U.S. Department of Justice
Immigration and Naturalization Service

Nebraska Service Center
P.O. Box 82521
Lincoln, NE 68501-2521

12/22/00

MEMORANDUM FOR CENTER ADJUDICATION'S OFFICERS

FROM: TERRY WAY
         NSC DIRECTOR

SUBJECT: Guidance memo on H1B computer related positions

From time to time certain occupations are in transition from nonprofessional to professional status. These occupations have always been problematic, especially in the adjudication of eligibility for the H-1B1 classification. This uncertainty has frequently resulted in inconsistent adjudication not only in this center, but service wide.

At present, computer programmers and programmer/analysts are examples of occupations in transition. This memorandum will attempt to clarify this center's policy regarding adjudication of petitions relating to these occupations.

One of the references we use to determine whether or not a position is professional or nonprofessional is the Department of Labor's Occupational Outlook Handbook. The 1996-1997 edition of this handbook reflects that although some programmers obtain 2-year degrees or certificates, bachelor's degrees are now commonly required.

The 1998-1999 edition of this handbook states that bachelor's degrees are now commonly required, although some programmers qualify with 2-year degrees.

The current 2000-2001 edition states that bachelor's degrees are now commonly required, although some programmers may qualify for certain jobs with 2-year degrees. This implies that individuals without a bachelor's degree now only qualify for lower level programming positions.

Therefore, from these descriptions of the training requirements from 1996 to 2000, it is clear that the position of programmer has been in transition. The question is, has this occupation now evolved to the level of professional status or a specialty occupation for H-1B1 purposes?

Past unpublished decisions of the Administrative Appeals Office have generally held that where the position of programmer involves providing clients with customized analysis and problem resolution to unique problems, the position's complexity would require a person with at least a baccalaureate degree in computer science. The position would therefore merit eligibility as a specialty occupation.

Past case law also provides some guidance on this issue. One of the issues in Matter of Caron International, Inc., I&N Dec. 791 (Comm. 1988), dealt with occupations in transition from nonprofessional to professional status. In this case it was determined that where occupations are in transition, employers may be able to establish a position is professional in nature by demonstrating that the higher standard of a specific baccalaureate-level degree has been consistently required for the more complex positions within their organization.

This principal was subsequently codified into Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(A), where the standards for a specialty occupation are listed. One of those standards for a position to qualify as a specialty occupation is that an employer normally requires a degree or its equivalent for the position.

In accordance with the above guidelines and in light of the fact that in 1998, 60% of the universe of programmers had a bachelor's degree or higher, we will generally consider the position of programmer to qualify as a specialty occupation. This will especially be true if the position involves providing clients with programming analysis, custom designs, modification, and/or problem solving of software. Positions such as these are usually associated with consulting firms.

However, positions strictly involving the entering or review of code for an employer whose business is not computer related (does not furnish software or hardware development, production, and/or consulting) may require more careful scrutiny. These types of positions would include little or no analysis or design duties. They would normally require only the entering or reviewing of computer code. This would be an example of a lower level position where a beneficiary with a 2-year degree or certificate would qualify and, therefore, the position would not qualify as a specialty occupation.

Regarding other positions in the computer field, since we will now recognize most programmers as specialty occupations it would follow that the higher level positions such as programmer/analyst, software consultants, and computer consultants would also qualify for specialty occupation status. Therefore, if the duties described in the petition primarily constitute analysis/design/modification of software or hardware, that fact should be sufficient to establish eligibility. We will no longer require a petitioner to establish that the analysis duties will constitute a majority of the proposed duties in order for the position to qualify. The higher level of programming duties described previously will also qualify as analysis.

Finally, all adjudicators are reminded that examination for eligibility as a specialty occupation is not based on the job title, but is centered on reviewing the actual duties to be performed. A careful review of the duties to be performed should be the focus of attention when determining whether or not the position offered qualifies as a specialty occupation.

Any questions or clarifications regarding the above policy should be directed to your first line supervisor.

Sincerely,

Terry E. Way
Director
NSC