ALERT: Effective January 30, 2021, based on the 9th Circuit decision in *Innova Solutions v. Baran,* USCIS rescinds PM-602-0142 "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions.'" USCIS officers should not apply the memorandum to any pending or new requests for H-1B classification, including motions on and appeals of revocations and denials of H-1B classification.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

March 31, 2017 **PM-602-0142**

Policy Memorandum

SUBJECT: Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions"

Purpose

This policy memorandum (PM) supersedes and rescinds the December 22, 2000 memorandum titled "Guidance memo on H1B computer related positions" issued to Nebraska Service Center (NSC) employees by Terry Way.

Scope

This PM applies to all U.S. Citizenship and Immigration Services (USCIS) employees. The updated guidance is effective immediately.

Authority

- Sections 101(a)(15)(H)(i)(b) and 214(a)(1), (c)(1), (i) of the Immigration and Nationality Act (INA), Title 8, United States Code, sections 1101(a)(15)(H)(i)(b) and 1184(a)(1), (c)(1), (i).
- Title 8 Code of Federal Regulations (CFR), section 214.2(h).

Policy

On April 1, 2006, USCIS instituted "bi-specialization" procedures that discontinued the adjudication of H-1B petitions by the NSC and the Texas Service Center. On July 1, 2016, the NSC once again began to directly accept certain H-1B and H-1B1 (Chile/Singapore Free Trade) petitions. USCIS instituted this change to help address a large increase in H-1B petitions and provide the operational flexibility to redistribute caseloads as necessary to meet processing goals.

Now that H-1B petitions are once again being adjudicated by the NSC, USCIS officers at that service center may inadvertently follow the prior, but no longer adhered to, memorandum entitled "Guidance memo on H1B computer related positions" (dated December 22, 2000) from Terry Way, the former director of the NSC. As the guidance provided in this NSC memorandum is not an accurate articulation of current agency policy, USCIS is rescinding it to prevent inconsistencies in H-1B and H-1B1 adjudications between the three service centers that currently adjudicate H-1B petitions.

One concern with the Terry Way memorandum is that it is now somewhat obsolete. Relying on the 1998-1999 and 2000-01 editions of the *Occupational Outlook Handbook* (*Handbook*),[1] it was issued during what the NSC Director called a period of "transition" for certain-computer related occupations.[2] In addition, this memorandum also relied partly on a perceived line of relatively early unpublished (and unspecified) decisions, which did not address the computer-related occupations as they have evolved since those decisions were issued.[3]

But more importantly, statements in the memorandum do not fully or properly articulate the criteria that apply to H-1B specialty occupation adjudications. While the memorandum stated that most programmers had a bachelor's degree or higher based on information provided by the *Handbook*, that information is not particularly relevant to a specialty occupation adjudication if it does not also provide the specific specialties the degrees were in and/or what, if any, relevance those degrees had to the computer programmer occupation. Further, the memorandum failed to mention that only "some" of those that had a bachelor's or higher degree at that time held a degree in "computer science . . . or information systems."[4]

Furthermore, the memorandum also did not accurately portray essential information from the *Handbook* that recognized that some computer programmers qualify for these jobs with only "2-year degrees." While the memorandum did mention beneficiaries with "2-year" degrees, it incorrectly described them as "strictly involving the entering or review of code for an employer whose business is not computer related." The *Handbook* did not support such a statement.

Rather, the 2000-01 edition did not make such a distinction and described all programmers as sharing a fundamental job duty, i.e., writing and testing computer code. According to the current version of the *Handbook*, this is still the case; and individuals with only an "associate's degree" may still enter these occupations.[5] As such, it is improper to conclude based on this information that USCIS would "generally consider the position of programmer to qualify as a specialty occupation."

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[1] USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses; however, USCIS does not maintain that the *Handbook* is the exclusive source of relevant information.

[2] In stating that the computer programmer occupation was in transition, the NSC Director presumably relied on information in the 2000-01 edition of the *Occupational Outlook Handbook*. That edition indicated that the computer programmer occupation included those with varying and shifting job titles and descriptions due to the many technological innovations in programming at that time.

[3] While 8 CFR 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

[4] U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2000-01 ed., "Computer Programmers."

[5] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Computer Programmers," https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4 (last visited Mar. 31, 2017).

The memorandum also does not properly explain or distinguish an entry-level position from one that is, for example, more senior, complex, specialized, or unique.[6] This is relevant in that, absent additional evidence to the contrary, the *Handbook* indicates that an individual with an associate's degree may enter the occupation of computer programmer. As such, while the fact that some computer programming positions may only require an associate's degree does not necessarily disqualify all positions in the computer programming occupation (viewed generally) from qualifying as positions in a specialty occupation, an entry-level computer programmer position would not generally qualify as a position in a specialty occupation because the plain language of the statutory and regulatory definition of "specialty occupation" requires in part that the proffered position have a minimum entry requirement of a U.S. bachelor's or higher degree *in the specific specialty*, or its equivalent. *See* section 214(i)(1) of the Act; 8 CFR 214.2(h)(4)(ii).[7]

Based on the current version of the *Handbook*, the fact that a person may be employed as a computer programmer and may use information technology skills and knowledge to help an enterprise achieve its goals in the course of his or her job is not sufficient to establish the position as a specialty occupation. Thus, a petitioner may not rely solely on the *Handbook* to meet its burden when seeking to sponsor a beneficiary for a computer programmer position. Instead, a petitioner must provide other evidence to establish that the particular position is one in a specialty occupation as defined by 8 CFR 214.2(h)(4)(ii) that also meets one of the criteria at

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[6] Officers are reminded that "USCIS must determine whether the attestations and content of [a Labor Condition Application (LCA)] correspond to and support the H-1B visa petition." *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 (AAO 2015). Accordingly, USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation*.

In general, a petitioner must distinguish its proffered position from others within the same occupation through the proper wage level designation to indicate factors such as the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at https://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Through the wage level, the petitioner reflects the job requirements, experience, education, special skills/other requirements, and supervisory duties. *Id*.

[7] Officers are also reminded that USCIS does not bear the burden of establishing that a particular position does not qualify as a specialty occupation. Instead, the petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the INA, 8 U.S.C. § 1361. Accordingly, USCIS officers may not approve a petition based on inconclusive statements from the *Handbook* about the entry-level requirements for a given occupation. Rather, the petitioner bears the burden to submit probative evidence from objective and authoritative sources that the proffered position qualifies as an H-1B specialty occupation.

8 CFR 214.2(h)(4)(iii). Section 214(i)(1) of the INA; *see also Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).[8]

Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

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[8] Specifically, the court explained in *Royal Siam*, 484 F.3d at 147, that:

> The courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D. Mass. 2000); *Shanti*, 36 F. Supp. 2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & &N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.