POLICY ALERT:
REVISED H-1B ELIGIBLITY STANDARDS

Executive Summary

U.S. Citizenship and Immigration Services (USCIS) has issued a Memorandum that reverses a longstanding presumption that the position of computer programmer qualifies as a specialty occupation. The Memorandum also signals that the agency will review the wage level in the accompanying Labor Condition Application (LCA) and that a Level 1 (Entry Level) wage may make it more difficult for the petitioner to establish that the requested position is an H-1B specialty occupation.

What does the Memorandum do?

The Memorandum removes the presumption that the position of computer programmer qualifies as a specialty occupation. Though an employer may still establish that a computer programmer is eligible for H-1B status, the burden will be on the petitioner to provide additional evidence "to establish that the particular position is one in a specialty occupation."

The Memorandum also instructs adjudicators to look at the wage level in the accompanying Labor Condition Application (LCA) and states that a Level 1 (Entry Level) wage "will likely contradict a claim that the proffered position is particularly complex, specialized or unique."

Which computer-related positions will be affected by this change in policy?

In recent years, USCIS has questioned whether a wide range of computer-related positions (e.g., computer programmer, programmer analyst, systems analyst, etc.) require a bachelor's degree as a minimum requirement for entry into the positions. While the focus of the new Memorandum is on computer programmers, it is reasonable to expect additional scrutiny of any H-1B petition where the job duties involve computer programming or where the Occupational Outlook Handbook indicates that certain roles within the occupation may be filled by individuals who do not possess a bachelor's degree.

What changes are expected for H-1B petitions that list Level 1 (Entry Level) Wages?

The Memorandum reminds adjudicators that they must determine whether the attestations and content of the LCA correspond to and support the H-1B petition. The guidance states that filing an LCA for an entry level position at Level 1 wages "will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation*." This suggests that it may be more difficult for a petitioner to establish that a position qualifies for H-1B status if the supporting LCA reflects that the role is entry level. If the H-1B petition involves a computer programmer role and the supporting LCA is for Level 1 wages, the company should expect a Request for Evidence and heightened scrutiny.

Why did USCIS make this change?

A company must establish that the position the H-1B worker will fill is a specialty occupation. To qualify as a specialty occupation, the position must require a bachelor's degree or higher as the minimum requirement for entry into the position. In the alternative, the employer may establish that the position is so complex or unique that it can be performed only by an individual with a bachelor's degree.

For almost two decades, the government has struggled to apply this standard in computer-related occupations where some, but not all, positions require a bachelor's degree for entry into the field. In 2000, the government issued a memorandum that established a general presumption for adjudicators that the position of computer programmer qualifies as a specialty occupation, particularly "if the duties described in the petition primarily constitute analysis/design/modification of software or hardware."

In recent years, attention has been drawn to the role of computer programmer, which often pays less than more complex computer-related occupations. As part of the Trump administration's effort to tighten eligibility criteria for H-1B visas, the agency is increasing scrutiny of those job roles to ensure that the H-1B program is not being used to undercut U.S. workers.

USCIS is quoted as saying that there is no change in policy and that the 2000 memorandum was "no longer adhered to." Why did the government issue the new Memorandum?

The government's claim that there is no policy change should therefore be viewed as a legal argument and not as a reflection on whether companies will experience a change in H-1B adjudications. The computer programmer role is the third most popular occupational classification for H-1B positions, and many companies routinely obtain H-1B approvals for individuals working in that occupational classification. The new guidance will change how the government adjudicates those H-1B petitions and the tightening of the eligibility standards is expected disrupt the ongoing work authorization of certain H-1B workers already in the U.S.

Anticipating a legal challenge that the government was required to go through the rulemaking process, the government is arguing in public that they are harmonizing policy, not changing it, and so the government is not required to promulgate a regulation to accomplish its goals. It is not yet known whether parties will challenge the new policy in court.

When will the new H-1B standards go into effect?

The updated guidance became effective immediately upon publication on March 31, 2017. It will apply to all petitions filed after that date, including any request to extend or amend H-1B status.

Will H-1B cap petitions for FY 2018 be affected?

Yes. As of March 31, the guidance applies to all H-1B petitions, including cap filings and requests to extend or amend H-1B status.