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Sent:	Thursday, May 31, ~~2018 8:12 AM~~	
To:	BEST_H1Bfoia@sptaas.dhs.gov	
Subject:	FW: Follow up - Rescission Memo Discussion	

From: Nicklaw, Nicole C
Sent: Tuesday, June 20, 2017 2:17 PM
To: Boudreau, Lynn A; Fierro, Joseph; Martin, Evelyn M; Selby, Cara M (Carrie); Tamanaha, Emisa T; Crandall, Kristine R
Cc: Hutchings, Pamela G; Doumani, Stephanie M; Stern, Kimberly M (Kim)
Subject: Follow up - Rescission Memo Discussion

Hello Centers,

Thank you for participating in the call on Friday to further discuss the implementation of the rescission memo. SCOPS is currently working with OCC to clear the RFE templates and would like to reiterate and elaborate on our recent discussion.

When reviewing a petition, the first, threshold issue is whether or not a position qualifies as a specialty occupation and meets the requirements of the first criteria of 8 CFR 214.2(h)(4)(ii). When determining whether a position qualifies as a specialty occupation, an officer may look to the wage level designated on the LCA as part of the analysis. For instance, the DOL's Occupational Outlook Handbook (OOH) indicates that most computer programmers have a bachelor's degree however some computer programmers are hired with an associate's degree. As such, a basic computer programmer position would not qualify as a specialty occupation without additional evidence. In addition, when evaluating any additional evidence, an officer should look to the designated wage level as a piece of evidence when deciding whether or not a position qualifies as a specialty occupation.

If the position meets the threshold analysis of a specialty occupation, then an officer should apply the wage level analysis to determine if the petition is supported by a certified LCA which corresponds to the petition/position. Note: the specialty occupation threshold can be met through the analysis of presented evidence or because the position itself is inherently a specialty occupation (lawyer, doctor, engineer, etc).

OCC summarized the wage level analysis in their clarifying guidance (quoted below):

> "In order to ensure that the certified LCA corresponds to the position as described in the petition, we believe officers should apply the wage level analysis to all occupations, including those that are clearly specialty occupations. If the wage level is *clearly inconsistent with/lower than* the level of responsibility of the position, etc., then it is legally defensible to conclude that the petitioner has not established that the petition is supported by a certified LCA corresponding to the petition/position. We also believe that further guidance on the wage level issue/analysis is needed, and until such time as additional guidance is issued, we believe it is safer to initially apply the analysis to petitions filed with Level I LCAs. If, however, an officer believes there is an issue with a Level II position, and that the Level II LCA appears to be *clearly inconsistent with/lower than* the position as stated in the petition, the officer may wish to raise it with their supervisor and, if needed, seek the advice of counsel. Note that trying to distinguish a Level III from a Level IV position, however, is very difficult under the 2009 DOL guidance, so we recommend against analyzing the appropriateness of the wage level in such cases until further DOL and USCIS guidance is issued."

Applying the above analysis to "SCENARIO 1" below, an officer would first look to determine whether the position in question is a specialty occupation. Based on the information given in the scenario, the position appears to be a standard computer programmer per the OOH definition of the position. An officer should weigh the evidence presented along with the position description and the Wage Level 1 designation to determine if any evidence is presented to elevate the position to the level of a specialty occupation. Absent additional evidence, it does not appear that this position would qualify as a specialty occupation. A denial may be issued based on the position not qualifying as a specialty occupation. (*Please note, in a prior email, SCOPS did not address this analysis and went right to the wage level analysis which is not the proper way to approach the issue.)*

In contrast, if evidence is presented to demonstrate the position rises to that of a specialty occupation, the officer should then perform the wage level analysis to determine if the wage level is clearly inconsistent/lower than the level of responsibility of the position.

SCENARIO 1

The petition is for a Computer Programmer, with an LCA certified for the Computer Programmer SOC title and code with a Wage Level 1. The beneficiary will work off-site for an end-client, the Massachusetts Institute of Technology (MIT).

The duties of the position are described, in the petitioner's cover letter and the end-client letter, as:
- Develop one or more large-sized, moderately to highly complex user design projects;
- Develop comprehensive projects that fit strategic and operational goals for user experience design;
- Create a fully realized user experience design footprint for projects that encompass end-to-end concepts;
- Create advanced test scripts to test user interfaces;
- Create communications for user design projects;
- Incorporate organization change management for training, and updating policies & procedures;
- Create the functional and technical specifications for the Use Case;
- Determine how each requirement will be met, and how it interacts with current and planned system functionality;
- Plan, develop, test, and document computer programs and apply broad knowledge of programming techniques and computer systems to evaluate user requests for new or modified programs;
- Formulate plans outlining steps required to develop programs using structured analysis and design;
- Write manuals and document operating procedures and assist users to solve problems;
- Replace, delete and modify codes to correct errors, analyze, review and alter programs to increase operating efficiency and adapt the system to new requirements; and, oversee the installation of software and provide technical assistance to clients; and
- Responsible for requirement analysis, designing various application components, writing functional/technical specifications, coding, unit/integration testing etc.

There is also an expert opinion letter which makes many claims about the specialized knowledge, skills, and systems that will be utilized. For example, a worker in this position "must have highly specialized expertise in a number of technical fields related to infrastructure design, implementation, and maintenance."

In regards to supervision, the beneficiary will work off-site at MIT. The only specific claims about his supervision are in the beneficiary's employment agreement with the petitioner. This document indicates that the beneficiary will participate in the bi-monthly task review conducted by his manager.

As discussed during our last call, we will begin round table sessions next week to discuss particular case scenarios. Please feel free to reach out to us with any additional questions.

Thank you,

Nicole Nicklaw
Adjudications Officer

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