipt of the class member’s response to the NOID.
- The settlement agreement shall remain in effect until October 24, 2026.

11. Does the settlement have any effect on USCIS’ adjudication of market research analyst H-1B petitions filed after October 19, 2021?

Yes. USCIS has agreed to issue guidance to USCIS adjudicators as to how to apply the OOH entry for market research analysts, as it exists on October 19 (the date the court approved the settlement agreement), when they consider whether a job in the market research analyst occupation meets the first regulatory criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(i), as it exists on October 19. The settlement agreement also provides parameters for adjudicators to determine whether a petitioner’s education requirements for the job offered meet the definition of a specialty occupation and provide mechanisms for petitioners to demonstrate that certain fields of study qualify. See the bullet point at #5 above and § II.C.1 of the settlement agreement for details.