

The ABC'S Of Immigration: H-3 Trainees

by Gregory Siskind

What is an H-3 nonimmigrant visa?

The H-3 nonimmigrant visa category is designed to allow foreign nationals to come to the US to receive training in many different activities. Unlike the H-1B category, the H-3 is not a dual-intent visa, so the beneficiary cannot be pursuing avenues toward permanent residency.

What type of training must I have to be eligible for an H-3?

The regulations allow for training in "any field of endeavor." The regulations give examples of agriculture, commerce, communications, finance, government, transportation, the professions, as well as purely industrial areas. The only sort of training that is specifically excluded is graduate medical training. Nurses may, in some circumstances, receive training in the US in H-3 status, and foreign medical students on school vacation can participate in externships at US hospitals. While the category initially appears very appealing, it is subject to many detailed requirements and limitations that render it less useful. Indeed, about only 3000 H-3 visas are issued each year. The category underwent many substantive changes in 1990, when the following requirements were imposed on training programs:

- o The training must not be available in the alien's home country
- o The alien must not be placed in a position which is part of the normal operation of business which would ordinarily be filled by a US worker
- o The alien must not be productively employed unless such employment is "incidental and necessary" to the training
- o The training must benefit the alien in pursuit of employment outside the US

There are also eight restrictions on training programs, which are essentially designed to ensure they meet the above listed requirements. Under these restrictions, a training program will not be approved if:

- o It would go beyond training to productive employment with the alien acting as part of the petitioner's regular staff
- o It is not described in terms of a fixed schedule
- o There are no stated objectives
- o There is no method by which to evaluate the training
- o It is incompatible with the petitioner's other business
- o The proposed training cannot be accomplished by the petitioner
- o It will teach skills the alien already possesses or will not be able to use in

employment outside the US

- o It is being used to extend the training of a former student who has used their maximum period of optional practical training.

What are the risks of being denied an H-3?

There are numerous aspects of the H-3 application that must be carefully considered, or the petition risks denials. First among these is that there must be an existing and structured training program. The best way to show this is to show that training has previously been provided to aliens. In the alternative, this requirement can be satisfied by the submission of formal training materials, such as books, a syllabus and a planned curriculum.

The training cannot be provided as a prelude to eventual employment with the petitioner in the US. Rather, the purpose of the training must be to enable the alien to pursue a career outside of the US, a career that can be with the US based employer. Generally USCIS requires a detailed description of the position the alien intends to pursue. However, there are situations in which this need not be shown. For example, it is not uncommon for a company to provide training in order to create a potential ally in the overseas market. Such a purpose of training is acceptable, but must be explained to USCIS.

While the statute creating the H-3 category says only that the training shall not be "designed primarily to provide productive employment," USCIS in effect considers any productive employment reason to deny the petition. USCIS will determine whether there is productive employment by looking at how much time the alien spends in on the job training. However, on the job training is acceptable, so long as the position held by the alien would not exist without the alien — that is, the alien is not filling a job that would otherwise be held by a US worker.

One of the requirements to obtain an H-3 visa is that the training the alien will receive in the US must not be available in their home country. USCIS uses this requirement in two ways to create grounds for denying an application. First, it broadly reads the type of training involved, making it difficult to provide training in US techniques in fields where training is available in other countries. Second, USCIS is of the opinion that the more a petitioner can show the employment is not available in the alien's home country, the less likely it is that the alien will use the training to pursue employment there, which a ground for denying the application. This slippery logic places petitioners in a Catch-22 situation — face denial of the petition because the training is available in the alien's home country, or face denial because the alien is receiving training they cannot use in their home country. This may be one of the primary reasons there are only 3000 H-3 visas issued annually.

When training is sought in an area in which the alien already has ability, USCIS will closely scrutinize the application to ensure the visa is not being used to provide the alien with productive employment. This also creates difficulties for petitioners — the alien must be prepared for the training, as through an educational program, but cannot be too proficient — either under- or over-preparedness can result in a denial.

What type of exception is there for Special Education trainees?

Since 1990, there has been an exception from the requirements of H-3 training programs for training in educating children with physical, mental or emotional disabilities. The only requirements are that the petition be filed by a facility with a professionally trained staff and a structured program for providing education to children with disabilities, and for

providing hands-on experience to participants in the special education exchange visitor program." The beneficiary must already hold or be about to finish a degree in special education, or have experience in caring for disabled children. There is an annual limit of 50 such visas available annually.

How do I apply for an H-3 visa?

Applying for an H-3 visa is much like applying for any other visa in the H category. The application is made on Form I-129, which is then submitted to the appropriate regional service center. The application must also include evidence that will allow USCIS to determine whether the training program meets the four requirements. Typically this is done in the form of a statement from the sponsor of the training program. This statement must include the following:

- o A description of the training program, outlining the number of hours spent in classroom or on-the-job training
- o The amount of time that will be spent in productive employment
- o The employment abroad for which US training will prepare the alien, and why the alien must receive this training in the US
- o The amount and source of the alien's compensation, and what, if any, benefit the petitioner will receive

If the petition is approved, the alien will receive an H-3 visa. This maximum period of admission in H-3 status is two years. If the visa is approved for a shorter period, it may be extended in increments of up to one year, but an alien is not permitted to remain in H-3 status for more than two years.

Qualifying family members (spouses and unmarried children under 21) accompanying the H-3 alien are given the H-4 classification.

If the training undergoes a substantial change from that authorized, a new petition must be filed. Otherwise, if the alien continues to participate in the training program, they are deemed to have violated their status and are deportable.

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