

Practice Alert: Biden Administration Rescinds Buy American and Hire American (BAHA) EO and 2017 Computer Programmer Memo

By AILA's Business Immigration Response Team

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This practice alert provides a summary of recent actions that have resulted in the revocation and rescission of two Trump era immigration policies, including the “Buy American and Hire American” Executive Order, and the 2017 Computer Programmer Memorandum.

Revocation of BAHA Executive Order

On January 25, 2021, President Biden signed an [Executive Order](#)¹ which effectively revoked President Trump’s Buy American and Hire American Executive Order (commonly known as “BAHA”).²

On April 18, 2017, President Trump signed the Buy American and Hire American Executive Order which was used as the basis for many restrictive immigration policies that came to fruition during his term. This Executive Order claimed to aim to increase wages and employment rates for U.S. workers and directed agency heads to issue rules to protect U.S. workers through their administration of the U.S. immigration system.³

The BAHA Executive Order resulted in cascade of restrictive immigration policies, including:

- Rescission of USCIS’s deference policy to prior approvals for extension filings⁴;
- Issuance of the now rescinded H-1B Third-Party Worksite Memorandum⁵;
- Enhancement of Fraud Detection and Prevention’s site visit program for H-1B and L-1 employers⁶.

The BAHA Executive Order further resulted in a sharp increase in requests for evidence (RFEs) and case denials across various case types.⁷

With the revocation of the BAHA Executive Order, we anticipate a shift in immigration policy. While change remains to be seen, this first step is a welcome shift for legal immigration.

Rescission of the 2017 Computer Programmer Memorandum

On February 3, 2021, USCIS issued a new [Policy Memorandum](#)⁸ that rescinds the Trump-era Computer Programmer [Policy Memorandum](#).⁹ This 2021 Policy Memorandum was issued in direct response to the decision issued in the Ninth Circuit in [Innova Solutions v. Baran](#).

By way of background, in December 2000, the Director of the USCIS Nebraska Service Center, Terry Way, issued a [policy memorandum](#)¹⁰ (commonly known as the “Terry Way Memo”) to its employees on how to evaluate H-1B petitions filed for transitional occupations, specifically addressing the Computer Programmers occupation. This Memorandum deemed Computer Programmers as an example of a “transitional” occupation in which occupations transition from nonprofessional to professional status and established the presumption that the position of Computer Programmer is a specialty occupation. The analysis was based upon the Department of

Labor’s Occupational Outlook Handbook (OOH) and its changes from 1996 through to the 2000-2001 edition, as well as AAO decisions and related case law.

In 2017, USCIS issued PM-602-0142, which rescinded the 17-year-old “Terry Way Memo” on the basis that it was obsolete as it relied on dated OOH data and that the memorandum did not “fully or properly articulate the criteria that apply to H-1B specialty occupation adjudications.” USCIS also claimed that essential information in the memorandum was not taken into consideration—with the focus on how the OOH states that some may qualify for the Computer Programmer occupation with only a 2-year degree. The USCIS concluded that, since some can enter the occupation with just a 2-year degree, it purportedly follows that the occupation is not a specialty occupation for purposes of the H-1B classification. This Memorandum disqualified the Computer Programmers occupation as a specialty occupation.

The memo further instructed USCIS officers to “review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position” and further stated that “[i]f 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.” The increased scrutiny by USCIS officers of the LCA and the wage level designated resulted in a significant uptick in RFEs and denials starting in the summer of 2017.¹¹

In December 2020, the Ninth Circuit issued a decision in *Innova Solutions v. Baran*, finding that USCIS’s adjudication of an H-1B petition that held that Computer Programmers is not a specialty occupation was “arbitrary and capricious.” Notably, the Court identified that, while the USCIS did not explicitly rely upon the 2017 Memorandum, the Service followed its logic. As a result, USCIS issued the February 2021 Memorandum to ensure consistent adjudications.

USCIS has stated that further guidance is forthcoming.

¹ See Executive Order 14005, Ensuring the Future Is Made in All of American by All of America’s Workers (January 25, 2021).

² See Executive Order No. 13788, Buy American and Hire American (April 18, 2017).

³ See Executive Order No. 13788, Buy American and Hire American (April 18, 2017).

⁴ See Memorandum PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (October 23, 2017).

⁵ See Memorandum PM-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (February 8, 2018); Rescinded by Memorandum PM-602-0114, Rescission of Policy Memoranda (June 17, 2020).

⁶ See Fraud Detection and National Security Directorate (<https://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security-directorate>).

⁷ See e.g., *H-1B Denial Rates Through the Second Quarter of FY 2020*, NAT’L FOUNDATION FOR AMERICAN POLICY (Aug. 2020), <https://nfap.com/wp-content/uploads/2020/08/H-1B-Denial-Rates-Analysis-Through-The-Second-Quarter-Of-FY-2020.NFAP-Policy-Brief.August-2020.pdf>; *H-1B Approved Petitions and Denial Rates for FY 2019*, NAT’L FOUNDATION FOR AMERICAN POLICY (Feb. 2020), <https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf>.

⁸ See Memorandum PM-602-0142.1, Rescission of 2017 Policy Memorandum PM-602-0142 (February 03, 2021).

⁹ See Memorandum PM-602-0142, Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions.’” (March 31, 2017).

¹⁰ See Memorandum PM-NSC NSC 70/44.4, Guidance memo on H-1B computer related positions (December 22, 2000).

¹¹ See *Practice Pointer: Responding to H-1B RFEs Raising Level 1 or Level 2 Wage Issues*, AM. IMMIGRATION LAWYERS ASS’N (Sept. 20, 2017), <https://www.aila.org/infonet/practice-pointer-responding-to-h-1b-rfes-raising>.