

Tricky Little Visas H-3 Trainees

The H-3 trainee visa category is seldom used due to its stringent requirements. However, it is a practical gem when there are no other well suited visa alternatives. The H-3 visa category allows foreign nationals to train in the United States for up to two years.¹ The essence of this visa is having a solid training program and submitting evidence to demonstrate how the petitioner uses it to train foreign nationals. In evaluating whether the H-3 visa is a fitting option, it is fundamental to gather sufficient detail from your client before proceeding in order to fully understand whether the petitioner and beneficiary meet the requirements for the H-3 visa.

The regulations define this visa category as, “*The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation or the professions as well as training in a purely industrial establishment. This category shall not apply to physicians who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.*”² There are no numerical limits on the H-3 visa category.

The regulatory criteria require the petitioner to demonstrate: (1) proposed training is not available in the foreign national’s home country, (2) foreign national will not be placed in a position that which is in the normal operation of the petitioner’s business and which US citizens and residents are regularly employed, (3) H-3 trainee will not participate or be engaged in productive employment unless it is incidental and necessary for the training and (4) training will benefit the foreign national pursuing a career outside the United States.³

Practice Pointer: Be prepared to ask preliminary questions with specificity. In particular, the nature of the petitioner’s business and industry, operations abroad, training programs, patents and processes that are highly specialized. In regard to the foreign national, inquire into education and work experience and other relevant factors such as previous visas and other training periods in the United States.

The regulations require that the petitioner demonstrate why the proposed training is not available in the foreign national’s home country. For this specific element, ask the petitioner to provide details of the training including but not limited to the duration, structure and purpose of the

¹ INA §1010(a)(15)(H)(iii).

² 8 CFR §214.2(h)(7)(i).

³ 8 CFR §214.2(h)(7)(ii)(A).

training program. You may have represented a corporate client for many years who have a picture-perfect training program that meets the requirements of the H-3 visa category and would lead to a successful application.

Training Program

The training program description and content must adhere the regulatory guidelines in 8 CFR §214.2(7)(ii)(B). The regulations state that the training program must contain all of the following:

1. The training program must describe the type of training and supervision to be given and the structure of the training program;
2. Details time that will be devoted to productive employment if incidental to training;
3. Details number of hours for each part of the training program including classroom instruction;
4. Describes the career abroad for which the training will prepare the alien;
5. Explains why such training cannot be obtained in the alien's home country and why the Petitioner is required to train the foreign national in the United States; and
6. Indicates the source of remuneration if any receive by the trainee.⁴

The essence of an H-3 visa petition is undoubtedly the training program. It must contain a very detailed description of the training itself but also the type of candidates eligible for the training program, a breakdown of the training program by sessions or modules including hours and weeks. In particular, the Service will strike down a training program that is general and lacks specificity.⁵ The petitioner must be prepared to provide the adjudicating officer with a direct correlation essentially establishing a nexus between the petitioner's training program and business operations.⁶ Incompatibility with the petitioner's business is a basis to deny the visa.⁷

The training program should be a roadmap for the adjudicating officer. Particularly, it is fundamental to provide within each weekly schedule, module or training schedule the number of hours devoted to classroom instruction and active training.

Another important section of the training program are the supervisors. The Service will assess the size of the petitioner organization as to whether there is sufficient staff to provide the proposed training and their qualifications to perform the training. It is recommended that a

⁴ 8 CFR §214.2 (h)(7)(ii)(B).

⁵ 8 CFR §214.2(h)(7)(iii)(A).

⁶ 8 CFR §214.2(h)(7)(iii)(B).

⁷ Id.

training program include a detailed description of the training supervisors positions with the company and why they are qualified to perform the training. It is also advisable to attach the training supervisor's CV to the training program.

Practice Pointer: Request that the petitioner provide classroom instruction materials, training manuals and other evidence to supplement the visa application. If the Petitioner routinely issues a certificate upon completion, include a sample. Providing photographs of the training installations such as a laboratory or classroom is also recommended.

The visa petition must prove that the training cannot be obtained in the foreign national's home country and how the training will benefit the foreign national's career abroad.⁸ First to qualify for the training program, the foreign national must have either an educational degree or work experience related to the petitioner's industry and or business operations. Second, the petitioner must demonstrate that the training it will provide to the beneficiary is not available in his or her home country.⁹ For instance, if the petitioner organization has either a process or service it plans to offer abroad through its foreign subsidiary, affiliate or branch and is not yet available abroad. In this situation, the foreign national will be trained in the United States in order to introduce the product abroad or perform services to enhance the petitioner's business operations abroad. The training can also be a proprietary process that is only available in the petitioner's main office in the United States and a pre-requisite to employment abroad with the petitioner's business. Alternatively, the petitioner organization and a foreign university often times enter into agreements to provide unpaid training to a select few of the university's students. In those cases, it is recommended to supplement the visa application with the agreement.

Practice Pointer: If the petitioner has offices abroad or a joint venture, it is recommended to include this supporting evidence. For instance, the corporate formation documents and evidence of operations abroad.

The training must provide a benefit to the foreign national's career abroad. This requirement is two-fold.¹⁰ Specifically, explain in detail the benefits to the foreign national and how and which career it will benefit him or her abroad. Moreover, the training program should also describe the remuneration and benefits afforded to the trainee during the training program. The Service will view this in conjunction with the entire training program and the business operations in order to determine if the trainee will be involved in productive employment as is not designed to recruit or train individuals for ultimate "staffing of domestic operations".¹¹

⁸ 8 CFR §214.2(h)(7)(ii)(A)(i).

⁹ Id.

¹⁰ 8 CFR §214.2(h)(7)(ii)(A)(4).

¹¹ 8 CFR §214.2(h)(7)(iii)(7).

Other: Nonimmigrant Intent, Timing, Extensions and Limitations

The H-3 trainee visa requires the beneficiary to prove it has a foreign residence abroad it does not intend to abandon.¹² The foreign national must be prepared to demonstrate its ties to its home country or last residence abroad. In some cases, the Service will issue a request for further evidence for the petitioner to provide the foreign national with an employment offer abroad. However, though it is preferable to include a firm offer of employment abroad, your petition can still be approved without it. It is recommended to include the offer of employment if the trainee has a firm starting date and it is not speculative.

The H-3 visa is authorized for a period not exceeding 24 months.¹³ Moreover, if a trainee spends the total period of time in the United States under H-3, they are not permitted to seek an extension, change of status or be readmitted to the United States as an H-3 unless they have remained abroad for at least six (6) months. However, an extension can be filed for an H-3 beneficiary, who has been in the US for less than the maximum period of 24 months and can demonstrate extenuating circumstances as to why an extension of H-3 is warranted. For instance, situations as being unable to complete the entire training program due to processing or consular delays. If the petitioner can demonstrate that the foreign national was not able to complete its training program due to no fault of his own, in most cases an extension is granted for the remainder of the training program not to exceed 24 months. In addition, it is important to note that time spent in H-3 status counts toward the H-1, H-2 and L limitation and vice versa. For example, H-3 trainee who spent 20 months in the United States and later obtains and H-1B visa abroad, having spent less than 6 months outside the United States, must deduct the time in H-3 from its anticipated H-1B time.

Practice Pointer: A training program for the maximum period of 24 months will be highly scrutinized as a possible recruitment for staffing in the United States. It is your responsibility to explain to the petitioner that the H-3 training visa cannot be used to replace US workers. Therefore, ascertaining the purpose of the petitioner's training program in relation to its business while discussing the benefit to the foreign national's is essential before opening the file for your client.

¹² INA §101(a)(15)(H)(iii).

¹³ 8 CFR §214.2(h)(13)(iv).

Be wary of beneficiaries who are overly qualified for the petitioner's training program, the Service may deny an H-3 visa. In particular, a beneficiary with substantial training already or those who have been training with the petitioner through practical training while in F-1 status. In those cases, a recommended strategy is to provide evidence with your petition to demonstrate that the beneficiary did not complete the entire training program during the allowed OPT period or differentiate the petitioner's curriculum with the training received by the beneficiary in the past. However, this argument must be supported by evidentiary evidence that will be scrutinized by the Service.¹⁴

Conclusion

The H-3 visa category appears to be tricky with very specific highly scrutinized requirements is nonetheless a viable alternative to explore with your clients. The essence is to determine early on in the process if the petitioner and the beneficiary are candidates for this visa to present a solid and successful application.

¹⁴ 8 CFR §214.2(h)(7)(iii)(H).